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The Encyclopedic Digest of Virginia and West Vir- ginia Reports ^{ct}

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Virginia Reports and Vol. 55 West
Virginia Reports

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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As to commitments in bastardy proceedings, see the title BASTARDY, vol. 2, p. 334. As to commitments in the contempt proceedings, see the title CONTEMPT. As to commitments for nonpayment of fines, see the title FINES AND COSTS IN CRIMINAL CASES. As to commitments for nonpayment of costs, see the title COSTS. As to commitments of witnesses for contempt, see the title CONTEMPT.

I. Commitments.

A. NATURE.

Ministerial or Judicial.—Whether the act of commitment be strictly ministerial or partakes in part of the judicial character according to the common-law definitions of those terms, has not been decided in Virginia. *Ex parte Pool*, 2 Va. Cas. 276.

But whether such acts of commitment be strictly ministerial or not as they would be defined by the common law, they are not such judicial acts as the third article of the constitution of the United States intended to vest exclusively in the courts therein provided for. *Ex parte Pool*, 2 Va. Cas. 278.

B. AUTHORITY TO COMMIT.

1. Justice of Peace.

See also, the title JUSTICES OF THE PEACE.

A justice of the peace, or any other person designated by act of congress, may be authorized to commit a person charged with an offense against the federal laws, although they can not be required or compelled to do so. *Ex parte Pool*, 2 Va. Cas. 276.

Committal on Appeal.—Any person convicted of a misdemeanor by the justice of the peace shall have a right to appeal to the county, corporation or hustings court; and shall unless admitted to bail, be committed by the justice until the next term of court. *Combs v. Com.*, 95 Va. 88, 27 S. E. 817.

Constitutionality of Act Authorizing Committal.—The act of congress of 1790, which authorizes a justice to commit a sailor who had deserted from the merchant service, is constitutional. *Ex parte Pool*, 2 Va. Cas. 276.

2. Commitment of Infant by Hustings Court.

Under the provisions of the statute (Acts, 1895-96, p. 658) a hustings court may commit to the prison association of Virginia, before conviction, an infant who has neither parent nor legal guardian to consent to such commitment, although the infant does not consent thereto. *Napier v. Prison Ass'n of Virginia*, 95 Va. 431, 28 S. E. 598. For the present law see Virginia Code, 1904, § 4173d. See also, the title REFORMATORIES.

3. Coroner.

Whether or not a coroner has authority to commit to jail for trial a person charged by an inquest with felony is not settled in Virginia. *Wormeley v. Com.*, 10 Gratt. 658. But see *Jackson v. Com.*, 23 Gratt. 919, where the accused was committed by order of a justice acting as coroner.

4. Examining Court.

The examining court had power after examination of a person charged with crime to commit him for trial in the superior court. See *Bailey v. Com.*, 1 Va. Cas. 258; *Sorrell v. Com.*, 1 Va. Cas. 253; *Com. v. Myers*, 1 Va. Cas. 188. See post, "Decision of Examining Court or Officer," II, D, 5.

C. WARRANT OF COMMITMENT.

See generally, the title WARRANTS.

1. Requisites.

a. In General.

Must Describe Offense.—A warrant of commitment before indictment must describe the offense plainly and fully. *Young v. Com.*, 1 Rob. 744.

A party who is acquitted of felony and thereupon committed by the circuit court to take his trial for a "misdemeanor" will be discharged on habeas corpus because the warrant of commitment does not sufficiently specify the offense. *Young v. Com.*, 1 Rob. 744.

Description Aided by Record.—If it may be fairly understood from the rec-

ord of the examining court that the crime for which the prisoner is indicted is the offense for which he was examined, that is sufficient, though the final order of the examining court committing him to prison merely states that it appeared to the court that a felony had been committed and that there was probable cause to charge the accused therewith. *Clore's Case*, 8 Gratt. 610.

If the warrant of commitment shows the offense charged on the prisoner to be the same with that for which he is indicted in the superior court, the indictment will not be quashed although the other part of the proceedings of the examining court only exhibit a charge of felony generally. *Com. v. Murray*, 2 Va. Cas. 505; *Wormeley v. Com.*, 10 Gratt. 670.

Oath or Affirmation.—It is not necessary that the warrant of commitment should set forth that the party is charged on oath or affirmation. *Com. v. Murray*, 2 Va. Cas. 505. See post, "Constitutional Requirements," I, C, 1, c.

Virginia Practice.—In Virginia it has been the almost universal practice to omit the statement in the warrant of commitment that the party was charged on oath. *Com. v. Murray*, 2 Va. Cas. 504.

Mistake in Date.—A mistake of the justice in the date of the warrant of commitment is no ground for setting aside the subsequent proceedings. *Com. v. Murray*, 2 Va. Cas. 505.

b. Statutory Requirements.

Must Conform Thereto.—The terms of a statute authorizing a justice to commit an offender upon his refusal to pay a fine must be strictly followed and the warrant of commitment must be strictly in accordance therewith. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

Departure from Statute.—A justice imposed a fine upon a defendant for violating the Sabbath, and the defendant refusing to pay the same, committed

him to jail "for one year unless the fine be sooner paid." It was held, that commitment was a departure from the terms of the statute (Virginia Code, 1887, ch. 185, § 3799) which provides that a defendant may be committed "until the fine is paid" but prescribes no regular term of imprisonment. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

Commitment to Wrong Court.—By § 4106, Va. Code, 1887, as amended by an act approved March 5, 1896 (Acts, 1895-96, ch. 845, p. 924), justices of the peace are given exclusive original jurisdiction of all misdemeanors occurring within their jurisdiction. The effect of this statute is to take away from the county courts all power to try misdemeanors as courts of original jurisdiction. A warrant of commitment, remanding a prisoner, charged with a misdemeanor for trial by the county court, is therefore void. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930.

c. Constitutional Requirements.

Oath or Affirmation.—The fourth article of the constitution of the United States, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" does not apply to warrants of commitment. *Com. v. Murray*, 2 Va. Cas. 507.

Bill of Rights.—Article 10 of the bill of rights, which declares "that general warrants whereby an officer or messenger may be commanded to seize any person or persons not named or whose offense is not particularly described and supported by evidence are grievous and oppressive and ought not to be granted," does not apply to warrants of commitment. *Com. v. Murray*, 2 Va. Cas. 508.

2. Not a Part of Record.

A warrant of commitment is no part of the record of the examining court. *Com. v. McCaul*, 1 Va. Cas. 300; *Wormeley v. Com.*, 10 Gratt. 670; *Kemp v. Com.*, 18 Gratt. 973.

The warrant of commitment can not be looked to on a motion to quash for the purpose of identifying the offense for which the prisoner was examined. *Com. v. McCaul*, 1 Va. Cas. 271.

May Be Made Part of Record.—But if a prisoner excepts to an opinion of the examining court on a motion to quash that warrant and the proceedings founded on it, and in his bill of exceptions sets forth the warrant of commitment, he thereby makes that warrant a part of the record of the examining court. *Com. v. Murray*, 2 Va. Cas. 507.

3. Does Not Fix Grade of Offense.

See post, "Decision of Examining Court or Officer," II, D, 5.

The committing magistrate does not by his warrant fix the grade of the offense with which the accused is charged. His inquiry is simply as to the fact. *Hawley v. Com.*, 75 Va. 847.

4. Variance between Commitment and Indictment.

See also, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Variance in Offense Charged.—A prisoner charged before the examining court with feloniously stabbing another with intent to main, disable, disfigure or kill and committed for trial for the offense can not be indicted and tried for murder, without a further examination before the justice, though the party stabbed afterward die from the injuries inflicted. *Com. v. Linton*, 2 Va. Cas. 205.

When it appears by the record of the examining court that the prisoner was committed for a felonious stabbing with an intent to kill, and he is charged

in one count of the indictment with a malicious stabbing, etc., and in another count with an unlawful stabbing, the variance is no ground for quashing the indictment. *Derieux v. Com.*, 2 Va. Cas. 379.

An examining court having acquitted of murder and remanded the prisoner to the superior court to be tried for manslaughter, it is lawful for the superior court to indict for murder. *Sorrell's Case*, 1 Va. Cas. 253.

Forgery.—If an examining court remand a prisoner, on a charge of passing a forged note, he may be indicted for passing it, knowing it to be forged. *Huffman v. Com.*, 6 Rand. 685.

If an examining court remand to the superior court for trial a prisoner charged with forgery, the prisoner may be indicted in the superior court not only for the forgery but also for procuring the instrument to be forged and for acting and assisting in the forgery. *Huffman v. Com.*, 6 Rand. 685.

A person examined in a county court on a charge of forging an order, and committed by that court for trial in the circuit superior court for the forgery only, can not be there tried for uttering and publishing the order, and the counts of an indictment which charge him with the latter offense will be quashed. *Mowbray v. Com.*, 11 Leigh 643.

A prisoner who is examined for forging and counterfeiting twenty-four pieces of silver coin and is committed for trial in the circuit court can not be indicted for feloniously having in his possession ten or more pieces of coin with intent to alter and employ the same as true. The two offenses are distinct. *Scott v. Com.*, 14 Gratt. 687.

When a prisoner is committed by the examining court for trial, for "feloniously using and employing as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit" and is indicted for forging

the note, the variance is fatal and the indictment will be quashed. Page *v. Com.*, 9 Leigh 683.

Abbreviations.—In a commitment by a justice of a person for forging an order and in setting out the order he writes out some words in full, which in the order as set out in the indictment are abbreviated, as Thomas for Thos., 23 cents for 23c., respectfully for resp'ty. These are not such variances as require that the accused should be sent back to a justice for examination. *Burress v. Com.*, 27 Gratt. 934.

Larceny.—When a prisoner is tried and committed by the examining court for the larceny of a slave and sent on for trial in the superior court where he is indicted on four counts: 1st. For larceny of the slave. 2d. For carrying the slave from one country to another, etc. 3d. For enticing the slave to run away from his owner. 4th. For delivering the slave money, clothes, etc., with intent to aid him to abscond from his owner, a motion to quash the last three counts on the ground of the variance will be sustained. *Clere v. Com.*, 3 Gratt. 615.

Where a person is indicted for carrying away four slaves named S., H., P., and Hyatt the property of D., without his consent and with intent to defraud and deprive him of the property, but the record of the examining court shows that he was examined and committed for so carrying away the first three slaves named and another named Harriet not Hyatt, the indictment will not be quashed for the variance. *Thomas v. Com.*, 2 Leigh 741.

Variance in Description of Thing Stolen.—When by the warrant of commitment a prisoner is charged with stealing a dark bay horse and by the indictment is charged with stealing a dark bay gelding, it is not a sufficient variance to quash the indictment. *Halkem v. Com.*, 2 Va. Cas. 4.

And, if the record of the examining court charge the stealing of a dark

bay horse; of the stealing of two horses, and a halter chain and collar, of the value of \$150; and the indictment charge the stealing of a dark bay gelding, or the stealing of the two horses of the value of \$75 each, these variances are not sufficient to quash the indictment. *Halkem v. Com.*, 2 Va. Cas. 4.

Variance in Name of Owner of Goods.—A prisoner who is committed by the examining court to be tried for embezzling the goods of W. may thereupon be indicted for embezzling the goods of A., the embezzlement being of the same goods for which he was tried by the examining court. *Com. v. Adcock*, 8 Gratt. 661.

A person who is examined by the examining court for stealing three bags of cotton "of the goods and chattels of N. L.," and is remanded for further trial in the superior court may be indicted in two counts for stealing three bags of cotton, first, of the goods and chattels of N. L.; secondly of the goods and chattels of a person unknown. And he may be convicted on the second count and acquitted on the first. A motion to quash the second count, on the ground that he has not been examined for the offense therein charged will be overruled. *Mabry v. Com.*, 2 Va. Cas. 396.

Certification of Commitment.—A justice of the peace, acting as coroner and having as coroner committed a person to jail for felony, may certify the fact of such committal as justice of the peace. *Wormeley v. Com.*, 10 Gratt. 658. See ante, "Coroner," I, B, 3.

D. ILLEGAL COMMITMENTS.

1. Time of Making Objections.

Before Indictment.—After a prisoner has been indicted there can be no inquiry into the sufficiency of the warrant of commitment or the regularity of the commitment. *Kemp v. Com.*, 18 Gratt. 974.

After a person charged with a crime and committed for examination by a justice has been examined and remanded to jail by the examining court, an indictment charging the prisoner with the offense for which he was examined will not be quashed even though the original commitment was illegal. *Com. v. Murray*, 2 Va. Cas. 509; *Clore's Case*, 8 Gratt. 612.

After a prisoner has been regularly examined and sent for trial and has been indicted for the offense by the grand jury, it is too late to object to the regularity of the commitment. *Wormeley v. Com.*, 10 Gratt. 658; *Kemp v. Com.*, 18 Gratt. 975; *Chahoon v. Com.*, 20 Gratt. 784.

Commitment by Coroner.—Even if the coroner has not authority to commit to jail for trial a person charged with felony, it is too late to object to it after the prisoner has been regularly examined and sent for trial and has been indicted for the felony in the circuit court. *Wormeley v. Com.*, 10 Gratt. 658. See ante, "Coroner," I, B, 3.

2. Discharge of Prisoner.

If the court is satisfied that an offense has been committed within the jurisdiction of the court, the prisoner will not be discharged on a writ of habeas corpus although the warrant of commitment be defective and not in compliance with the law. *State v. Plants*, 25 W. Va. 119.

Mistake in Verdict.—On a trial for felony, for which the shortest term of imprisonment is five years, the jury found the prisoner guilty and fixed the term of his imprisonment at three years. Upon a writ of error to the judgment, on the application of the prisoner, the judgment will be reversed but the prisoner will not be discharged, but will be committed for another trial. *Jones v. Com.*, 20 Gratt. 848.

Examination into Commitment of Federal Prisoner.—If a person be com-

mitted with a view to prosecution in a court of the United States, for an offense there cognizable, and the commitment be regularly made, the state judge will neither discharge nor bail him, but if the commitment be by a justice of the peace, the judge will look beyond the warrant of commitment or not according to circumstances. *Ex parte Pool*, 2 Va. Cas. 276.

3. Recommitment for New Trial.

Where a prisoner has been carried to the penitentiary in execution of the judgment of the court below, and after that a new trial is granted him by the court of appeals, the last-named court will award a writ of habeas corpus, directed to the superintendent of the penitentiary, to bring the prisoner before it and order him to be committed to the sheriff of the county in which the court of appeals is sitting, to be by him conveyed to the jail of the county in which the judgment of conviction was rendered, for the purpose of being again tried in conformity with the judgment of the appellate court. *Stuart v. Com.*, 28 Gratt. 951; *Jones v. Com.*, 20 Gratt. 848.

On the trial of an indictment against William Young for felony, in stealing a slave, the prisoner was acquitted; whereupon the circuit superior court, wherein he was tried, made the following order: "It appearing to the court, from the testimony of witnesses this day examined on the trial of the said William Young, that he is guilty of a misdemeanor, it is ordered that he be remanded to jail, and continued in custody of the jailer of this court till the next term, to answer an indictment to then be preferred against him." In a bill of exceptions to this order filed by the prisoner, the offense for which he was so remanded was described as a misdemeanor, under the statute (*Sup. Rev. Code*, 1819, p. 243, § 1). On a writ of habeas corpus sued out by the prisoner to the general court, it was held, that the commitment

was illegal, as not sufficiently specifying the offense, and the prisoner was discharged from custody under the same; but the general court ordered the sheriff to take the prisoner again in custody, to be taken by the officer before a justice of the peace, to be by him examined, as to offense which it appeared from the record there was reasonable ground to suspect the prisoner to have been guilty. *Young v. Com.*, 1 Rob. 744.

Where the warrant of commitment was insufficient because it did not sufficiently specify the offense, the supreme court, after discharging the prisoner by habeas corpus from custody under the commitment of the justice, forthwith issued an order commanding the officer in whose custody he was, to take him again into custody and forthwith carry him before the justice, by whom he was committed, to be further dealt with according to law. *Ex parte Marx*, 86 Va. 47, 9 S. E. 475; *Young v. Com.*, 1 Rob. 744. See ante, "Requisites," I, C, 1.

II. Preliminary Examination of Accused.

A. NECESSITY FOR EXAMINATION.

1. In General.

A person must be examined before a justice before he can be tried for a felony. *Butler v. Com.*, 81 Va. 159. See also, *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005; *Va. Code*, 1904, §§ 3969, 3990 et seq.

Not a Matter of Right.—The examination of an accused, by a justice of the peace, was never considered in Virginia as a matter of right, but merely as a means to an end; that is, as a means of bringing the accused to justice, and giving him the benefit of an examining court, to which he was entitled by law, and which could only be called by the warrant of a justice of the peace. *Chahoon v. Com.*, 20 Gratt. 749.

2. Statutory Provisions.

a. Virginia Statute.

Act of 1804.—The first statutory provision in Virginia providing for a preliminary examination of persons accused of crime, seems to have been an act of the assembly passed January 24, 1804 (See Va. Rev. Code, 1819, vol. 2, p. 38), which provided, "that before any person charged with treason or felony shall be tried before a district court, he or she shall be examined in the manner prescribed by law, by the courts of the county or corporation wherein the offense was committed." See *Com. v. Blakeley*, 1 Va. Cas. 131. *Anonymous*, 1 Va. Cas. 144; *Hurd v. Com.*, 5 Leigh 717; *Com. v. Myers*, 1 Va. Cas. 235; *Page v. Com.*, 9 Leigh 683; *Com. v. Cohen*, 2 Va. Cas. 158; *Angel v. Com.*, 2 Va. Cas. 231; *Com. v. McCaul*, 1 Va. Cas. 300. See also, dissenting opinion in *Chahoon v. Com.*, 20 Gratt. 768; *State v. Stewart*, 7 W. Va. 731.

And under this act it was held, that the district court did not have original jurisdiction to receive and sustain an indictment for felony, before an examination before a court of justices in the manner prescribed by law. *Anonymous*, 1 Va. Cas. 144; *Hurd v. Com.*, 5 Leigh 717.

And that it was error to put a prisoner upon trial on an indictment of felony, found by the grand jury in a circuit superior court, before any examination of him for the offense in the county or corporation court, though such examination be had after the indictment found and before the trial. *Hurd v. Com.*, 5 Leigh 715.

Code of 1849.—The first section of ch. 205, Va. Code, 1849, declared "that before a white person charged with a felony is tried before the circuit court, he shall be examined as in subsequent sections is provided, unless by his assent, entered of record in such court, the examination is dispensed with." See *Wormeley v. Com.*, 10 Gratt. 658.

Act of 1877.—"After a careful examination of the authorities bearing upon the subject, we have no difficulty in deciding that a person can not in Virginia, be tried for a felony, without a previous examination of the offense of which he stands charged, before a justice, unless he waives such examination. See acts, 1877-78, § 12, ch. 14, p. 328; and § 16, ch. 16, of same, p. 336." *Butler v. Com.*, 81 Va. 161.

Act of 1885.—By the act of 1885 where a person was accused of the commission of a felony he was entitled to a preliminary examination before a justice of the peace. See act 1885-86, p. 522. *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005; *Wilson v. Com.*, 86 Va. 666, 10 S. E. 1007.

b. West Virginia Statute.

By an act of the legislature of West Virginia, passed April 3, 1873, it was provided, that before any person charged with a felony is tried before a circuit court, he shall be examined before the county court unless he waive such examination by his assent entered of record. See *Buskirk v. Judge*, 7 W. Va. 91; *State v. Stewart*, 7 W. Va. 731; *State v. Abbott*, 8 W. Va. 746; *State v. Strauder*, 8 W. Va. 686. This act was repealed by ch. 92, act of 1875, and at the present time it does not seem necessary to have a preliminary examination of the accused before his trial for a criminal offense. See *State v. Mooney*, 49 W. Va. 713, 39 S. E. 657.

Constitutionality of Statutes.—The act of the legislature, approved April 3, 1873, entitled, "An act providing for the examination of persons charged with felony before the county court," was constitutional, valid, and binding. *State v. Strauder*, 8 W. Va. 686.

3. Commitment by Coroner.

See ante, "Coroner," I, B, 3.

In *Jackson v. Com.*, 23 Gratt. 919, the court expressly refused to decide the question as to whether when a per-

son had been arrested because of evidence introduced at a coroner's inquest, and had been committed by a justice of the peace who was acting coroner, he was entitled to a preliminary examination. See also, *Wormeley v. Com.*, 10 Gratt. 658.

4. After Indictment.

a. Former Rule.

Previous to the complement of Va. Code, 1887, there seems to have been a conflict in the decisions as to whether a person who had been indicted for the commission of a crime was entitled to have a preliminary examination. It had frequently been held by the supreme court that it was error to put a prisoner upon trial, on an indictment for felony, found by the grand jury in a circuit court before an examination of him, for the offense in the county or corporation court, if such examination was properly claimed; and that for such error the final judgment of conviction by the circuit court upon a verdict of guilty would be reversed upon a writ of error. See *Com. v. McCaul*, 1 Va. Cas. 300; *Com. v. Cohen*, 2 Va. Cas. 158; *Angel v. Com.*, 2 Va. Cas. 231; *Hurd v. Com.*, 5 Leigh 715; *Page v. Com.*, 9 Leigh 683; *Wright v. Com.*, 19 Gratt. 626. See also, *Butler v. Com.*, 81 Va. 161.

But it was held in *Chahoon v. Com.*, 20 Gratt. 733, by an equally divided court that where the prisoner was already in the custody of the court in which the indictment is found against him, or could be brought into such custody by *capias* issued by the court to compel him to answer the indictments, that there was no occasion for any preliminary examination. Judge Moncure in delivering his opinion expressly approved of *Shelly v. Com.*, 19 Gratt. 653, a decision delivered by the military court of appeals, which held, that where a prisoner in custody had been indicted in husting court of Lynchburg, held by a judge, he was not en-

titled to be sent before a justice for examination, but the court may proceed to try upon the indictment. The case of *Chahoon v. Com.*, 20 Gratt. 749, was followed in *Jackson v. Com.*, 23 Gratt. 919. And to the same effect see *Hawley v. Com.*, 75 Va. 847.

b. Present Rule.

Since Code of 1887.—By the act of 1885-86, it was required that where a person was indicted for an offense, he should be sent before a justice of the peace for a preliminary examination. This act, however, was left out of the Virginia Code of 1887, (See § 4003, Code 1904), and at the present time it seems that a prisoner who has been indicted for an offense may be tried without a preliminary examination. See *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005.

And where at the time of the commission of the offense the law required that the prisoner should be sent before a justice of the peace for a preliminary examination, but at the time of the trial the Va. Code of 1887 had gone into effect and by § 4003 it was provided, that upon an indictment the court shall award process, which shall be *capias*, which method was pursued, the court held, that the present method of procedure governs, although the offense was committed prior to the date of the passage of the act abolishing preliminary examinations after indictment, and that as the act related wholly to matters of procedure the prisoner was not deprived of any substantial rights. See *Jones v. Com.*, 86 Va. 662, 10 S. E. 1005; *Wilson v. Com.*, 86 Va. 666, 10 S. E. 1007.

West Virginia.—Where an indictment for felony is found, the accused is not entitled to a preliminary examination before a justice before trial. *State v. Mooney*, 49 W. Va. 712, 39 S. E. 657.

For cases under former statute, see *Buskirk v. Circuit Court Judge*, 7 W. Va. 91; *State v. Stewart*, 7 W. Va. 731;

State v. Strauder, 8 W. Va. 686; *State v. Abbott*, 8 W. Va. 746.

5. Waiver by Accused.

a. In General.

The defendant may waive a preliminary examination. *Butler v. Com.*, 81 Va. 159; *Wormeley v. Com.*, 10 Gratt. 668; *Jackson v. Com.*, 23 Gratt. 919. See also, *Buskirk v. Circuit Court Judge*, 7 W. Va. 91; *State v. Stewart*, 7 W. Va. 731; *State v. Strauder*, 8 W. Va. 686; *State v. Abbott*, 8 W. Va. 741.

b. Effect of Waiver.

The waiver of a preliminary examination by a person charged with crime is prima facie evidence of probable cause. *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729.

B. TIME OF EXAMINATION.

Code of 1792.—It was held in *Com. v. Myers*, 1 Va. Cas. 245, that under the provision of the Virginia Code of 1792, no innocent man could be kept in jail more than ten days without a trial.

Code of 1819.—By the Virginia Revised Code of 1819, ch. 169, p. 598, § 1, it was provided that the day to be appointed in the warrant for holding the court of examination, shall be not less than five or more than ten days after the date thereof, and under this provision it was held, that where the warrant was dated on Thursday which was the 17th day of the month, it was proper that the examination be held on the 22d, although one of the intervening days was Sunday. See *Boyd v. Com.*, 1 Rob. 692.

The five days required by law between the commitment of the magistrate, and the sitting of the examining court, must be either exclusive of both days, or inclusive of one and exclusive of the other; and must not be inclusive of both. *Thompson v. Com.*, 2 Va. Cas. 135.

Code of 1849.—By the Virginia Code of 1849, ch. 205, §§ 2, 3, the examination might be had at a regular term, in the discretion of the justice, and in that

case no particular length of time was required to intervene between the commitment and the examination. That requirement was made only when a special session was called. It was argued that the legislature must have intended to allow a prisoner some time for preparation. To this it was replied: 1. That the statute made no such provision; and 2. That the legislature doubtless thought that all injustice might be avoided by an application to the court for a postponement of the examination. *Kemp v. Com.*, 18 Gratt. 977.

Day Prisoner Was Committed.—The examination of a prisoner may be on the same day on which he was committed for examination, when it is at the regular term of the county court. *Kemp v. Com.*, 18 Gratt. 969.

Examined at Regular or Special Term.—A justice who commits a prisoner for felony could direct him to be tried by an examining court called for the purpose, or by the county court at its regular term. And if he committed the prisoner without directing a called court, the trial was held at a regular term. *Kemp v. Com.*, 18 Gratt. 969.

Before Indictment.—An examination of the accused before the county court may be had before he is indicted. *State v. Stewart*, 7 W. Va. 731.

C. TRIBUNAL OF EXAMINATION.

1. Examining Court.

See also, the title COURTS.

a. In General.

Creatures of Statutes.—The courts of examination were courts unknown to the common law; they were merely creatures of the statute law. See *Com. v. Myers*, 1 Va. Cas. 234. And were peculiar to Virginia. *Forde v. Com.*, 16 Gratt. 551.

Power of Examining Court.—The examining court being mere creatures of the statute law, could not upon any principle, exercise any power or juris-

diction which was not expressly conferred on them by that law, or which did not result to them as the means necessary to carry the jurisdiction expressly given to them into effect. These powers they did and must have possessed, but no more. *Com. v. Myers*, 1 Va. Cas. 234. See also, post, "Effect of Discharge of Accused," II, D, 6.

In *Forde's Case*, 16 Gratt. 547, Judge Allen, in delivering the opinion of the court, in speaking of the examining court, says: "It is in effect nothing more than a mere formal examination and inquiry into the facts than could be made by a single justice sitting generally alone, without time to examine carefully, or the aid of counsel to assist his deliberations. Under such circumstances he may err (supposing the facts to be undisputed) upon the question whether in law they make out a felony; or he may be mistaken as to the facts. As an additional safeguard for the liberty and protection of the accused, the examining court is interposed. It must be satisfied that there is a corpus delicti, that a felony has been committed, a proposition in regard to which they can have the benefit of consultation and argument." Quoted in *State v. Strauder*, 8 W. Va. 695.

Authority to Hold Examination.—When the examination was had before a special session of the examining court called for the purpose, the warrant of the justice was the authority, and the only authority, under which the court was held; but the regular monthly term sat by authority of the general law. It had authority to examine a prisoner committed for examination, unless the justice, in his discretion, determined to call a special session of the court. If he committed the prisoner generally for examination, without issuing his warrant for a special session, he was understood as determining, in his discretion, that there should be no special session,

and that the examination should be at the regular term. *Kemp v. Com.*, 18 Gratt. 973.

b. Composition.

By the act of January 24, 1804 (See Va. Rev. Code, 1819, vol. 2, ch. 34, p. 36, § 1), the examining court was composed of eight justices of the county wherein the offense was alleged to have been committed. *Com. v. Myers*, 1 Va. Cas. 235.

A justice of the peace who has acted as coroner in taking the inquest upon the dead body of the man whom the prisoner is charged to have murdered, is not thereby legally disqualified from sitting as a member of the examining court. *Forde v. Com.*, 16 Gratt. 547.

As to the constitution of the court, § 4, ch. 205, Va. Code, 1819, provided that the justice who committed or recognized the accused for examination should not, without the consent of the accused entered of record, be one of the examining court. *Forde v. Com.*, 16 Gratt. 551.

c. Abolition of Examining Courts.

Special Sessions.—By the act of 1847-78 the called or special sessions of the examining courts were entirely abolished, § 19, ch. 15, p. 132, directing that when the accused was entitled to the benefit of an examining court before trial, the magistrate before whom he was brought, should bail or commit him for examination before the next succeeding court of his county or corporation. *Wormeley v. Com.*, 10 Gratt. 669.

Act of 1867.—The act passed April 27, 1867, Sess. Acts, 1866-67, ch. 118, p. 915, to revise and amend the criminal procedure, provided that it should go into operation on July 1, 1867, and it repeals the law in relation to examining courts. Still a prisoner committed on a charge of murder on June 24, 1867, must be committed for examination; and it is proper to proceed, under the former law, in the ex-

amination of the prisoner before an examining court, and his trial before the circuit court. *Phillips v. Com.*, 19 Gratt. 485.

Effect of Abolition.—The only change made by the act (Acts, 1866-67, ch. 118, p. 915) repealing the law providing an examining court, is that after the repeal the commitment was for trial whereas before it was for examination. *Phillips v. Com.*, 19 Gratt. 485; *Chahoon v. Com.*, 20 Gratt. 733.

When examining courts were abolished, the necessity for a preliminary examination by a justice of the peace, in order to the constitution of such a court, also ceased; and there was then no occasion for an examination by a justice, except as a means of bringing the accused to justice. *Chahoon v. Com.*, 20 Gratt. 749.

2. Mayor.

See generally, the titles COURTS; MUNICIPAL CORPORATIONS.

A person accused of a crime committed in a city was examined before the mayor of said city. It was held, this was a sufficient preliminary examination. *Butler v. Com.*, 81 Va. 159.

3. Justice of Peace.

See generally, the title JUSTICES OF THE PEACE.

At the present time a justice of the peace seems to be the proper officer before whom the prisoner should be brought for his preliminary examination. See Va. Code, 1904, § 3966. *Butler v. Com.*, 81 Va. 161; *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005.

Generally, a prosecution for felony is commenced by a complaint before a justice of the peace, and a warrant issued by him to arrest the accused and bring him before the same or some other justice to be examined and disposed of according to law; and this is the case as well now as it was before the abolition of examining courts. *Chahoon v. Com.*, 20 Gratt. 749.

4. County Court.

West Virginia.—The second section

of the act of 1872-73 provides that "every such examination shall be had before the county court having jurisdiction of the offense, at one of the terms held for the trial of causes." *State v. Strauder*, 8 W. Va. 691; *State v. Stewart*, 7 W. Va. 733. This act has since been repealed. See *State v. Mooney*, 49 W. Va. 712, 39 S. E. 657.

D. PROCEEDINGS UPON EXAMINATION.

1. In General.

By § 11, ch. 204, it is provided that a justice before whom any person is brought for an offense, shall, as soon as may be, in the presence of such person, examine on oath the witnesses for and against him, and he may be assisted by counsel. *Wormeley v. Com.*, 10 Gratt. 667.

2. Necessity for Presence of Accused.

It is not error to enter a judgment ordering that the defendants, who are convicted for a misdemeanor, be committed to prison, though the defendants are absent. The common law which required their presence has been changed by § 4076, Va. Code, 1887. *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838.

A defendant may appear by counsel in any misdemeanor case though it be punishable by imprisonment but in no case can there be a judgment ordering that the defendant be committed to prison unless the defendant be present at its rendition. *State v. Campbell*, 42 W. Va. 246, 24 S. E. 875.

3. Adjournment or Continuance.

Refusal to Grant Continuance.—The refusal of the examining court to grant the prisoner a continuance of the case is no ground for arresting judgment in the circuit court; but, if available there at all, it should be taken advantage of by plea in abatement or motion to quash the indictment. *Morris v. Com.*, 9 Leigh 636.

Adjournment.—A prisoner is committed for examination two days be-

fore the regular court of the county in December, but the examining court is called to meet seven days thereafter; it fails to meet, and the examining court stands adjourned till the regular court in January: by that court the case is continued till the February term, and by that court till March, without the application of the prisoner, when the examination takes place, and the prisoner is remanded for trial. Within the meaning of the proviso to § 6, ch. 169, 1 Rev. Va. Code, the January court was the first, and the March court the third, after his commitment. *Mendum v. Com.*, 6 Rand. 704.

A prisoner is sent on to the county court for examination, and the case is twice continued for the commonwealth. At the third term the proceedings are quashed for irregularity, on the motion of the prisoner. A new proceeding is then commenced against him for the same offense, and at the first term of the examining court, the case is again continued for the commonwealth. It was held, the prisoner is not entitled to be discharged from the prosecution. *Morrissett v. Com.*, 6 Gratt. 673.

Limitation as to Adjournment.—By § 5, ch. 205, Va. Code, 1808, it was provided that the examining court is prohibited from adjourning the examination, except on the motion of the accused, etc., "beyond the third regular term after the examination was ordered." *McCann v. Com.*, 14 Gratt. 575.

4. Sufficiency of Examination.

An examination by an examining court upon a general charge of a felony is sufficient, although at the final trial the offense was parceled out and divided into distinct offenses. *Com. v. Leath*, 1 Va. Cas. 151.

Warrant directs a court to be summoned for the examination of a prisoner charged with feloniously stealing "sundry checks drawn by sundry individuals upon the exchange bank at

N., and sundry other checks drawn in like manner upon the Farmers' bank at N., also treasury notes and other bank notes, the whole of which checks, treasury notes and bank notes amount to 2324 dollars, of the value of 2324 dollars, the property of J. S. M.;" the record of examining court states, that prisoner was examined upon a charge of feloniously stealing "divers goods and chattels, the property of J. S. M." It was held, the warrant and examination are sufficient, and an indictment for the larceny of divers checks, bank notes, and United States treasury notes, the property of J. S. M., is well supported thereby. *Boyd v. Com.*, 1 Rob. 692.

5. Decision of Examining Court or Officer.

Can Not Fix Grade of Offense.—

The court of examination had no power by their decision to fix the grade of the offense for which the prisoner should be tried. Their only power was either to commit the prisoner for trial, for the offense of which he stood charged before them, or else to discharge him. See *Com. v. Myers*, 1 Va. Cas. 245; *Sorrell v. Com.*, 1 Va. Cas. 253; *Bailey v. Com.*, 1 Va. Cas. 258; *Huffman v. Com.*, 6 Rand. 692. See also, *Hawley v. Com.*, 75 Va. 847.

And where a prisoner was brought before an examining court charged with forgery, it was the duty of the examining court, if they thought the prisoner ought not to be discharged from further prosecution, to send him on for further trial in the superior court of law, without undertaking to discriminate as to the grade of the offense, or to designate the mode in which it had been committed. *Huffman v. Com.*, 6 Rand. 692.

A court of examination had no power to acquit a person charged before them with murder, of the murder with which he stands so charged, and to remand him to be tried for manslaughter in the superior court on account of the

same homicide. *Com. v. Myers*, 1 Va. Cas. 245; *Sorrell v. Com.*, 1 Va. Cas. 253; *Bailey v. Com.*, 1 Va. Cas. 258.

The committing magistrate does not by his warrant fix the grade of the offense with which the accused is charged. His inquiry is simply as to the fact. And a prisoner can not object that he has had no preliminary examination before a justice of the peace of the offense of which he is indicted and found guilty, that being one grade of the offense for which he was committed. *Hawley v. Com.*, 75 Va. 847.

If a man be examined by the examining court for feloniously stabbing another, and remanded for trial for that offense, and the party stabbed afterwards die, the accused can not be indicted for the murder, without an examination, before the justices, of the murder. *Com. v. Linton*, 2 Va. Cas. 206.

Decision as to Prisoner Being Free Man.—If a black man be sent on for trial by the examining court to the superior court (charged with a crime, which in a slave is punishable with death, and in a free man by penitentiary confinement), as a free man, unless the accused shall himself plead in abatement to the jurisdiction of the court that he is a slave, the superior court will proceed to try him as a free man. Such plea is the only mode by which the question can be put in issue in the superior court. *Com. v. Tyree*, 2 Va. Cas. 262.

6. Effect of Discharge of Accused.

Act of 1804.—By § 3, act of 1804, it was provided "that if any person charged with any crime or offense against the commonwealth shall be acquitted or discharged from further prosecution by the court of the county, or corporation, in which the offense is, or may by law be examinable, he or she shall not thereafter be examined, questioned or tried for the same crime or offense; but may plead such acquittal or discharge, in bar of any

other or further examination or trial for the same crime or offense, any law, custom, usage or opinion to the contrary in any wise notwithstanding." *Com. v. Myers*, 1 Va. Cas. 240. See also, *Chahoon v. Com.*, 20 Gratt. 769.

Power to Acquit.—"There is no question with me but that an examining court may acquit finally, and discharge a prisoner upon any criminal prosecution, and that such an acquittal may be pleaded in bar of any future prosecution for the same offense." Quoted in *Sorrell's Case*, 1 Va. Cas. 255. See also, *Com. v. Myers*, 1 Va. Cas. 245.

Code of 1849.—Section 11, ch. 205, Va. Code, 1849, declares that "if the court in which a person is examined as aforesaid, discharge him, he shall not thereafter be questioned or tried for the same offense." Under this section it was held, that a discharge by an examining court, of a prisoner committed on a charge of felony, is not a bar to another prosecution for the same offense, except when the record shows that the discharge was upon an examination of the facts charged. *McCann v. Com.*, 14 Gratt. 570.

Discharge by Justice.—"The discharge by a justice of the plaintiff of one who has been arrested and brought before him for examination or the refusal of the grand jury to indict him is prima facie evidence of want of probable cause but it is liable to be rebutted by proof." When the refusal of the grand jury to indict is opposed to the refusal of the justice to discharge, one rebuts the other, so as to render neither prima facie evidence of the existence or want of probable cause; and, if the plaintiff manages in any way to have the evidence for his defense considered by the grand jury, their finding is tantamount to an acquittal by a petit jury, and is not prima facie evidence of the want of probable cause on the part of the

prosecutor." *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729.

In an action for malicious prosecution, the discharge by a justice of the plaintiff, who has been arrested and brought before him for examination, or the refusal of the grand jury to indict him, is prima facie evidence of a want of probable cause, except in a case where it shall appear that such discharge, or refusal to indict, was after the hearing by the justice or the grand jury of the witnesses for the accused as well as for the prosecution, and such prima facie evidence is liable to be rebutted by proof. *Harper v. Harper*, 49 W. Va. 661, 39 S. E. 661.

E. PROCEEDINGS SUBSEQUENT TO EXAMINATION.

1. Review of Examination—Power to Sign Bill of Exceptions.

An examining court has no right to sign a bill of exceptions to any opinion or act of the court; and if they do, it is no part of the record of the trial. *Souther v. Com.*, 7 Gratt. 673; *Forde v. Com.*, 16 Gratt. 551.

2. Right to Re-Examination.

On Reindictment.—When a prisoner is arrested under a warrant of a justice, examined and committed to jail, and indicted and tried, and afterwards that indictment quashed and a new indictment found against him for the same offense, he is not then entitled to a new preliminary examination before a justice under the last indictment found against him. *Stuart v. Com.*, 28 Gratt. 951.

3. Time of Objection for Want of Examination.

After Verdict.—If a person, charged with felony, is entitled to be examined before the county court of the county wherein the offense is charged to have been committed, it is too late after verdict of guilty and judgment thereon, against the prisoner, to claim, in the appellate court, for the first time, the right to such examination, and to claim

that the judgment of the circuit court should be reversed, and the verdict of the jury set aside, upon the allegation by him, in his petition for the writ of error, that he had not been examined before the county court, upon the charge of felony in the indictment contained, and had not, by his assent, entered of record in the circuit court, dispensed with such examination. *State v. Stewart*, 7 W. Va. 731.

After verdict and judgment in felony, against a prisoner, he can not have a writ of error to reverse the judgment, on the ground, that he was not examined for the felony of which he was indicted, and has been convicted. *Campbell v. Com.*, 2 Va. Cas. 314.

4. Admission to Bail.

For a full treatment of the subject of the admission of a prisoner to bail after a preliminary examination, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 196.

5. Separate Juries for Persons Jointly Examined.

See generally, the title JURY.

Where several persons are proceeded against jointly for a felony before an examining court, and are sent on to the superior court for trial, the clerk of the county court should issue a separate venire facias for summoning a venire for the trial of each of them separately. *M'Whirt's Case*, 3 Gratt. 594.

When several persons have been examined and remanded for trial jointly, a single venire facias issues for the trial of all of them. If they elect to be tried separately, the venire summoned for all is used for the one first tried, and a several venire facias issues for trial of each of the others. Va. Code, 1849, ch. 208, §§ 13, 15; *Kemp v. Com.*, 18 Gratt. 981.

The act of February 24, 1846, changing the mode of summoning and making up juries in trials for felony, applies to all cases tried after the act, though the offense was committed, or

even the examining court had passed upon the case, before the passage of the act. *Perry v. Com.*, 3 Gratt. 632.

6. Indictment after Acquittal by Examining Court.

See generally, the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**.

An examining court having acquitted of murder and remanded the prisoner to the superior court to be tried for manslaughter, it is lawful for the superior court to indict for murder, and the prisoner, being so indicted, is not entitled to be bailed on the ground of no indictment being found against him for the manslaughter. *Bailey's Case*, 1 Va. Cas. 258; *Com. v. Myers*, 1 Va. Cas. 251; *Sorrell v. Com.*, 1 Va. Cas. 253.

"It is further the unanimous opinion of the court, that the examining court being legally incompetent to control the proceeding of the superior court upon the case of the prisoner remanded by the examining court to the superior court for a felonious homicide, it was lawful to indict the prisoner for murder, notwithstanding the discrimination by the examining court as to the grade of homicide, and being so indicted, the said prisoner was not entitled to be bailed on the ground of no indictment being found against him for the offense of manslaughter." *Com. v. Myers*, 1 Va. Cas. 251.

7. Admissibility of Evidence on Examination at Trial.

As to the admissibility of the evidence introduced at the preliminary examination at the subsequent trial of accused, see the titles **CRIMINAL LAW; EVIDENCE**.

8. Indictment for Offense for Which Accused Was Not Examined.

A plea in abatement to an indictment for murder, which sets out, that the examining court had not been duly constituted in this, that the warrant by which it was summoned, did not specify any offense charged on the pris-

oner (but only the felonious offense with which he stands charged), and does not set out any other part of the proceedings had against him, either before the justice or the examining court, is insufficient, and ought not to be received. *Sprouce v. Com.*, 2 Va. Cas. 375.

As to the indictment of the accused for an offense for which he was not examined, see ante, "Variance between Commitment and Indictment," I, C, 4.

F. RECORD OF EXAMINATION.

See also, ante, "Variance between Commitment and Indictment," I, C, 4.

Not a Part of Proceedings at Trial.

—The record of the proceedings of an examining court are not necessarily a part of the proceedings of the trial of an indictment for felony in the circuit court. And if the defendant in such a case does not claim the benefit of an examining court, before trial in the circuit court, or raise the question before the circuit court, he can not do so in the appellate court for the first time. *State v. Abbott*, 8 W. Va. 742.

Warrant Summoning Examining Court.—In *McCaul's Case*, 1 Va. Cas. 271, it was held, that the warrant for summoning an examining court is part of the record of that court. See also, *Kemp v. Com.*, 18 Gratt. 972.

Examination of Record.—Where the record of the proceedings of the examining court states that the prisoner was examined for felony, in general terms, not describing the particular offense, the circuit court may, on a motion to quash the indictment, or on a plea in abatement, on the ground that the prisoner has not been examined for the offense for which he is indicted, look into the warrant summoning the justices for the purpose of identifying the offense. *Kemp v. Com.*, 18 Gratt. 972.

Statement of Offense.—The record of an examining court need not set forth the offense with the same precision and certainty as an indictment;

thus: In an examination for horse-stealing, it is not necessary to charge the felonious taking; stealing is sufficient. Nor to lay the horses to be the property of any person. *Halkem v. Com.*, 2 Va. Cas. 4.

Should Regard Substance of Offense.

—In looking into the record of a trial before a court of examination to see for what offense a prisoner has been examined, the court should regard the substance of the offense, and not the manner in which it may have been perpetrated; nor should the offense be required to be described there with technical precision. *Huffman v. Com.*, 6 Rand. 692.

Variance between Record and Indictment.—The record of the examining court shows that the prisoner was charged with a felonious stabbing, with intent to kill. The indictment contained four counts, of which the first charged a malicious stabbing, with intent to kill; the second, a malicious stabbing, with intent to maim, disfigure,

and disable; the third and fourth, an unlawful stabbing, with the same intents, respectively. This variance between the record of the examining court, and the indictment, is no ground for quashing the latter. *Derieux v. Com.*, 2 Va. Cas. 379.

Certification of Record on Change of Venue.—The act of assembly which directs, that on a change of the venue in a case of felony, the judge shall certify the recognizances, together with a copy of the record of the case, "and all other papers which he may deem necessary to the trial," does not require that the judge should certify a copy of the record of the examining court. *Vance v. Com.*, 2 Va. Cas. 162.

Insertion of Warrant of Commitment in Record.—After an indictment for a felony, the indictment will not be quashed, because the clerk of the examining court has not inserted the justice's warrant of commitment of the prisoner in the record. *Kemp v. Com.*, 18 Gratt. 969.

Committee of Lunatic.

See the title INSANITY.

Common Carriers.

See the title CARRIERS, vol. 2, p. 671.

Common Council.

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COMMON LAW.

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As to effect of repealing statutes that have been enacted to repeal the common law, see the title STATUTES. As to construction of statutes in derogation of the common law, see the title STATUTES. As to effect of statute on common-law remedies, see the titles ACTIONS, vol. 1, p. 125.

I. Definitions.

Municipal law is a rule of civil conduct, prescribed or recognized by the supreme power in a state, commanding what, in its opinion, is right or convenient, and prohibiting what is wrong or inconvenient. The rule of civil conduct is based upon certain principles, which can neither be ignored nor left out. These principles, controlled in their application by custom, constitute the common law. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 627.

Meaning of Phrase "Common Law" in Seventh Amendment.—The words "according to the rules of the common law," as used in the constitution providing that "no fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law," were intended to be according to the procedure of common-law courts in contradistinction of equity courts, as modified, prescribed and fixed by legislative enactment, especially when this section is construed in connection with § 21, art. 8, to wit:

"Such parts of the common law, and of the laws of this state as are in force when this article goes into operation and are not repugnant thereto, shall be and continue the law of the state until altered or repealed by the legislature." *Michaelson v. Cautley*, 45 W. Va. 533, 32 S. E. 170; *Barlow v. Daniels*, 25 W. Va. 512.

II. Adoption of Common Law.

A. ADOPTING ACTS.

The Virginia convention, in May, 1776, by an ordinance then passed, declared that "the common law of England, and all statutes or acts of parliament made in aid thereof, prior to the fourth year of James the First, which are of a general nature and local to that kingdom, together with the several acts of the colony then in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be considered as in full force until the same shall be altered by the legislative power of the common-

wealth." The same provision is found in the Code of Virginia, 1860, p. 112, in the following form: "The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly." By § 18, art. 11, of the constitution of West Virginia, "such parts of the common law and of the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the legislature." See Va. Code, 1904, § 2; W. Va. Code, 1899, ch. 13, § 5; *Cunningham v. Dorsey*, 3 W. Va. 293; *Blaine v. Chesapeake, etc., R. Co.*, 9 W. Va. 265; *Crawford v. Chapman*, 17 O. 449; *Foster v. Com.*, 96 Va. 309, 31 S. E. 503; *Hanriot v. Sherwood*, 82 Va. 1.

"The ordinance of the convention in 1776, declares all the statutes of England prior to the fourth of James 1st, which were of a general nature, applicable to Virginia, and not local to that country, to be in force here. Applying the principle of that ordinance to the force of precedents, from thence, if it shall appear, that the rule now contended for (admit its existence) grew out of the local situation of the inferior courts in that country, and was grounded upon considerations in which ours totally differ from theirs, then the precedents can not bind us." *Thornton v. Smith*, 1 Wash. 83.

In *Hanriot v. Sherwood*, 82 Va. 15, Judge Lacy refers to an act of assembly passed in 1861, which recognizes the common law of England as in force in this commonwealth.

How Far Ordinance of 1776 Repealed.—The convention of May, 1776,

which declared our separation from England, and framed the first constitution of the state, ordained that "the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." 9 Hen. Stat. 127, § 6; 13 Hew. Stat. 23, ch. 17; 1 Rev. Code, ch. 38, 40, pp. 135, 136. In the year 1792 so much of the ordinance of 1776 as adopted the acts of Parliament of a general nature, made in aid of the common law prior to the fourth year of James the First, was repealed by the legislature; but that part of the ordinance of 1776, which established the common law until it should be altered by legislative power, has never been repealed. The revisors of the Code of 1849 prepared, and the legislature adopted, the following statute, prescribing the force and effect to be given to the common law: "The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, shall continue in force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly." Code of 1849, ch. 16, § 1. And this is, by statute, the force and effect to be given to it at the present time. Code, 1887, § 2. *Foster v. Com.*, 96 Va. 308, 31 S. E. 503.

B. EXTENT OF ADOPTION.

1. In General.

Although, by the terms of the ordinance of 1776, the common law was

adopted generally and without a qualification similar to that annexed to the adoption of the British statutes, yet it has always been considered that the same principle governs the adoption of the common law. Such of its doctrines and principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are either not in force here, or must be so modified in their application as to adapt them to our condition. It is a reasonable and substantial compliance with the common law, "whose peculiar beauty is that it adapts itself to the rights of parties under every change of circumstances," rather than a literal one, which is exacted by its adoption. *Coleman v. Moody*, 4 Hen. & M. 20, 21; *Findlay v. Smith*, 6 Munf. 148; *Stout v. Jackson*, 2 Rand. 147; *Stokes v. Upper Appomattox Co.*, 3 Leigh 337; *Foster v. Com.*, 96 Va. 309, 31 S. E. 503; *Lightfoot v. Colgin*, 5 Munf. 42; *Inornton v. Smith*, 1 Wash. 83.

Judge Tucker says the common law of England is at this day the law of this commonwealth, except so far as it has been altered by statute, or so far as its principles are inapplicable to the state of this country, or have been abrogated by the resolution and the establishment of free institutions: It adapts itself to the varied situation and circumstances of the country. *Findlay v. Smith*, 6 Munf. 134; *Stokes v. Upper Appomattox Co.*, 3 Leigh 338, citing *Lightfoot v. Colgin*, 5 Munf. 42; *Hanriot v. Sherwood*, 82 Va. 15.

West Virginia.—"To what extent, then, is the common law of England in force in this state? By § 8, art. 11, of the constitution it is provided that 'such parts of the common law and the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia, when this constitution goes into operation, and not repugnant thereto, shall be and

continue the law of this state until altered or repealed by the legislature.' The constitution of the state of Virginia in force at the time of the creation of this state, as well as all previous constitutions of the former state, contained similar provisions adopting the common law so far as its principles were not repugnant to said constitution. And I believe quite all of the states, by like provisions, have also adopted the common law so far as it is not inimical to their constitutions. But although so adopted, it was early held by the courts of Virginia, as well as of the other states, that the common law was in force in this country only so far as it was in harmony with our institutions, and its principles applicable to the state of the country and the conditions of society. 1 Tuck. Com. 8, 9, and authorities cited." *Powell v. Sims*, 5 W. Va. 4, 13 Am. Rep. 629.

Waste.—The common law of England is, at this day, the law of Virginia, except so far as it has been altered by statute, or so far as its principles are inapplicable to the state of the country. It adapts itself to the situation of society, being "liberalized by the courts according to the circumstances of the country and the manner and genius of the people, so as to effect a reasonable and substantial, rather than a literal, compliance with its principles." Thus, what is waste in England is not, therefore, of course, waste in Virginia; but the law of waste, in its application here, must be varied and accommodated to the circumstances of a new and comparatively unsettled country. *Findlay v. Smith*, 6 Munf. 134, cited in *Stout v. Jackson*, 2 Rand. 147, 148; *Stokes v. Upper Appomattox Co.*, 3 Leigh 338; *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. 527; *Bond v. Godsey*, 99 Va. 567, 568, 39 S. E. 216; *McDodrill v. Pardee, etc., Lumber Co.*, 40 W. Va. 579, 21 S. E. 883; *Bierne v. Ray*, 37 W. Va. 574, 16 S. E. 805.

The Northwestern Bank of Virginia, incorporated under the laws of Virginia prior to the foundation of the state of West Virginia, was continued in existence by § 8, art. 11, of the constitution of West Virginia of 1863, and also by the constitution of 1872, art. 8, § 36. *Northwestern Bank v. Maçhir*, 18 W. Va. 271.

Writ of Error in Behalf of State.—

The thirty-sixth section of article 8 of the constitution declares: "Such parts of the common law, and of the laws of this state, as are in force when this constitution goes into operation, and are not repugnant thereto, shall be, and continue, the law of the state, until altered or repealed by the legislature," etc. It is, therefore, obvious that, as § 3, ch. 160, W. Va. Code, 1868, allowing a writ of error in behalf of the state in all cases of violation of laws relating to the revenue, was in force at the time the constitution went into operation, it continued to be the law of the state, if not repugnant to the constitution, and, consequently, as the right to obtain from the supreme court of appeals, the writ of error in such cases existed to the state, at that time, it continued to exist after the constitution went into operation. *State v. Allen*, 8 W. Va. 682. See the title APPEAL AND ERROR, vol. 1, p. 418.

2. Doctrine of Ancient Lights.

See the titles ADJOINING LAND-OWNERS, vol. 1, p. 178; EASEMENTS.

It is believed that the common-law doctrine of ancient lights is inapplicable to the condition of a growing country such as ours, and is not in force here. It is not adapted to the rapid physical development of the country, especially in cities and towns. *Cunningham v. Dorsey*, 3 W. Va. 293; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Tunstall v. Christian*, 80 Va. 1, citing *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

3. Animals Running at Large.

See the title ANIMALS, vol. 1, p. 383.

There is no general law in the state of West Virginia, prohibiting the owners of domestic animals, consisting of cattle, horses, hogs, etc., from suffering them to run at large upon the range of uninclosed lands, except when unruly and dangerous; and the rule of the common law of England, requiring the owner of such animals, to keep them on his own land, or within inclosures, has never been in force in West Virginia, being inconsistent with the legislation of the state. *Baylor v. Baltimore*, etc., R. Co., 9 W. Va. 270; *Blaine v. Chesapeake*, etc., R. Co., 9 W. Va. 265; *Washington v. Baltimore*, etc., R. Co., 17 W. Va. 190; *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123.

The common law imposes on the owner of domestic animals the duty of keeping them on his own lands, or within inclosures, and he becomes a wrongdoer if any of them escape, or stray off upon the lands of another. Held, that this common-law rule is not in force in West Virginia, it being inconsistent with the legislation of the state, subject to the qualification, however, that animals which are unruly, or dangerous, are required to be restrained. *Baylor v. Baltimore*, etc., R. Co., 9 W. Va. 270.

And this is the rule in Virginia. *Poindexter v. May*, 98 Va. 143, 34 S. E. 971

4. Capacity of Infants to Commit Rape.

See the titles CRIMINAL LAW; RAPE.

The common-law rule that a boy under fourteen years of age is conclusively presumed to be incapable of committing or attempting to commit rape, whatever be the real fact, obtains in Virginia. "We are not aware of any climatic influence on our people, by reason of their locality, or dif-

ference in their habits or condition, that calls for a modification of our unwritten laws as to the age of puberty, even if we were satisfied that we had the power to make it, in view of the force and effect the statute requires shall be given to the common law." *Foster v. Com.*, 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846.

5. Handwriting—Comparison of Hands.

Notwithstanding the act of the assembly which recognized in 1661 the common law of England as in force in this commonwealth, and the ordinance of 1776 which adopted the common law in this state, and acts of parliament prior to the fourth year of James I., of a general nature, it was held, that expert testimony was admissible to test the genuineness of disputed writings by comparison of hands. The court rejected the common-law rule excluding such testimony. *Hanriot v. Sherwood*, 82 Va. 1. See generally, the title HANDWRITING.

6. Custom of London.

In *Lightfoot v. Colgin*, 5 Munf. 42, the court, after an exhaustive discussion of the question, came to the conclusion that the custom of London imposing an incapacity on the husband to bequeath all his personal estate from his wife, existed in Virginia. The court said: "I do not think it material whether what is now called the custom was originally the common law, or not. It was a law of a considerable portion of the kingdom, and the reasons which induced a particular course of decision under it would have applied with the same force had it been and remained the general law. But take it as merely the law of part of the kingdom, and that, almost at the dawn of our existence, it was borrowed therefrom, by our legislature, as far as it respected the wife, and adopted as the general law of this state, the rules and principles of decision, under the custom, if sound and correct equity,

ought to be the same under our law; unless I am incorrect as to the parity of the cases, or unless that which is equity, under the same circumstances, at one place, is not so at another. It may be said though, that this course of decision forms a part of the custom, and that our law has not adopted every part of the custom, much less these decisions. I do not think it material to investigate the details of the custom, and to compare them with our law, as it is enough for me that the decisions above referred to are not certificates of recorders, but the application, by learned judges, of principles of equity to the rights of parties arising under a law, which, though not general, is obligatory where it is the law; and which course of decision, it appears to me, as it did to them, was necessary to prevent that law becoming a dead letter." See the titles HUSBAND AND WIFE; WILLS.

7. Navigation Laws.

See the title NAVIGABLE WATERS.

The common law on the subject of the relative rights of the public and navigation companies in the use and navigation of rivers of the commonwealth, as understood in England, mixed up as it is with the prerogative of the crown, is not to be so understood here. Its peculiar beauty is that it adapts itself to the rights of parties under every change of circumstances. So far as it recognizes the prerogative of the crown, it was abolished by the resolution; and even where this is not the case, it is not always applicable to the same objects here as in England. *Stokes v. Upper Appomatox Co.*, 3 Leigh 338, citing *Lightfoot v. Colgin*, 5 Munf. 42; *Findlay v. Smith*, 6 Munf. 134; *Baring v. Reeder*, 1 Hen. & M. 161, opinion of Tucker, J.

8. New Trials—Refreshments for Jury.

Rules of ancient common law in respect to eating or drinking by a

jury. See *Coleman v. Moody*, 4 Hen. & M. 1. See the titles JURY; NEW TRIALS.

9. Waste.

See the title WASTE.

The law of waste, in its application here, must be varied and accommodated to the circumstances of our new and unsettled country. "In considering what is waste, in this country, it is to be remarked, that the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situation and circumstances of the country. That can not be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land, in such circumstances, would not be a lasting damage of the inheritance nor a disherison of him in remainder, which is the true definition of waste. It would, on the contrary, be beneficial to him in remainder, so long as a sufficiency of timber was left. This variation of the law of waste, not only exists in relation to a new country, compared with a cleared one, but takes place as to different parts of the same country." *Findlay v. Smith*, 6 Munf. 134, cited in *Stout v. Jackson*, 2 Rand. 147; *Stokes v. Upper Appomattox Co.*, 3 Leigh 338; *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. 527; *Bond v. Godsey*, 99 Va. 567, 39 S. E. 216; *McDoddrell v. Pardee, etc., Lumber Co.*, 40 W. Va. 579, 21 S. E. 883.

Chancellor Kent in his commentaries, vol. 4, p. 76, says that the American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the condition of a new and growing country. Quoted in *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. 527.

10. Criminal Law.

See the title CRIMINAL LAW.

In General.—The Virginia courts will follow the common law as to crimes in the absence of a statute on the subject, if not contrary to our established policy and to the changed conditions of our people. *Anderson v. Com.*, 5 Rand. 627; *Com. v. Callaghan*, 2 Va. Cas. 460; *Houston v. Com.*, 87 Va. 257, 12 S. E. 385.

The offense of robbery was not created by the statute, but was at an early period, and still is, a common-law offense, and was adopted by us at the formation of our state government, with the great body of the common law then adopted, and the crime, with its common-law definition, has remained unchanged. *Houston v. Com.*, 87 Va. 261, 12 S. E. 385. See the title ROBBERY.

Adultery and Fornication.—The statute of circumspecte agatis, may be seen in the original latin in 2 Coke's Inst. 487, and in its English dress, in 2 Bac. Abr., p. 171, title "Ecclesiastical Courts," D. In his commentary on that statute, Lord Coke says, that "in ancient times, the King's Courts, and specially the Leets, had power to inquire of, and punish fornication and adultery." The authority of the King's Courts, over these mere spiritual offenses, as they are called, appears to have ceased with the above statute, which forbids the judges from interfering with the courts Christian, in punishing them. That statute was enacted about the year 1285, that is, several centuries before the colonization of Virginia, and consequently, that part of the ancient common law of which Lord Coke speaks, was not brought here by our ancestors. It can not for a moment be supposed that the act of 1792, which repeals all British statutes, was intended to bring into existence an old law of England, which had never existed here. But, although that common-law power did not pre-

vail, yet our ancestors at a very early period, enacted several statutes on the subject. In the year 1642, it was enacted, that there should be a yearly meeting of the ministers, and church wardens, before the commander, and commissioners of every county court, in the nature of a visitation, and that the church wardens, on oath, should make presentment (*inter alia*) of all persons guilty of these high foul offenses. 1 Hen. Stat. at Large, 240. See also, p. 310. And in 1857, it was enacted, that for scandalous living in that way, the person convicted should be severely punished, and be held incapable of being a witness, and of bearing any public office in the colony. *Ib.* 433. These acts seem to have been repealed in 1696, and a new enactment was then made on the subject. 3 Hen. Stat. 139. In 1705, it was enacted, that every person committing these offenses, and thereof convicted by the oaths of two or more credible witnesses, or confession of the party, should be punished, for fornication, by a fine of 500 pounds of tobacco, and for adultery, by a fine of a thousand pounds of tobacco; to be recovered by the suit or prosecution of the church wardens, by bill, plaint or information, for the benefit of the poor of the parish. *Ib.* 361. The provisions of the act of 1705, have been continued to this day, except as to the amount of the fine, and that the prosecution is to be carried on by the overseers of the poor. 1 Rev. Code of 1819, ch. 141, § 6. There is no statute, either in England, or in Virginia, against the offense of seduction, except those which relate also to abduction; and these only apply where the female is under sixteen years of age. And with respect to the punishment of seduction, as being an offense *contra bonos mores*, there does not appear to be a single authority for such a prosecution in the English courts, unless where it is accompanied by conspiracy, or the

like; but, civil prosecution for these offenses, are known to be very common. *Anderson v. Com.*, 5 Rand. 632. See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 184.

Punishment.—The statutes in Virginia and West Virginia provide that a common-law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed. W. Va. Code, 1899, ch. 152, § 3; Va. Code, 1904, § 3881. See the title SENTENCE AND PUNISHMENT.

11. Christianity.

Whether christianity is a part of the common law, see appendix to Jefferson, p. 137.

C. ENGLISH STATUTES.

1. In General.

The Virginia convention, in May, 1776, by an ordinance then passed, declared that all statutes or acts of parliament prior to the fourth year of James the First, which are of a general nature, applicable to Virginia, and not local to that country, are in force here until the same shall be altered by the legislative power of the commonwealth. See ante, "Adopting Acts," II, A, and cases cited.

In 1793, a statute was adopted from Virginia, declaring that "the common law of England, and all statutes made in aid of the common law prior to the fourth year of James I., which were of a general nature, should be a rule of decision until repealed, within the territory." 1 Chase 190. By the second section of the act passed February 22, 1805, the above law was repealed, and by the first section of the same act it was re-enacted. 1 Chase 512. And again it was repealed January 2, 1806. 1 Chase 528. Since that date, we can discover no legislation upon the subject. The adoption of the law from Virginia, and the two enactments of 1805 and 1806, by implication, neces-

sarily show that the British statutes never had any force in Ohio, save that derived from their adoption by the legislature. In all cases, where the British statutes contravene or change the common law, and are not so incorporated into it as to have become part and parcel of the system, it is supposed they have no force within this state independent of legislative enactment adopting them. *Crawford v. Chapman*, 17 O. 449.

2. Particular English Statutes Considered.

The act of 5 George 2, ch. 7, § 4, subjecting lands, slaves, etc., in the colonies to payment of debts, was the law of Alexandria county in the district of Columbia from June 24, 1812. *Suckley v. Rotchford*, 12 Gratt. 60.

Indictments for Perjury—23 Geo. 2.—See the title PERJURY.

The British Statute of 23 Geo. 2, as to indictments for perjury, has no force in Virginia, and can in no wise change the common-law rules in this respect. Indictments for perjury in Virginia must be according to the common law. *Com. v. Lodge*, 2 Gratt. 579.

"The statute of 23 Geo. 2, was enacted too late to become a part of the laws we inherited from England (§§ 2, 3, Code of Virginia), and was never in force in this state. Consequently, when the case of *Lodge*, 2 Gratt. 580, was decided, it was held, that an indictment for perjury must still conform to the requirements of the common law. But on January 16, 1846, the general assembly enacted substantially, and in almost identical words, the English statute, which has ever since been in force here, and now constitutes § 3993 of the Code." *Fitch's Case*, 92 Va. 831, 24 S. E. 272.

17 Car. 2, Cap. 9—Westen 2, Cap. 45.

—The English statutes giving a scire facias to an administrator de bonis non, on a judgment in favor of an executor, came to us upon the settle-

ment of the colony, and has been preserved by the exception in our acts repealing the British statutes. The court seemed to be in doubt, however, whether this writ was derived from the common law, or from the English statutes, but said that it was immaterial from what source it was derived, whether from the common law or statutes. *Dykes v. Woodhouse*, 3 Rand. 287. *Coalter, J.*, dissenting. See the title EXECUTORS AND ADMINISTRATORS.

English Statute of Frauds.—The 17th section of 29 Charles 2, ch. 3, requiring that to make good a contract for the sale of goods, wares and merchandise (for the price of £10 or upwards), the buyer shall accept and actually receive in whole or in part the thing sold, or give something in earnest to bind the bargain or in part payment; or that some note or memorandum of the bargain be made and signed by the parties or their agents, has not been adopted in this state. *Chapman v. Campbell*, 13 Gratt. 105. See the title FRAUDS, STATUTE OF.

3. Interpretation of English Statutes.

In adopting an English statute, it is to be taken that there was adopted along with it the interpretation put upon it by the courts of England. It follows, therefore, that it is now unnecessary in this state to set forth the record of the case upon the trial whereof the false testimony was given, or to aver the jurisdiction of the tribunal over it; but only necessary, instead thereof, "to state the substance of the offense charged against the accused, in what court or by whom the oath was administered which is charged to have been falsely taken, and to aver that such court or person had competent authority to administer the same, together with proper averments to falsify the matter wherein the perjury is assigned." *Fitch v. Com.*, 92 Va. 831, 24 S. E. 272.

Where a term in a statute has been borrowed from the English law, the court will follow the interpretation put on that word by the English decisions. *Finch v. Com.*, 14 Gratt. 643; *Nowlin v. Scott*, 10 Gratt. 64.

4. Writs Given by English Statutes.

In General.—It is provided by statute in Virginia and West Virginia that the right and benefit of all writs, remedial and judicial, given by any statute or act of parliament, made in aid of the common law prior to the fourth year of the reign of James I., of a general nature, not local in England, shall still be saved, so far as the same may be consistent with the constitution and statutes of the state. Va. Code, 1904, § 3; W. Va. Code, 1899, ch. 13, § 6.

Writ of Warrantia Chartæ.—In *Stout v. Jackson*, 2 Rand. 146, Judge Green, in an obiter dictum, was of opinion that there was nothing in our situation which ought to vary the common law by which a writ of warrantia chartæ lay for a tenant of the freehold to recover damages in real actions in cases in which voucher did not lie, where a freehold estate was conveyed with warranty and the warrantee afterwards evicted. The existence of this remedy was not inconsistent with the policy of the statute of 1734, which "for the more easy prosecution of real actions" takes away "all essoins, views and vouchers;" and the abolition of the vouche did not necessarily abolish the warrantia chartæ, but, on the contrary, made it applicable to all cases of warranty. "For, as by the common law, that remedy existed as a substitute for voucher, only in cases where voucher would not lie, because the tenant was not impleaded, or because the policy of the law prohibited voucher, for avoiding delay in particular cases; so, when our statute prohibited voucher in all cases upon the same principles, the warrantia chartæ remained as the substitute for voucher

in all cases. Nor is there anything in the situation of this country, which would render this remedy inconvenient, except that the issues of property here are not, as in England, a just criterion of its value; and that would justify a modification of the remedy, so far as to ascertain the value of the property warranted and of that recovered in value, by its gross value in money, instead of resorting to the profits as the standard; as, in the case of waste, although the general principles of the common law remain with us, yet their practical application is varied according to the circumstances of the country, so that what is waste in England, is not, therefore, of course, waste here. *Findlay v. Smith*, 6 Munf. 134. If, then, this remedy remained, a party warranting a freehold must be considered as using the word in its proper and technical meaning, and to bind himself no otherwise than such a contract bound at common law. I should, therefore, doubt, whether a personal action of covenant would now lie on a real warranty; except in the case of the recovery of a chattel interest against the purchaser, as to which the covenant would be personal."

Writ of Scire Facias.—The writ of scire facias, given to an administrator de bonis non on a judgment in favor of an executor, whether this process was derived from the common-law or English statutes, came to us upon the settlement of the colony, and has been preserved by the exceptions in our act repealing the British Statutes. *Dykes v. Woodhouse*, 3 Rand. 287. Coalter, J., dissenting, said: "It has been the course here, in mere matters of practice, not affecting rights or property, to vary from that in the courts in England, as the situation of the country, and the general policy of our laws and institutions require; and this, though in matters of meum and tuum we consider ourselves governed by the common law, where unaltered by statute.

I should, therefore, not lightly depart from what I presume to have been the uniform practice on this subject."

Writ of Capias Pro Fine.—See the title FINES.

The common-law writ of capias pro fine is unrepealed, and may be used by the Commonwealth. *Com. v. Webster*, 8 Gratt. 702.

D. ENGLISH DECISIONS.

See the title STARE DECISIS.

In General.—English decisions are regarded by this court, for the sake of information merely, but not as authority. *Marks v. Morris*, 4 Hen. & M. 463.

"This question is placed upon the authority of English precedents. I shall presently consider those cases at large, but let us first inquire how far we are bound by their authority. The ordinance of the convention in 1776, declares all the statutes of England prior to the 4th of James 1st, which were of a general nature, applicable to Virginia, and not local to that country, to be in force here. Applying the principle of that ordinance to the force of precedents from thence, if it shall appear, that the rule now contended for (admit its existence) grew out of the local situation of the inferior courts in that country, and was grounded upon considerations in which ours totally differ from theirs, then the precedents can not bind us." *Thornton v. Smith*, 1 Wash. 83.

In *Marks v. Morris*, 4 Hen. & M. 463, which was a suit in equity, the chancellor used the following language: "While I have not less respect for English judges and English opinions, than other gentlemen; yet I have too much regard for myself, and the national character of my country, to rely upon English books, farther than for information merely, but not as authority; it was the common law we adopted, and not English decisions."

Custom of London.—The decisions of the British courts in cases arising

under the custom of London are entitled to weight here, when pronounced in cases arising under similar statutes with our own. *Lightfoot v. Colgin*, 5 Munf. 42.

Opinion of Judge Tucker Favoring English Precedents.—But in an early case involving the competency of husband and wife as witnesses for or against each other, Judge Tucker used the following language favorable to English decisions: "As I am upon the subject of the modern decisions in England, I will beg leave to say, that while I consider myself bound to pare down the governmental part of the common law of England to the standard of our free republican constitution; while I am free to admit, that from the progressive and mutable state of the common law (even the law of *meum et tuum*) on some subjects, that law ought not to be received here, whether evinced by new or old decisions, in the same extent that it is admitted in England, the circumstances and character of which nation varying from ours, produces (imperceptibly perhaps) a correspondent variation in the rules of their common law (such, for example, as those which depend upon and vary with the highly commercial character of the nation); yet, that on such rules of the common law as do not change, such as are neither affected by a change in the form of government, nor by a variation in the circumstances or character of the nation, I am free to avail myself of the testimony of able judges and lawyers of that country, even of modern times. As upon those subjects of commercial law, or the law merchant, which are common to England and the other countries of Europe, the greatest judges who ever sat in England have often consulted eminent jurists and merchants on the continent, in relation to such law; as upon the subject of the law of nature and nations, we avail ourselves of the testimony of eminent writers on those sub-

jects, though clothed with no authority whatsoever; so with respect to this last-mentioned portion of the common law, which is and must ever be the same in both countries, until altered by the legislature of either, I do not see that we may not avail ourselves of the testimony of the eminent and able judiciary of England, in relation to the subject. I shall certainly not be accused of partiality towards the government of Great Britain; but I wish not, without necessity, to sound the tocsin against that nation; to indulge my prejudices against her to an unreasonable length; nor to shut from our eyes that light, which, while it conduces to truth, will certainly not contaminate our political institutions. I am not willing that an appeal to my pride, as a citizen of independent America, should prevail over the best convictions of my understanding. I do not see why, upon principles of stable and unvarying law, such as those of evidence, for example, the epoch of our independence should be clutched with so much avidity; nor that, in relation to such principles, the testimony of Lord Mansfield delivered in 1777, is not of equal weight with his testimony delivered in 1775. I wish it, however, to be clearly understood, that I would not only confine the reception of the modern decisions in England to doctrines of this description, but would not receive even them, as binding authority. I would receive them merely as affording evidence of the opinions of eminent judges as to the doctrines in question, who have at least as great opportunities to form correct opinions as we have, and are influenced by no motives but such as are common to ourselves; and with respect to ancient decisions in England, what judge would wish to go further? Who will contend that they are binding authorities upon us, in all cases whatsoever? Shall we not have the privilege every day exercised in England, of detecting

the errors of former times? Shall we 'take our law of evidence from Keeble and Siderfin?' Shall we go back to the Gothic days of Lord Coke, and reject every man as a witness who is not a Christian? If we are to draw a line of exclusion on a subject no way affected by the change of our government (I speak now in relation to the law of *meum et tuum*), why shall we not rather keep our eye upon the particular topics in question, and vary our rule accordingly, than upon the time of our separation, which has no necessary connection at all with the subject? It would be infinitely more mischievous for us to receive en masse all the doctrines of the common law as our law, and the ante-revolutionary reports thereto relating, than to select what is really our law, and even to read the modern decision upon the subject thereof. Exclusively of the circumstance of our having become a separate and independent nation, every argument which applies against the reception of the modern authorities in England arising from the annihilation of the right of appeal from our courts to the supreme court in that country equally applied before the revolution, to the decisions of the subordinate courts in Westminster Hall, which were not paramount to our courts, and whose decisions were yet received. Whensoever the judiciary of this country shall have had time to rear up a system for itself; whensoever that judiciary or the legislature of our country, shall deem it proper to draw a further line of exclusion upon this subject, I shall most readily yield my concurrence; but certain I am, that inasmuch as from the very outset of our independence up to this day, this court, and perhaps every other court in the union, has been in the habit of inspecting and acting upon the modern decisions in England, under the restriction I have mentioned; and as those decisions have become the basis of their judgments, great incon-

venience and mischief would result from making a sudden alteration in this particular; thereby shaking the authority of our own solemn decision, and re-establishing the authority of such ancient decisions in England, as the modern ones, in both countries, had detected of error and exploded. I have deemed it proper to make these preliminary observations, because an objection is taken to the modern decisions, by the judge who has just spoken, it being impossible even to question the competency of the witness, on any other ground; and because I shall in this cause, as usual, and as heretofore has been the course in this court, quote and rely upon some post-revolutionary decisions in England, touching the subject before us; at the same time I do by no means admit, that the decisions of an earlier date would not equally support my opinion." *Baring v. Reeder*, 1 Hen. & M. 161.

III. Evidence.

A. PROOF OF COMMON LAW.

The evidence of what the common law is, is to be found in the decisions of the courts of justice and the treatises of learned jurists. The reports of judicial decisions contain the most certain evidence of the common law, and all properly constituted courts consider it their duty to adhere to the authority of adjudged cases. 1 Kent 476; *Marks v. Morris*, 4 Hen. & M. 463.

B. PRESUMED TO EXIST IN SISTER STATE.

In General.—In the absence of any evidence to the contrary, the Virginia courts will presume that the common law prevails in a sister state. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 976, 14 S. E. 838; *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296.

Husband and Wife—Contracts of Married Women.—In the absence of evidence to the contrary the common law is presumed to be in force in Pennsylvania, and under it the contracts of married women are void. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624. See the title HUSBAND AND WIFE.

Death by Wrongful Act.—It seems that where the declaration in an action for death by wrongful act avers and the evidence shows that the alleged cause of action arose in another state, it is incumbent upon the plaintiff to allege and prove his right to maintain this action under some statute of the foreign state, because, in the absence of evidence to the contrary, it will be presumed that the common law obtains in that state, and at common law a personal action died with the person. *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296, citing *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 976, 14 S. E. 838; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 634. See the title DEATH BY WRONGFUL ACT.

Common Nuisance.

See the title NUISANCES.

Common Schools.

See the title SCHOOLS.

COMMON SELLER.—In *Moundville v. Fountain*, 27 W. Va. 194, it is said: "There is in England and in some of the states a statutory criminal known as 'a common seller of liquor.' He is one who sells commonly spirituous or forbidden liquors without license; and it has been decided, that to establish this crime the state must prove at least three different sales by the accused, and in

some states this alone would not suffice to prove the offense in all cases. If one be convicted of this offence, he can not afterwards be prosecuted for any separate sale of liquor without license prior to the institution of the proceedings against him as a **common seller**. (*State v. Watts*, 28 Vt. 598.) But in Maine the contrary was held (*State v. Jackson*, 35 Me. 228)." See generally, the title **INTOXICATING LIQUORS**.

Common Stock.

See the title **STOCK AND STOCKHOLDERS**.

COMMONWEALTH.—In *State v. Lambert*, 44 W. Va. 308, 28 S. E. 931, it is said: "The reason alleged for its invalidity is that the cognizors acknowledged themselves to owe **commonwealth** of West Virginia, instead of the 'state' of West Virginia. There is nothing in this objection. It is true that the Code provides that the recognizances in criminal cases shall be payable to the state of West Virginia; but I am free to say that a recognizance taken in this state in a criminal proceeding, though it read to the **commonwealth** of West Virginia, is good. The word **commonwealth**, in such case, is synonymous with the word 'state.'" See the title **STATE**.

COMMONWEALTH'S ATTORNEY.

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CROSS REFERENCES.

See the titles **ACTIONS**, vol. 1, p. 122; **AMENDMENTS**, vol. 2, p. 316; **ARGUMENTS OF COUNSEL**, vol. 1, p. 713; **ATTORNEY AND CLIENT**, vol. 2, p. 145; **CRIMINAL LAW**; **DISMISSAL**, **DISCONTINUANCE AND NON-SUIT**; **EVIDENCE**; **INSTRUCTIONS**; **JUDGMENTS AND DECREES**; **JURISDICTION**; **NEW TRIALS**; **OPEN AND CLOSE**; **PENALTIES AND FORFEITURES**; **TESTIMONY**; **VERDICT**; **WITNESSES**.

I. Scope of Title.

Since the terms "district attorney" and "prosecuting attorney" are identical with that of "commonwealth's attorney," all three are treated under the latter head.

II. Appointment.

The circuit superior courts might at their pleasure appoint commonwealth attorneys to succeed those whom they have removed. *Ex parte Bouldin*, 6 Leigh 639; *McDougal v. Guigon*, 27 Gratt. 136, 137.

III. Employment of Counsel to Aid Prosecution.

In a criminal trial, the prosecutor may employ counsel to aid the attorney for the commonwealth, and such counsel will be permitted to aid in the prosecution. *Hopper v. Com.*, 6 Gratt. 684; *Sawyers v. Com.*, 88 Va. 357, 13 S. E. 708.

Power.—The right of a public prosecutor to have associated with him an attorney to assist in the prosecution is established law in this state, and is not a proper subject of animadversion. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

Counsel So Employed May Close Argument.—The trial court may, at its discretion, allow counsel, employed by parties to aid the prosecution, to close the argument before the jury. *Sawyers v. Com.*, 88 Va. 356, 13 S. E. 708. See the titles **ARGUMENTS OF COUNSEL**, vol. 1, p. 713; **OPEN AND CLOSE**.

Prosecuting Attorney Retiring—Counsel Opening and Closing Not Subject to Review.—The action of a trial

court in permitting the prosecuting attorney to retire from a criminal case, and in allowing attorneys employed by the private prosecutor to conduct it, and open and close the argument before the jury, is not subject to review unless it appears that it was improperly done, and that the accused was prejudiced thereby. *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452. See the title **OPEN AND CLOSE**.

When Remark of Assisting Attorney Does Not Violate Statute.—The remark of an attorney, assisting a prosecuting attorney, to this effect: "Although I have no right to swear any man who is accused of crime, I have the right to prove his statements," does not violate § 3897, Va. Code, 1887. *Sawyers v. Com.*, 88 Va. 357, 13 S. E. 708. See the title **WITNESSES**.

IV. Powers and Duties.**A. POWER TO INTRODUCE WITNESSES HE DESIRED.**

It is for the commonwealth's attorney to say what witness he will call. *Hill v. Com.*, 88 Va. 633, 14 S. E. 330; *State v. Cain*, 20 W. Va. 679; *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385. See the title **WITNESSES**.

An attorney for the commonwealth may introduce witnesses in chief to sustain a charge, whose names are not written at the foot of an indictment. *Lawrence v. Com.*, 30 Gratt. 845. See the title **WITNESSES**.

B. OPEN AND CONCLUDE ARGUMENT.

Though on a criminal trial the accused offers no evidence, yet as the affirmative of the issue is on the com-

monwealth, the attorney for the commonwealth is entitled to open and conclude the argument before the jury. *Doss v. Com.*, 1 Gratt. 557. See the title OPEN AND CLOSE.

C. COMMONWEALTH ATTORNEY'S CONSENT TO REMOVE INDICTMENT GIVES NO JURISDICTION.

The removal of an indictment from a county to a superior court by consent of the attorney for the commonwealth, and the defendant gives no jurisdiction to the superior court to try it. *Com. v. Brownwell*, 2 Va. Cas. 223. See the title JURISDICTION.

D. WHEN AMENDMENT MAY BE MADE TO REPLICATION.

See the title AMENDMENTS, vol. 1, p. 349.

E. JUDGE CAN NOT TRY INDICTMENT SIGNED BY HIM AS PROSECUTING ATTORNEY.

A prosecuting attorney, who signed an indictment, afterwards became the judge of the circuit court for which he had acted as prosecuting attorney. It was error for him as judge to try a case on such indictment. *State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162. See the title JUDGES.

F. NOLLE PROSEQUI.

Consent of Court First Had.—A commonwealth's attorney has not the right to enter a nolle prosequi in any case, without the consent of the court first had. *Anonymous*, 1 Va. Cas. 139. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

When It Fails to Act as Bar to Further Prosecution.—A nolle prosequi entered by an attorney for the commonwealth, and a consequent discharge from custody by the court, is not an acquittal or discharge from further prosecution. *Lindsay v. Com.*, 2 Va. Cas. 347; *Wortham v. Com.*, 5th Rand. 676; *McCann v. Com.*, 14 Gratt. 581. See generally, the title AUTREFOIS,

ACQUIT AND CONVICT, vol. 2, p. 181.

G. CAN NOT REMIT PART OF IMPRISONMENT.

"At the trial of an indictment for a crime, the punishment whereof, prescribed by law, is imprisonment, etc., for not less than one nor more than three years, the clerk charges the jury, that the term of imprisonment is to be not less than two nor more than three years; verdict finds prisoner guilty, and ascertains his imprisonment to be two years; the attorney for commonwealth remits one year of the term; whereupon the court sentenced the prisoner to one year's imprisonment; it was held, that the attorney had no power to make such remission, which was therefore merely void." *Allen v. Com.*, 2 Leigh 727. See also, the titles PARDON; SENTENCE AND PUNISHMENT.

H. DUTY TO PROSECUTE ALL OFFENSES AGAINST STATE IN HIS COUNTY.

It is the duty of the commonwealth's attorney to prosecute all offenses against the authority of the state committed within his county. *Cherry v. Com.*, 78 Va. 379.

V. Comment on Failure of Accused to Testify.

See the titles ARGUMENTS OF COUNSEL, vol. 1, p. 717; WITNESSES.

VI. Can Not Agree with Counsel for Prisoner upon a Member of Bar under Ch. 20, Acts of 1895, W. Va.

A prosecuting attorney and a counsel for a prisoner in a murder case can not agree upon a member of the bar as special judge, under chapter 20 of the acts of 1895, W. Va., to try, hear, and determine the case. *State v. Burnett*, 47 W. Va. 731, 35 S. E. 983. See generally, the title JUDGES.

VII. Removal.

See generally, the title PUBLIC OFFICERS.

Attorneys for the commonwealth, in the circuit superior courts, held their offices during the pleasure of the respective courts and the courts may remove them from office without assigning any reason for such removal. *Ex parte Bouldin*, 6 Leigh 639; *McDougal v. Guigon*, 27 Gratt. 136, 137.

Forfeits Office When Guilty of Gross Immorality.—If a public officer, whose duty it is to prosecute the keeper and inmates of a house of ill fame, resort to the same for immoral purposes, he is guilty of gross immorality, and thereby forfeits his office. *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274.

VIII. Compensation.

The fee of a commonwealth's attorney, in the superior courts, in cases of conviction for offenses where the penalty is not ascertained by law, but rests in the discretion of the jury, is ten dollars, although the fine actually imposed by the jury is less than thirty dollars. *Com. v. Flint*, 2 Va. Cas. 159.

A commonwealth attorney's fee of ten dollars should not be taxed in a bill of costs against each of two defendants when it does not appear that the defendants were severed in their defense. *Com. v. Hooper*, 2 Va. Cas. 223; *Com. v. Sprinkles*, 4 Leigh 651.

"The prosecuting attorney receives no fixed salary prescribed by law, but his compensation consists of such fees as are allowed to be taxed for his ben-

efit, under different provisions of the Code, * * * and such further allowances as are authorized to be made to him by the board of supervisors, * * * being not less than one nor more than six hundred dollars." *Rucker v. Supervisors*, 7 W. Va. 663.

IX. Assent Not Necessary to Writ of Error.

A common-law writ of error may issue from a judgment of an inferior court upon a presentment for a misdemeanor to a superior court for review without the assent of the commonwealth's attorney. *Temple v. Com.*, 1 Va. Cas. 163.

X. Verdict Not Set Aside because Part of Charge Made by Commonwealth's Attorney.

If no injury result to the person accused in a criminal case, a verdict will not be set aside because, part of the charge to the jury was given by the attorney for the commonwealth. *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352. See the title INSTRUCTIONS.

XI. Evidence.

The unsworn statements of a prosecuting attorney are not evidence against the accused, unless the former be sworn, examined, and submit himself to cross-examination as any other witness. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561. See generally, the titles EVIDENCE; WITNESSES.

COMMOTION.—See CIVIL COMMOTION, vol. 2, p. 827.

COMMUNICATO CONSILIO.—In *Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 492, 14 S. E. 235, it is said, quoting *Aug. & Ames' Corp.*, § 388: "An action of trespass can not be sustained against a private corporation for an act done by one of its agents unless done *communicato consilio*; or, in other words, unless the act has been directed, suffered, or ratified by the corporation." See also, the titles CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Community of Interest.

See the title PARTNERSHIP.

COMMUNITY OF PROFITS.—In *Logie v. Black*, 24 W. Va. 19, it is said: "Here clearly was no **community of profits** between these parties for carrying on a legal business, which is necessary to constitute a partnership. For by a **community of profits** in a legal business is meant a joint and mutual interest in the profits of the business. See *Setzer v. Beale*, 19 W. Va. 274." See the title PARTNERSHIP.

COMMUTATION.—See the title PARDON.

In *Lee v. Murphy*, 22 Gratt. 798, it is said: "A **commutation** is a substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this state the executive is only authorized to **commute** capital punishment; whereas he may grant conditional pardons in all cases legally involving an exercise of the pardoning power."

Compacts between States.

See the title CONSTITUTIONAL LAW.

COMPANY.—In *Plumer v. Com.*, 3 Gratt. 646, it is said: "It was not argued or supposed, that the words **company** or 'copartnership,' could be applied to the congregation of a church."

The word **company** does not embrace a county or city. *Charlottesville v. Southern R. Co.*, 97 Va. 431, 34 S. E. 98.

Comparative Negligence.

See the title NEGLIGENCE.

Comparison of Handwriting.

See the title HANDWRITING.

COMPENSATION.—See the titles AGENCY, vol. 1, p. 266; ATTORNEY AND CLIENT, vol. 2, p. 162; EMINENT DOMAIN. See also, references under COMMISSION, vol. 2, p. 855.

In *James River and Kanawha Co. v. Turner*, 9 Leigh 340, it is said: "**Compensation** means 'a recompense given for a thing received.' But the general advantages received by the public from a public improvement, can not properly be said to be a 'recompense given' for the land, for they are equally conferred on those who lose no land."

In *Allen v. Hart*, 18 Gratt. 733, it is said: "'It is evidently a principle of natural reason and justice,' says Evans in his Appendix No. 13 to Pothier on Obligations, 2 vol., p. 112, 'that when two parties are mutually indebted the balance only shall be paid, and that one of the parties shall not be compelled to pay the debt which he has incurred, and be left to sue for that to which he is entitled. This principle forms an essential part of the civil law, and the effect

of such mutual debts in destroying each other is distinguished by the term **compensation**; the extinction or reduction of one debt ensues immediately and by operation of law upon the other being contracted, as is shown by the chapter to which this appendix refers.'"

Compensation of Any Nature.—See *Crumlish v. Shenandoah Valley R. Co.*, 45 W. Va. 567, 32 S. E. 235.

Compensation for Deficiency or Excess of Land Sold.

See the titles MORE OR LESS; VENDOR AND PURCHASER.

COMPENSATORY DAMAGES.—See the titles DAMAGES; EXEMPLARY DAMAGES.

In *Norfolk, etc., R. Co. v. Neely*, 91 Va. 540, 22 S. E. 367, it is said: "Actual or **compensatory damages** are the measure of the loss or injury sustained, while exemplary or punitive damages are 'something in addition to full compensation, and something not given as his due, but for the protection of the public.'"

In *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 490, it is said: "This first class of damages, which I designate as determinate pecuniary loss, is often, but inappropriately, called in the text books and designated actual loss, or remunerative or **compensatory damages**. It is certainly true that this determinate pecuniary loss is actual damages, or remunerative damages, or **compensatory damages**; but it is an inappropriate designation of this sort of damages, because it does not distinguish it from the second class of damages, of which I will speak hereafter, indeterminate damages, which is, as we shall presently see, as much actual loss or remunerative and **compensatory damages** as is this first class determinate pecuniary loss; this marked difference between the two classes being that the first class is capable of being calculated and ascertained with exact or at least proximate accuracy, while the second class, as we shall presently see, is from its very nature indeterminate, and can never be ascertained exactly, or with any approximation to exactness. This difference we will presently point out distinctly. It makes a marked difference between these two classes of damages; and, as the laws governing these two classes are strikingly different, it is unfortunate that the books and decisions have not kept these marked differences in the law always before us, by designating these two classes by distinct and appropriate names. On the contrary, they frequently designate this first class of damages, determinate pecuniary loss, either as actual or remunerative or **compensatory damages**, terms which in no way distinguish it from this second class, indeterminate damages. But, as these phrases have been so often used as if applicable to this first class peculiarly the natural consequence of such inappropriate language has been to engender the notion that this second class, indeterminate damages, was somehow not actual, remunerative, or **compensatory damages**."

Compensatory damages are damages to indemnify the plaintiff, "including injury to property, loss of time and necessary expenses, counsel fees and other actual losses." *Ogg v. Murdock*, 25 W. Va. 139; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 266.

Competency of Witnesses.

See the title WITNESSES.

COMPETENT.—It is the duty of a railroad company to provide **competent** men for its service. But it is not error to substitute in an instruction the word "efficient" for the word **competent** when the relation in which it is used makes the two words equivalent. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 110, 25 S. E. 226. See the title **MASTER AND SERVANT**.

Competent Evidence.

See the title **EVIDENCE** and reference given.

Competition.

As to agreements to suppress, see the title **RESTRAINT OF TRADE**. As to unfair compensation, see the title **PATENTS AND TRADE MARKS**.

COMPLETE PURCHASER.—See the titles **DEEDS; VENDOR AND PURCHASER; RECORDING ACTS**.

A **complete purchaser** is one who has paid the purchase money, and who, though he has not received a conveyance of the legal title, is entitled to call for it. *Preston v. Nash*, 76 Va. 2.

In *Easley v. Barksdale*, 75 Va. 279, it is said: "He paid full consideration and acquired the legal title by regular conveyance. So that he is a **complete purchaser**."

COMPLETE TITLE.—See **ABANDONMENT**, vol. 1, p. 1. And see *Medley v. Medley*, 81 Va. 265.

COMPLETION.—In *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 750, it is said: "To require the commencement of a well within thirty days is not unreasonable, but to require the **completion** of a well in such time is unreasonable, unless, in deference to *Cushwa v. Improvement, Loan, etc., Ass'n*, 45 W. Va. 490, 32 S. E. 259, it was held that **completion** means commencement."

Composition with Creditors.

See the title **COMPROMISE**.

Compos Mentis.

See the title **INSANITY**.

COMPOUNDING OFFENSES.

CROSS REFERENCES.

See the titles **BASTARDY**, vol. 2, p. 334; **COMPROMISE**; **ILLEGAL CONTRACTS**.

What Constitutes.—The mere taking back of one's goods again or receiving reparation where no favor is shown is not sufficient to constitute the crime of compounding offenses. *Whart. Crim. Law*, § 1559; *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137.

Promise Not Void.—A promise or security given as mere amends for the civil wrong involved in a criminal transaction, is not void. *Bishop on Contracts*, § 494. *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137.

Violation of Public Policy.—"It is

laid down in *Bishop on Contracts* (§ 493), that where the agreement is not technically a compounding, but tends to impede or discourage the orderly prosecution of crime, public policy is violated." *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137.

A note given in compromise of a **bastardy proceeding** is valid and can not be avoided on the ground that the compromise of such proceeding is contrary to public policy or against public morals. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See the title **BASTARDY**, vol. 2, p. 334.

Note Wholly or Partly Paid.—"In *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, held: 'One can not maintain an action to recover money paid on a note wholly or partly to compound a felony, though the note was procured by duress and undue influence.'" *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 127.

Effect on Criminal Prosecution.—Nor will a compromise between the seducer and the seduced have the effect of barring a prosecution for the offense. *Barker v. Com.*, 90 Va. 820, 20 S. E. 776. See generally, the title **SEDUCTION**.

Cancellation of Agreements.—Equity will not entertain a bill to cancel instruments of indebtedness given under an

agreement to compound a felony or stifle its prosecution, as the parties are in *pari delicto*. *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137. See generally, the title **RESCISSION, CANCELLATION AND REFORMATION**.

Bill Dismissed—Parties Left Where Found.—Where a sheriff commits a default, and the sureties on his bond, after paying his liabilities, proceed against him by indictment for embezzlement, and afterwards an agreement is entered into between the sureties who paid off said liability and the father of said sheriff, who was also one of his sureties, that, if he will pay them a certain sum of money, said criminal proceedings shall be stopped, and father be released from further liability to his cosureties; if such agreement is so far executed that the money is paid, and the pro rata share of said father on the liability of said surety is paid, and accepted by said cosureties, in a chancery suit brought by said cosureties against said father to make him contribute further, under the circumstances of the case, equity will leave the parties where it finds them, and the plaintiff's bill will be dismissed. *George v. Curtis*, 45 W. Va. 1, 30 S. E. 69.

Compound Interest.

See the titles **INTEREST**; **USURY**.

COMPROMISE.

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I. Nature and What Constitutes.

"The essence of an offer to compromise, is, that the party making that offer, is willing to submit to a sacrifice, and to make a concession." *Brown v. Shields*, 6 Leigh 448.

"A judgment by confession, accepted in satisfaction of a larger demand, par-

takes of the nature, and has more or less the effect of both an ordinary compromise and a judgment rendered at the end of a litigated controversy." *Morehead v. De Ford*, 6 W. Va. 316.

Release of Right to Crops.—Where a widow was entitled, under her deceased husband's will, to make a crop on the home plantation, and to receive certain articles for her support, an

agreement by her to give up her right to the crop for "as much corn and provision the ensuing winter as she and a friend should judge sufficient to settle her on a plantation directed to be purchased for her," which was given her, was a binding compromise of her rights in the crop. *Daniel v. Maclins*, 6 Munf. 61.

Acceptance by Attorney Subject to Clients Approval Not Binding.—If an attorney to collect a claim accept a proposition to purchase it at a discount, subject to the approval of his client, such acceptance is merely an undertaking to communicate the proposition to the client, and the proposition may be withdrawn at any time before acceptance by him. *Cady v. Straus*, 97 Va. 701, 34 S. E. 615. See post, "Attorneys," II, C.

II. Who May Compromise.

A. IN GENERAL.

The law presumes that every one is capable to contract, and exemption from liability for want of such capacity must be strictly established. Mere weakness of mind, lack of skill, or immaturity of judgment in one who has attained full age, are not of themselves sufficient to invalidate a contract, though taken in connection with other evidence, showing a lack of consent and an intention of the other party to overreach, they may have that effect. *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 93, 24 S. E. 916; *Mason v. Williams*, 3 Munf. 126. See the titles **CONTRACTS**; **PRESUMPTIONS** AND **BURDEN OF PROOF**.

Partly Addicted to Drink.—A party who is improvident in making bargains, addicted to drink, and weak in understanding, may make a valid compromise. *Mason v. Williams*, 3 Munf. 126.

B. ADMINISTRATOR.

Liable for Devastavit.—An administrator may settle or compound a debt;

but if he compounds or releases debts or actions for less than he ought, he will be liable as for a devastavit. *Richardson v. Donehoo*, 16 W. Va. 685. See also, *Turpin v. Chesterfield*, 82 Va. 74. See the title **EXECUTORS AND ADMINISTRATORS**.

C. ATTORNEYS.

An attorney at law, employed to collect a debt merely as such, has no power to compromise after judgment, and accept a sum of money less than the full amount of the judgment as satisfaction. *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007; *Wiley v. Mahood*, 10 W. Va. 206; *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59; *Harper v. Harvey*, 4 W. Va. 539. See also, *Wilkinson v. Holloway*, 7 Leigh 277; *Cady v. Straus*, 97 Va. 701, 34 S. E. 615. See ante, "Nature and What Constitutes," I.

D. NEXT FRIEND OF INFANT.

Must Have Authority.—A next friend of an infant can not compromise a judgment recovered in action in the name of the infant by such next friend, and on part payment release the judgment without authority from the court. *Fletcher v. Parker*, 53 W. Va. 422, 44 S. E. 422. See the title **INFANTS**.

E. COMMITTEE OF INSANE.

A committee of an insane person has no authority to make an agreement of compromise which will change the nature or condition of the estate of such insane person, without the approbation or direction of the court appointing him as committee, or some other court having jurisdiction of the subject. *Hinchman v. Ballard*, 7 W. Va. 152.

F. WIDOW OF DECEASED.

Reference to Right under Will.—A widow, having certain rights under the will of her deceased husband, of which she had knowledge, may enter into a compromise with reference thereto. *Daniel v. Maclins*, 6 Munf. 61. See the title **WILLS**.

III. Compromise Favored in Law.

A compromise of doubtful rights is not only valid but favored by the law. *Zane v. Zane*, 6 Munf. 406. See also, *Caperton v. Caperton*, 36 W. Va. 635, 15 S. E. 150; *Tait v. Tait*, 6 Leigh 154; *Epes v. Williams*, 89 Va. 795, 17 S. E. 235; *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 100, 24 S. E. 916; *Smith v. Chilton*, 84 Va. 843, 6 S. E. 142.

Claims Capable of Being Compromised.—It is entirely competent for parties to compromise controversies, which appear to them to have a bona fide existence, and thus avoid the trouble and expense of a lawsuit. *Mason v. Williams*, 3 Munf. 131. See *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 820; *Zane v. Zane*, 6 Munf. 406; *Moore v. Fitzwater*, 2 Rand. 442.

IV. Consideration.

A. NECESSITY.

Consideration for Release of Debtor.—A creditor's agreement to release debtors on payment of less than his just demand is not binding if without consideration, particularly where debtors are not parties to the agreement and do not promise to pay the less sum for the entire demand then due and payable. *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142. See *Seymour v. Goodrich*, 80 Va. 303; Va. Code, 1887, § 2858. See the title PAYMENT.

B. SUFFICIENT CONSIDERATION.

See post, "In General," V, A, 1.

The prevention of litigation is not only a sufficient but a highly favored consideration, and no investigation into the character of the different claims surrendered will be entered into, it being sufficient if the parties at the time thought there was a doubtful question between them. *Jarrett v. Ludington*, 9 W. Va. 337. See *Zane v. Zane*, 6 Munf. 406; *Moore v. Fitzwater*, 2 Rand. 442.

Disputed Title.—The compromise of a disputed title is not only valuable, but a favored, consideration. *Moore v. Fitzwater*, 2 Rand. 442. See *Williams v. Lewis*, 5 Leigh 690; *Zane v. Zane*, 6 Munf. 406; *Jarrett v. Nickell*, 4 W. Va. 276; *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240.

Accepting Smaller Sum than Due—New Elements.—While it is true that an agreement to accept a smaller sum in lieu of the liquidated and ascertained debt, made between the debtor and creditor, is nudum pactum, and not binding on the creditor, this rule does not apply where any new element enters into the agreement of compromise, such as the fixing of an earlier day for payment, or a different place is selected therefor, or where the payment is made in some other thing than that originally agreed on, or a promise by a new party to pay. *Seymour v. Goodrich*, 80 Va. 304. See also, *Smith v. Phillips*, 77 Va. 548. See the title PAYMENT.

Dismissal of Suit—Bastardy Proceeding.—A party litigant in a court of justice may yield everything to his adversary, upon the consideration that he put an end to the lawsuit, which is a sufficient consideration. *Mosby v. Leeds*, 3 Call 441. So, a note given a woman in compromise of a bastardy proceeding is based on a sufficient consideration. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See the title BASTARDY, vol. 2, p. 334.

Extending Time on Execution.—Plaintiff and defendant in an execution may enter into a valid compromise respecting it; and if, in such case, the plaintiff receives a part of the debt from defendant, for which he agrees to an extension of time to the debtor, the consideration is sufficient. *Baird v. Rice*, 1 Call 18.

V. Effect of Compromise.

A. CONCLUSIVENESS.

1. In General.

Where matters have been finally set-

tled by compromise, and the controversy closed thereby, they can not be reopened. *Pollard v. Patterson*, 3 Hen. & M. 78. See *Hook v. Ross*, 1 Hen. & M. 321.

Construction.—Compromises being favored by the law, are construed liberally, as adjusting all matters between the parties growing out of the transaction to which it relates, and not as leaving unsettled a fraction to constitute a bone of further strife and contention, unless it be clearly shown that such fraction was not included in the adjustment. *Caperton v. Caperton*, 36 W. Va. 635, 15 S. E. 150; *Tait v. Tait*, 6 Leigh 164; *Epes v. Williams*, 89 Va. 795, 17 S. E. 235; *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 100, 24 S. E. 916.

Subsequent Investigation—Question of Law and Fact.—And so, where a compromise of a doubtful right is fairly made between parties, it is binding, and can not be affected by any subsequent investigation or result, and this is so whether it is a compromise of a doubtful question of law or fact. *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17. See *Calwell v. Caperton*, 27 W. Va. 397; *Jarrett v. Ludington*, 9 W. Va. 333.

Scaling Debt.—Within six months after the act for scaling debts was passed, S. recovered a judgment by default against P., and P. being about to move the court to scale the debt, the parties agreed that the debts should be scaled as of the value at the date of the bond, which was one for three, and this is entered of record upon the judgment. Then P. files his bill to have the debt scaled as of the date the bond fell due. It was held, that the agreement between the parties was conclusive and the debt should not be further scaled. *Smith v. Penn*, 22 Gratt. 402.

Bonds Given to Settle Claim.—Where an obligor in a bond snatched it from obligee's hands, tearing it, for which act a suit was threatened, and there-

upon the obliger gave two bonds, in compromise of the trespass and for the debt in the torn bond, it was held, that the last-named bonds were a bar to any claim the obligee might have had under the original bond, and were valid and obligatory, though there was a mistake in the consideration upon which such original bond was based. *Betts v. Cralle*, 1 Munf. 238.

Note Given on Settlement.—Where parties compromise matters between themselves, and a note is given for the balance found due from one to the other, such note is conclusive of the correctness of the settlement, in the absence of accident, mistake or fraud in making the settlement. *Mahnke v. Neale*, 23 W. Va. 80; *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50; *Calwell v. Caperton*, 27 W. Va. 408. See also, *Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730. See to the same effect *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

Claims Growing Out of Lands.—Articles of agreement for the sale of land are several times made between the same parties for the same tract of land, and the vendee, in possession, claims interest on all sums paid by him before a title was made to him, which claim is compromised. It is such a compromise that ought not be disturbed unless upon allegations and proof of fraud, imposition or mistake. *Shugart v. Thompson*, 10 Leigh 434. See also, *Gold v. Marshall*, 76 Va. 668.

And, where two parties claim title to land, and they compromise the dispute by one party paying a sum of money and the other conveying the land with warranty, such agreement will be binding, if there be no fraud or imposition in obtaining the agreement. *Moore v. Fitzwater*, 2 Rand. 442. See *Zane v. Zane*, 6 Munf. 406; *Davisson v. Ford*, 23 W. Va. 627.

2. Matters Affecting Conclusiveness.

See post, "Pleading," VIII; "Evidence," IX.

a. In General.

"The efficacy of a compromise rests upon the broad ground that it is the settlement of a controversy between the parties, and it is none the less binding because all the right may be on one side, and the conclusion to which the parties come is the very reverse of that which a court of justice would reach if its decision were invoked." *Lee v. Harlow*, 75 Va. 22.

b. Relation of Parties.

Mere inequality in the wealth, power and influence of parties to contracts can not affect the validity of contracts of compromise. *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 93, 24 S. E. 916. See the title CONTRACTS.

c. Ignorance of Important Facts.

A party who enters into a compromise in ignorance of important facts connected therewith will not be bound by it. *Ross v. M'Lauchlan*, 7 Gratt. 86. *Epes v. Williams*, 89 Va. 794, 17 S. E. 235; *Mosby v. Leeds*, 3 Call 439. See also, *Morehead v. DeFord*, 6 W. Va. 316.

d. Fraud.

While it is true that compromises are favored by the law, yet equity will not enforce a compromise to aid a fraud even though such compromise were valid. *Smith v. Chilton*, 84 Va. 843, 6 S. E. 142; *Morehead v. DeFord*, 6 W. Va. 316. See also, *Moore v. Fitzwater*, 2 Rand. 442; *Zane v. Zane*, 6 Munf. 406; *Davisson v. Ford*, 23 W. Va. 627; *Shugart v. Thompson*, 10 Leigh 434; *Gold v. Marshall*, 76 Va. 668; *Mason v. Williams*, 3 Munf. 126; *Langhorne v. McGee*, 103 Va. 281, 49 S. E. 44.

And where there has been a suit instituted, which is dismissed by agreement, the order of dismissal is without effect if the agreement to dismiss was procured by fraud. *Francis v. Cline*, 96 Va. 201, 31 S. E. 10. See the title FRAUD AND DECEIT.

e. Mistake.

A consent decree, entered to make

effectual a compromise between parties, will be set aside on a showing that there was mutual mistake as to the subject of compromise. *Epes v. Williams*, 89 Va. 794, 17 S. E. 235. See *Ross v. M'Lauchlan*, 7 Gratt. 86; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Morehead v. DeFord*, 6 W. Va. 316; *Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730; *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50.

Effect of Laches.—A decree will be set aside for mutual mistake in the compromise agreement upon which it is based, though eleven years shall have passed since the compromise. *Epes v. Williams*, 89 Va. 795, 17 S. E. 235.

f. Accident.

That accident or surprise will vitiate a compromise, see *Morehead v. DeFord*, 6 W. Va. 316; *Mahnke v. Neale*, 23 W. Va. 58.

g. Personal Disabilities.

As Estoppel.—Though one of the contracting parties to a compromise be weak in understanding, improvident, and addicted to intoxicants, which might entitle him to the favorable consideration of a court of equity, yet, if no fraud was committed in procuring his deliberate and voluntary assent to such compromise, his various acts of confirmation and acknowledgment of it will disentitle him to any equitable relief he may otherwise have had. *Mason v. Williams*, 3 Munf. 126. See *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 93, 24 S. E. 916. See the title ESTOPPEL.

h. Lack of Consideration.

As to effect of insufficiency or lack of consideration, see ante, "Consideration," IV.

3. Laches Barring Right to Question.

In *Turpin v. Chesterfield, etc., Co.*, 82 Va. 74, distributees of a decedent were not permitted to question validity of a compromise by the administrator, after twenty years had elapsed. As to effect of laches in case of mistake, see ante,

"Mistake," V, A, 2, e. See also, post, "As to Persons Not Parties to Compromise," V, A, 5.

4. Question of Law and Fact.

On a trial of the validity and effect of a settlement, if there is evidence tending to prove that it was made under mistake and coercion, the question of the conclusiveness of such agreement between the parties is properly left to the jury. *Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730. See *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50.

5. As to Persons Not Parties to Compromise.

A creditor of a partnership agreed to sever the partnership liability and to allow each partner to pay a certain part of the debt, and that the two partners should have a settlement of their partnership transactions, and that the social assets, which were conveyed to secure the creditor, should be applied to the individual liabilities of each partner under their severed liability in proportion to their respective interests in the partnership assets. Being unable to agree upon terms of settlement, one of the partners sued the other for a settlement. On orders of reference several reports were made, each finding a large balance in favor of the plaintiff partner. None of these reports were confirmed. Finally they compromised upon an amount due the plaintiff, less than that found by either of the reports in the cause. The creditor was no party to this suit or compromise. At his instance the decree approving the compromise and decreeing against the defendant was set aside. No effort was made by the creditor to show that the compromise was not just and fair, although more than a year elapsed before this action was tried, and it is not claimed that there was any fraud or collusion between the partners, or that the sum agreed upon is in excess of what was due. Held, under the facts and circumstances the creditor is bound by the

compromise between the partners. *Langhorne v. McGhee*, 103 Va. 281, 49 S. E. 44. See the title PARTNERSHIP.

B. OF JUDGMENT BY NEXT FRIEND OF INFANT.

Must Be Beneficial.—When a judgment is recovered in an action brought by next friend of an infant in infant's name, it is not proper for such next friend to compromise the judgment but if he does and such compromise is beneficial to such infant, the court can enforce it. *Fletcher v. Parker*, 53 W. Va. 422, 44 S. E. 422.

C. BY COMMITTEE OF INSANE WITHOUT AUTHORITY FROM COURT.

Although a committee of an insane person may sue to set aside a deed or contract of the insane person; touching his estate, made prior to the time he was appointed committee, upon the ground that such insane person was insane at the time of making such deed or contract of sale; still if the committee does bring such suit, and, while the suit is pending, he makes an agreement of compromise with the defendant, which, if carried into effect, will change the nature and condition of the estate of the insane person, without the direction or approval of the court having jurisdiction of the subject, a court of equity will not in another suit, decree specific performance of such agreement of compromise against the personal representatives and legal heirs of the insane person, unless it appears that the insane person was insane at the time of the making of the deed or contract. *Hinchman v. Ballard*, 7 W. Va. 152. See the title INSANITY.

And also if an agreement of compromise is made by a committee without the approval or direction of the court by which he was appointed, or of any court having jurisdiction of the subject, a court of equity will not direct

a specific execution thereof, as against the personal representatives and legal heirs, unless it appears to the satisfaction of the court that the agreement was beneficial and advantageous to L. or his estate. *Hinchman v. Ballard*, 7 W. Va. 152. See the title SPECIFIC PERFORMANCE.

D. PARTY ESTOPPED TO CLAIM BENEFITS.

Where a creditor agrees to accept less than the amount due from his debtor in satisfaction of his debt, and then assigns the entire debt, and the debtor though aware of such assignment, consented to entry of judgment against him, in favor of the assignee for such entire amount, and there is proof that he consented to such assignment in order to prevent other creditors from attaching, such debtor is estopped from falling back upon the compromise and release to defeat the rights of such assignee. *Smith v. Chilton*, 84 Va. 843, 6 S. E. 142. See the title PAYMENT.

E. ON SURETIES.

See the title SURETYSHIP.

When Sureties Can Not Be Subrogated.—While a creditor, in order to preserve his rights against a surety, is not bound to active diligence, but may remain passive, if, however, he does not remain passive and attempts to collect the debt and compromise the same, and by such compromise puts it out of the power of the surety, against whom he subsequently proceeds, to be subrogated to the rights of the creditor and reimburse himself, if he paid the debt, the right of the creditor against the surety is destroyed. *Renick v. Ludington*, 14 W. Va. 368. See *Baird v. Rice*, 1 Call 18. See the title SUBROGATION.

Discharge of Surety.—A., being the judgment creditor of B, and C, his surety, issues execution thereon, which was levied on the goods of B. A, on receiving part payment, gave B, with-

out the assent of C., further time on the balance, and the goods were restored to B. It was held, that the effect of the compromise was to discharge the judgment and the surety also. *Baird v. Rice*, 1 Call 18. See also, *Renick v. Ludington*, 14 W. Va. 368; *Daniel v. Wharton*, 90 Va. 584, 19 S. E. 170.

F. ON STATUS OF WITHDRAWING STOCKHOLDER.

Only Entitled to Pro Rata Share.—

A withdrawing member of a building association which was in fact insolvent at the time the notice of withdrawal was given, though the insolvency was not notorious and no steps had been taken to wind up its affairs, is not a creditor, and is only entitled to his pro rata share of the assets along with the other stockholders of the association, and A compromised with the officers of the association, and a taking of its notes for a less sum than would be the withdrawal value of his stock if the association were a going concern, can not have the effect to change his status from stockholder to creditor. *Colin v. Wellford*, 102 Va. 581, 46 S. E. 780. See the title BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645.

G. ON FORMER JUDGMENT.

Over Co.'s land ran a creek which supplied the mill of N., who, under muniments of title, owned "the ditch which conducted the water to his mill, and the entire and exclusive use of the water and the dam by which the water is raised from the creek to the ditch. C. changed the channel of the creek. Thereupon, N. built a new dam across the creek just below the mouth of the ditch. At law M., the grantee of C., sued N. for damages for the injury from the overflow caused by the new dam, but was cast. N. then threatened suit for damages for the injury from the change of the channel. By written compromise M. stipulated to pay a sum of money to

N., who agreed at his own costs to restore the waterflow and release all damages; his rights to the water to remain as before. But instead of restoring the waterflow by rebuilding and maintaining the original dam, N. continued to maintain the new dam. M. obtained an injunction to prevent this. N. pleaded the judgment at law as a settlement of the rights of the parties. Held, the compromise after the judgment at law, remitted the parties to their original rights as before the change of the creek's channel. These rights were not affected by the judgment at law. And N. hath the right to the ditch whereby the water is conducted to his mill, and the entire and exclusive use of the water which could be raised into the ditch by means of the original dam, and nothing more. *Switzer v. McCulloch*, 76 Va. 777.

H. ON JOINT OBLIGORS.

See post, "Compromise with Joint Obligors," VI.

VI. Compromise with Joint Obligors.

A. OPERATION AND EFFECT.

Under Va. Code, 1887, §§ 2856, 2857, 2859, a creditor who has compromised with one of several joint obligors, and received his full share of the obligation, may sue the other obligors without making the released obligor a party. *Penn v. Bahnson*, 89 Va. 253, 15 S. E. 586.

Right of Contribution.—When a creditor has compromised with one of several joint obligors the right of contribution between the joint obligors under §§ 2856, 2857, 2859, Va. Code, 1887, is not impaired. *Penn v. Bahnson*, 89 Va. 253, 15 S. E. 586. See the title CONTRIBUTION AND EX-ONERATION.

Operates as a Release.—A compromise between the principal and the obligee in a bond signed by the former and another, made in consideration of the former's surrendering real estate

to be immediately applied to the bond and in full discharge thereof; held, operates as a release of the other signer whether joint obligor or mere surety, whether such compromise be regarded as an absolute release, as extending time of payment, or as taking new security. *Daniel v. Wharton*, 90 Va. 584, 19 S. E. 170.

B. STATUTORY PROVISION—CONSTITUTIONALITY.

Va. Code, 1873, ch. 141, providing that, "§ 14. A creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability on his contract or obligation, without impairing the contract or obligation as to the other joint contractors or co-obligors;" and that, "§ 15. When said compounding or compromise is made, the contract or obligation shall be credited with full share of the party released, except where the compounding or compromise is with a surety, or cosurety, and in that case, as between the creditor and principal, the credit shall be for the sum actually paid by the compounding debtor;" and that, "§ 16. Nothing herein contained shall affect or impair the right of contributions between joint contractors and co-obligors," does not impair the obligation of contracts existing at the date of its passage (April 25, 1867), and is not unconstitutional as to such contracts. *Yuille v. Wimbish*, 77 Va. 308.

VII. Compositions with Creditors.

See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, pp. 799, 821.

A court of equity will not assist in carrying into effect compositions of claims by executors, or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that

everything was fair. *Clay v. Williams*, 2 Munf. 105.

After the acceptance of a note, the payee, in a composition of the creditors of the maker, agrees that the note shall be paid according to the terms of a trust deed, one who acquires the note after maturity holds the same subject to the provisions of the trust deed, though the deed was not recorded when the note was acquired. *Karn v. Blackford*, 1 Va. Dec. 841. See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

Effect of Note on Firm Assets.—

Where, in settlement of the debts of an insolvent firm, a creditor accepts the individual note of the partner appointed to wind up its affairs, and the firm debts are secured by a trust deed to him of the assets, there is not a novation so as to release the firm assets from the debt evidenced by the note. *Karn v. Blackford*, 1 Va. Dec. 841. See the title **NOVATION**.

VIII. Pleading.

See the titles **PLEADING; FRAUD AND DECEIT**.

How Fraud or Mistake Alleged.—

Where parties have made a settlement of their transactions and struck a balance, which has been adjusted by cash or note, it is incumbent on the party complaining of fraud or mistake, by suit in equity, to allege it specially in his bill. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897. See *Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730; *Calwell v. Caperton*, 27 W. Va. 408; *Morehead v. DeFord*, 6 W. Va. 316.

Alleging Facts Consisting of Fraud or Mistake.—Where one seeks to reopen a compromise matter for accident, mistake or fraud, he must distinctly allege the particular facts wherein such accident, mistake or fraud consists. *Calwell v. Caperton*, 27 W. Va. 409. See *Mahnke v. Neale*, 23 W. Va. 80; *Parkersburg Nat. Bank v. Als*, 5 W. Va. 54.

IX. Evidence.

A. IN SETTING ASIDE COMPROMISE.

Must Be Satisfactory.—It is advantageous to the interest of all that there should be an end of litigation, a settlement deliberately sought ought not to be set aside except upon the most satisfactory evidence. *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 100, 24 S. E. 916. See *Caperton v. Caperton*, 36 W. Va. 635, 15 S. E. 150.

Must Be Clear and Convincing.—So, one who seeks to reopen a compromised matter, on the ground of accident, mistake or fraud, must by clear and convincing evidence prove the particular facts wherein such accident, mistake or fraud consists. *Calwell v. Caperton*, 27 W. Va. 408. See also, *Mahnke v. Neale*, 23 W. Va. 80; *Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730; *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Parkersburg Nat. Bank v. Als*, 5 W. Va. 54.

B. COMPROMISE OR ADMISSIONS IN OFFER TO COMPROMISE AS EVIDENCE.

Compromise to Prove Justice of Claim.—And a compromise made or offered is not evidence of the justness of the claim agreed or offered to be compromised. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See also, 2 Stark. Law Ev., pt. 4, p. 38; *Brown v. Shields*, 6 Leigh 453.

Admissions.—Nor are admissions of a party, in an offer to compromise which was not accepted, proper evidence. *Williams v. Price*, 5 Munf. 507. See also, 1 Phil. Law Ev. 83; *Baird v. Rice*, 1 Call 23; *Brown v. Shields*, 6 Leigh 453. See the title **DECLARATIONS AND ADMISSIONS**.

C. QUESTION OF LAW AND FACT

See ante, "Question of Law and Fact." V, A, 4.

X. Family Agreements.

Carrying Will into Effect.—Arrange-

ments made between members of a family to carry into effect the wills of their parents and to prevent unseemly dissensions about property between near relations, ought, on principles of public policy, to receive greater consideration from a court of equity than if the agreement sought to be enforced were between mere strangers. *Lucketts v. Lucketts*, 10 Leigh 56.

Compulsory Payment.

See the title PAYMENT.

Computation of Time.

See the titles LIMITATION OF ACTIONS; TIME.

Concealed Weapons.

See the title WEAPONS.

CONCEALING.—An affidavit alleges the “material facts” for an attachment to be “that the defendant is hiding and **concealing** a large part of the stock of liquors and wines which the plaintiff sold and delivered to him.” Held, insufficient to sustain the order of attachment. The court said: “No fact is stated to indicate what the affiant understands by the words hiding and **concealing**. The defendant may have had the liquors in his cellar or in some outhouse, and affiant may have regarded this to have been hiding and **concealing** them. In a general sense hiding and **concealing** may be considered an act; and the statement that the defendant is hiding and **concealing** may also be considered as the statement of a fact. But such generality can not be allowed in proceedings by attachment. The mode and manner of the act and the attendant facts must be stated, in order that the court may determine the purpose and character of the act and be able to decide for itself upon the propriety or impropriety of the act and to say whether it was fraudulent or innocent.” *Sandheger v. Hosey*, 26 W. Va. 221, 224. See the title ATTACHMENT AND GARNISHMENT, ante, p. 70.

CONCERN.—A person who does not take part in the game, but furnishes the room and gas in which poker or draw poker is played, for which he receives a moderate compensation from the persons playing, is not guilty, under the statute, of being **concerned** in interest in the keeping a table of the like kind with faro or keno. *Nuckolls v. Com.*, 32 Gratt. 84. See generally, the title GAMING.

To give the appellate court jurisdiction on the ground that the controversy **concerned** a freehold, it must be directly the subject of controversy. *Hutchinson v. Kellam*, 3 Munf. 202; *McClagherty v. Morgan*, 36 W. Va. 193, 14 S. E. 992; *Clark v. Brown*, 8 Gratt. 551; *Miller v. Little Kanawha Nav. Co.*, 32 W. Va. 46, 9 S. E. 59; *Goolsby v. St. John*, 25 Gratt. 157. See also, the title APPEAL AND ERROR, vol. 1, p. 491.

If in an action of trespass *quare clausum fregit* the damages recovered be less than \$100, the defendant can not obtain a writ of error from this court, though it appears from the record, that the title or boundaries of the land were drawn in question. The court said: “Nor has this court any jurisdiction by virtue of the second clause above quoted; for this is not a controversy **concerning** the title or boundaries of land. It is true, that the bills of exception in this case

show, that the title and bounds of the tract of land named in the declaration, for the breach of the close of which this action was brought, were drawn in question, the defendant by his evidence showing that he claimed that he and not the plaintiff had title to this land. 'But in this action of trespass quare clausum fregit damages only are recovered; and although the title or bounds of land may be incidentally and collaterally brought in question, yet the value of the matter in controversy is from the very nature of the action the value of the damages sustained by the trespass; and this, when the title or bounds of land may be drawn in question, as well as when it may in no manner be had in the dispute.' The above language is quoted from Judge Cabell's opinion in *Hutchinson v. Kellam*; *Lymbrick v. Seldon*, 3 Munf. 215, 216; and I adopt it as expressing my views." *Greathouse v. Sapp*, 26 W. Va. 87. See also, *Miller v. Little Kanawha Nav. Co.*, 32 W. Va. 51, 9 S. E. 57; *Neal v. Com.*, 21 Gratt. 511; *Skipwith v. Young*, 5 Munf. 276.

In *Hancock v. Railroad Co.*, 3 Gratt. 328, decided "appeals as of right from orders of the county court in controversies **concerning** roads only exist where the controversy is **concerning** the establishment of a road, and not where it is a collateral controversy **concerning** the damages occasioned by a road already established." See also, *Miller v. Little Kanawha Nav. Co.*, 32 W. Va. 46, 9 S. E. 57.

CONCESSIO—CONCESSION.—In *Western Mining, etc., Co. v. Peytona, etc., Co.*, 8 W. Va. 446, it is said: "But a grant of land is a mere transfer of such title or right thereto as the grantor, at the time of the grant, may hold or have, absolutely or contingently. The latin word **concessio**, derived from the operative word in the latin assurance, heretofore used in England, formerly was employed to designate that species of assurance. And the English word **concession**, derived from the latin word, in its ordinary use, is exactly or nearly the equivalent of the word 'grant;' though the former is not now, in Virginia or West Virginia, generally used, as the latter is, with reference to the conveyance of land or transfer of title, right or claim thereto." See also, the titles **DEEDS**; **VENDOR AND PURCHASER**.

CONCESSUM.—In *Barbour v. Duncanson*, 77 Va. 83, it is said: "The first bond has not been produced in this case, and as it is not claimed to be now due, or any part of it, to the appellee, it may be regarded as a **concessum** that it has been paid in some way, for the purposes of this case."

Conciliation, Courts of.

See the titles **COURTS**; **WAR**.

Conclusion of Argument.

See the title **OPEN AND CLOSE**.

Conclusion of Pleading.

See the title **PLEADING** and references given.

Conclusions of Law.

See the title **LEGAL CONCLUSIONS**.

Conclusive Presumptions.

See the title PRESUMPTIONS AND BURDEN OF PROOF and references given.

Concurrent Jurisdiction.

See the titles COURTS; JURISDICTION.

Concurrent Negligence.

See the title NEGLIGENCE.

Concurrent Remedies.

See the titles ACTIONS, vol. 1, p. 126; ELECTION OF REMEDIES.

Condemnation Proceedings.

See the title EMINENT DOMAIN.

CONDITIONAL BOND.—In *State v. Purcell*, 31 W. Va. 44, 5 S. E. 305, it is said: "A bond is defined to be an obligation under seal, and is either single or **conditional**. It is single when the obligor obliges himself, his heirs, administrators, or executors to pay a certain sum of money on a certain day. It is **conditional** when the obligor obliges himself his heirs, etc., to pay a certain sum of money, upon **condition** that if he does some particular act the obligation shall be void." See generally, the title BONDS, vol. 2, p. 507.

CONDITIONAL GRANTING OF INJUNCTION.—An injunction granted, but not to take effect or be in force until the plaintiff executes a bond, is a **conditional granting of the injunction**. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. See also, the title INJUNCTIONS.

Conditional Limitations.

See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

Conditional Order.

See the title ORDERS.

Conditional Pardon.

See the title PARDON.

Conditional Sales.

See the title SALES.

CONDITION IN TERROREM.—A condition in a will annexed to a bequest of personal estate, declaring the legacy forfeited if any attempt is made to set aside the will or to cause litigation over it, where there is no gift over upon breach of such condition, is merely in **terrorem** and inoperative. The court said: "Conditions relating to marriage and disputing a will, when annexed to bequests

of personal estate, where there is no gift over upon breach of such condition, are generally considered as *in terrorem* merely, and inoperative. This *in terrorem* doctrine, which is only admitted in these two classes of cases (2 Jarman on Wills, 60), although not based upon any satisfactory reason, was firmly fixed in the law of England at an early day. 2 Jarman on Wills, 45, 58, etc.; 2 Williams on Executors, p. 585, 586; 2 Pom. Eq. Jur., § 933; 1 Lomax Digest (2d Ed.), 341; 2 Minor's Inst. (4th Ed.) 286, 287; *Scott v. Tyler*, 2 Leading Cases in Equity, 429, etc., and notes. In this state, in the case of *Maddox v. Maddox*, 11 Gratt. 804, where the condition related to marriage, the doctrine was applied without being questioned by the court. See also, the case of *Phillips v. Ferguson*, 85 Va. 513, 8 S. E. 241." *Fifield v. Van Wyck*, 94 Va. 557, 563, 27 S. E. 446. See also, the title **WILLS**.

CONDITION OF MOTHER.—See the title **SLAVES**. And see *Maria v. Surbaugh*, 2 Rand. 236.

CONDITIONS.

I. Conditions Precedent and Subsequent Defined and Distinguished, 50.

II. Construction of Conditions Subsequent, 51.

III. Illegal Conditions, 51.

IV. Pleading Performance of Conditions, 52.

CROSS REFERENCES.

See the titles **BUILDING RESTRICTIONS**, vol. 2, p. 654; **CHATTEL MORTGAGES**, vol. 2, p. 798; **COVENANTS**; **DEMAND**; **EMINENT DOMAIN**; **ESCROW**; **ESTATES**; **INJUNCTIONS**; **MUNICIPAL SECURITIES**; **PUBLIC OFFICERS**; **REMAINDERS**, **REVERSIONS** AND **EXECUTORY INTERESTS**; **SHERIFFS** AND **CONSTABLES**; **SLAVES**; **VENDOR** AND **PURCHASER**.

As to conditions precedent to action, see the title **ACTIONS**, vol. 1, p. 122. And see also, the titles **BILLS**, **NOTES** AND **CHECKS**, vol. 2, p. 401; **DETINUE** AND **REPLEVIN**; **EXECUTORS** AND **ADMINISTRATORS**; **TROVER** AND **CONVERSION**. As to conditions in bonds generally, see the title **BONDS**, vol. 2, p. 501; in guardian's bond's see the title **GUARDIAN** AND **WARD**; in passenger tickets, see the title **CARRIERS**, vol. 2, p. 671; in contracts, see the title **CONTRACTS**; in deeds, see the title **DEEDS**; in gifts, see the title **GIFTS**; in insurance policies, see the general title **INSURANCE**, and also, the titles **ACCIDENT INSURANCE**, vol. 1, p. 71; **MARINE INSURANCE**, etc.; in leases, see the title **LANDLORD** AND **TENANT**; in mortgages, see the title **MORTGAGES**; in ordinances, see the title **ORDINANCES**; in wills, see the title **WILLS**; of guaranty, see the title **GUARANTY**; on tender, see the title **TENDER**.

I. Conditions Precedent and Subsequent Defined and Distinguished.

"A condition precedent calls for the performance of some act, or the hap-

pening of some event after the terms of the contract have been agreed upon, before the contract shall take effect. That is to say, the contract is made in form, but does not become operative as a contract until some future speci-

fied act is performed, or some subsequent event occurs. Hence it is said, 'a condition precedent doth get and gain the thing or estate made upon the condition, by the performance of it; as a condition subsequent keeps and continues the estate by the performance of the condition.' Jacob's Law. Dic., title 'Condition.' Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850.

"There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction." Burdis v. Burdis, 96 Va. 81, 30 S. E. 462.

Whether a condition contained in a deed is a condition precedent or subsequent, is a question of intention in the grantor, to be gathered from the whole instrument. Jones v. C. & O. R. Co., 14 W. Va. 514. See the title DEEDS.

Whether a condition annexed to an estate is precedent or subsequent depends upon the intent of the person creating the condition. The same words may make the condition either precedent or subsequent. If the language of the particular clause or of the whole instrument shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and unless it be performed, the devisee or grantee can take nothing. But if the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole instrument, the condition is subsequent. Burdis v. Burdis, 96 Va. 81, 30 S. E. 462.

II. Construction of Conditions Subsequent.

Conditions subsequent are not favored in law because they tend to destroy estates. When relied upon to create a forfeiture they must be created by express terms, or clear implication. Language will not be held

to create an estate upon condition if it will admit of any other reasonable interpretation. Lowman v. Crawford, 99 Va. 688, 40 S. E. 17.

"Nothing is better settled than that in conditions subsequent, since they are in defeasance of interests already vested, courts of law and courts of equity are strict in requiring the very event, or the act to be done, with all its particulars, which is to defeat the interest previously vested. Roper on Legacies, 513, 514, and cases there cited." Lewis v. Henry, 28 Gratt. 192.

"The rule laid down in the cases, and sustained by all the authorities is, that conditions subsequent are strictly construed, because they tend to destroy estates, and a rigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable with conscience." Alexandria, etc., R. Co. v. Chew, 27 Gratt. 547.

III. Illegal Conditions.

There is no solid distinction between bonds and other deeds containing conditions, not mala in se but illegal at the common law, and those containing conditions, illegal by the express prohibition of statutes. In each case the bonds are void as to the conditions, that are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is, where the statute has avoided the whole instrument to all intents and purposes by express words or necessary implication. Reed v. Hedges, 16 W. Va. 167.

Conditions in Restraint of Marriage.

—"In Long v. Dennis, 4 Burr. R. 2052, Lord Mansfield said, 'conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness. They are contrary to sound policy.' And accordingly, even in those cases in which restraints of a partial character may be imposed on marriage, as in respect of time, place or person, they must be such only as

are just, fair, and reasonable. Where they are of so rigid a character, or made so dependent on peculiar circumstances, as to operate a virtual though not a positive restraint on marriage, or unreasonably restrict the party in the choice of marriage, they will be ineffectual and utterly disregarded." *Maddox v. Maddox*, 11 Gratt. 804.

"Thus, a condition in restraint of marriage excluding men of a particular profession, has been held void. 1 Equ. Ca. Ab. 100." *Maddox v. Maddox*, 11 Gratt. 804.

IV. Pleading Performance of Conditions.

Performance of Condition Precedent Must Be Averred.—Where an act is required to be done by one party as a condition precedent to his right to claim performance upon the part of the other, he can not claim such performance without averring the doing of such act, or giving some sufficient excuse for its nonperformance. *Granite Building Co. v. Saville*, 101 Va. 217, 43 S. E. 351; *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. 850.

But the failure to allege the performance of a precedent condition, in a declaration, will be cured by a verdict. *Bailey v. Clay*, 4 Rand. 346.

Defendant Must Plead Performance of Condition Subsequent.—"It is never necessary by the common law for the plaintiff in his declaration to state, or in any manner to take notice of, any condition subsequent annexed to the right which he asserts; for the office of such condition is not to create the right on which the plaintiff founds his demand, but to qualify or defeat it. The condition, therefore, if performed or complied with, furnishes matter of defense which it is for the defendant to plead." *Gould's Pleading* ch. 4, § 17, p. 176, quoted in *Carter v. Noland*,

86 Va. 568, 10 S. E. 605. See also, *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. 850.

Where plea of "conditions performed" is already in, it is not error to reject its equivalent, "non damnificatus." *Elam v. Commercial Bank*, 86 Va. 92, 9 S. E. 498.

Where the plea of "non damnificatus" is a good plea, it is equivalent to the plea of "conditions performed." And if this last mentioned plea has been filed in a cause, it is no error to refuse the application at a subsequent term, to file the former. *Archer v. Archer*, 8 Gratt. 539.

When "Non Damnificatus" Is a Good Plea.—The plea of "non damnificatus" is a good plea, only where the condition is to indemnify and save harmless. The plea should go to the right of action, not to the question of damages. *Archer v. Archer*, 8 Gratt. 539.

A plea of non damnificatus is applicable only to a bond or contract to indemnify and save harmless, or one with words of the same import, and not to one where the engagement is to do some affirmative act, though it may operate to indemnify, and the bond may have been intended to save its beneficiary from loss. *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999.

Necessary Averments in Plea of Conditions Performed.—As a general rule, a plea of conditions performed must aver specifically the time, place, and manner of performance, and though the subject to be performed consists of several different acts, yet performance of each must be averred; and a general averment of performance will not be sufficient. The same is true of a plea of non damnificatus. *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 413, 23 S. E. 737.

But the setting out the performance of a condition precedent in the language of the condition is sufficient. *Smith v. Lloyd*, 16 Gratt. 295.

CONDONATION.—Condonation is the remission by one of the married parties of an offense known to have been committed by the other against the marriage, on the condition of being continually afterwards treated by the other with conjugal kindness. While the condition remains unbroken, there can be no divorce, but a breach of the condition revives the original remedy. *Owens v. Owens*, 96 Va. 191, 31 S. E. 72. See also, the title **DIVORCE**.

CONDUCE.—Upon the question of what is admitted by demurrer to evidence, the court in *Hansbrough v. Thom*, 3 Leigh 159, said: "Lastly, I will observe, before I proceed to pronounce on the particular case before us, that I think the expression, 'that the demurrant must admit, or is considered as admitting, every fact which the evidence may **conduce** to prove,' must not be understood too broadly. The language of this court is more appropriate; 'that the demurrant must be considered as admitting all that could reasonably be inferred by a jury from the evidence given against him.' For evidence may **conduce**; that is, tend or contribute towards the proof of a fact, which it is very far from establishing, and which could not be fairly inferred from it." See also, the title **DEMURRER TO THE EVIDENCE**.

CONDUCTOR.—See the titles **CARRIERS**, ante, p. 671; **FELLOW SERVANTS**.

Confederate Contracts and Currency.

See generally, the title **CONFEDERATE STATES**. As a medium of payment, see the title **PAYMENT**. As to liability of fiduciaries for receiving Confederate money, see the titles **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**; **TRUSTS AND TRUSTEES**. As to liability of public officers, such as commissioners, sheriffs, etc., for receiving Confederate money, see the titles **JUDICIAL SALES**; **REFERENCE**; **SHERIFFS AND CONSTABLES**. As to legality of Confederate money contracts, see the title **ILLEGAL CONTRACTS**. As to scaling Confederate debts, see the title **PAYMENT**. As to whether contract was made with reference to Confederate currency as a standard of value, see the title **PAYMENT**. As to tender of Confederate currency, see the title **TENDER**. See also, the titles **MUNICIPAL**, **STATE AND COUNTY SECURITIES**; **SPECIFIC PERFORMANCE**.

CONFEDERATE STATES.

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CROSS REFERENCES.

See the titles BANKS AND BANKING, vol. 2, p. 254; CONSTITUTIONAL LAW; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INSANITY; INSURRECTION; INTEREST; JURY; LIMITATION OF ACTIONS; MUNICIPAL, STATE AND COUNTY SECURITIES; OATH; PAYMENT; STATE; TRUSTS AND TRUSTEES; UNITED STATES; WAR.

I. Ordinance of Secession.

When Effective—Effect of Ratification.—By the act of the Virginia convention of 1861, the ordinance of secession, which was passed on April 17, 1861, was submitted for ratification or rejection to the people of Virginia by a vote to be taken on the 4th Thursday in May following. It was held, that the act was merely inchoate until that vote was taken; and the state was not until after that vote was taken and declared in a state of war with the United States. *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613.

The subsequent ratification of the act by the vote of the people could not have the effect, by relation to the day of its passage, to change the actual status of the two governments on that day, so as to make acts tortious which otherwise would not be so, and defeat the rights of private persons. *Port-*

mouth Ins. Co. v. Reynolds, 32 Gratt. 613. See the title WAR.

On April 21, 1861, the shiphouse and other buildings at the United States navy yard at Portsmouth were set fire to and burned by order of the officers of the United States forces, acting under the authority of that government, and the fire extended to buildings in the neighborhood, and consumed them. Upon two of these buildings there were policies of insurance against fire; with a proviso, that the insurance company should not be liable to make good any loss by fire which might happen to take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power. It was held, that the ordinance of secession not then being in force, the burning of the buildings caused by the firing of the United States buildings at the navy yard, did not bring the loss within the operation of the proviso as

to any military or usurped authority. *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613. See the title INSURANCE.

II. Status and Nature of Confederate Government and Character of Conflict with United States.

The late rebellion of 1861 was a civil war. *Hedges v. Price*, 2 W. Va. 192.

The late conflict between the United States and the Confederate States was a war, in the legal sense, with all the incidents and consequences of a war, as they are known to the international law. Accordingly all the citizens on one side were enemies of all the citizens on the other, and all commercial or other pacific intercourse or communication between them, unless specially authorized was unlawful, to the same extent and for the same reasons as in a war inter gentes, and in order to determine how the contracts of individual citizens were affected by the late war, recourse must be had to the general principles applicable to a state of war, as they are found in the International Code. *Billgerry v. Branch*, 19 Gratt. 393. See the title WAR.

"This doctrine by no means involves a recognition of the Confederate States as a political sovereignty. The concession by the government of belligerent rights to the Confederate States, and the application by the courts of the general laws of war, to the determination of questions arising out of the conflict, only recognizes the existence of a conflict of such magnitude, and with such an array of strength, that it could not be dealt with otherwise than as a war; they involve no concession of political rights to the association of states which carried on the conflict." *Billgerry v. Branch*, 19 Gratt. 393.

The late civil war between the United States and the Confederate

States was accompanied by the general incidents of a war between independent nations, and the inhabitants of the United States on the one hand, and of the Confederate States on the other, became thereby reciprocally enemies of each other, liable to be so treated without reference to their individual dispositions or opinions, and during its continuance all commercial intercourse and correspondence between them were interdicted by principles of public law as well as by express enactments of congress, and all contracts previously made between them were suspended, and the courts of each belligerent were closed to the citizens of the other. *Haymond v. Camden*, 22 W. Va. 180; *Herring v. Lee*, 22 W. Va. 661. See post, "Contracts between Citizens of Confederate States and Citizens of United States," XI.

"The so-called Confederate government was a de facto government, and maintained its jurisdiction, and the jurisdiction of the state government, at Richmond, for several years by paramount force over most of the state of Virginia, and a part of the territory embraced within the state of West Virginia." *Tracy v. Cloyd*, 10 W. Va. 19.

"During the war, neither the law of the United States, nor any policy of their government, was in force in any part of the Confederate States not in the possession or under the control of the United States. That law and that policy, in contemplation of law, are presumed to have been, and actually may have been, unknown to the citizens of the Confederate States, who were alien enemies to the citizens of the United States, between whom all intercourse, social, commercial or otherwise, was interdicted by the laws of both countries and the law of nations; and the interdiction was enforced by the armies of both countries. The law and the policy of the Confederate States were binding on the citizens thereof, and the obligation was

enforced by the power of those states, which, was perfectly irresistible by the citizens thereof, however much they may have been disposed to make such resistance." *Bier v. Dozier*, 24 Gratt. 1.

III. Validity of Acts of the Government and of Contracts Arising under It.

As has previously been stated the state government of Virginia, which existed at Richmond during the war, and the Confederate government, of which it formed a part, were at least governments *de facto*, and contracts arising thereunder are valid, and will be enforced unless prohibited by the constitution of the state. *Pulaski County v. Stuart*, 28 Gratt. 872; *Dinwiddle County v. Stuart*, 28 Gratt. 526. See ante, "Status and Nature of Confederate Government and Character of Conflict with United States," II.

All the acts of such government in the ordinary administration of law, and in the interests of civil society, and for the protection of civil rights, were valid, and all contracts arising out of the laws of such a government, will be enforced, after the restoration of peace, to the extent of their just obligations, unless it be shown that such laws were enacted, or contracts entered into, "for the purpose of aiding any rebellion against the state or against the United States." *Dinwiddle County v. Stuart*, 28 Gratt. 526.

"Such laws and contracts are not only declared valid and binding by the decisions of this court and of the supreme court of the United States, but by the express statutes of the restored government of Virginia, whose constitutionality or validity have never been questioned." *Dinwiddle County v. Stuart*, 28 Gratt. 526.

But in West Virginia it was held, that when a state government is in insurrection or rebellion, and committing acts of hostility against the government of the United States, and the

same is so declared by the political department of the United States government, the acts of all officers claiming allegiance to and adhering to the state government that is so committing acts of hostility are null and void. *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 532.

And it was further held, that the acts of persons who acted as officers and adhered to the government of Virginia at Richmond, after June 13, 1861, are null and void, having been so declared by the ordinance of that date, passed by the convention of the loyal people of Virginia then assembled. *Burkhart v. Jennings*, 2 W. Va. 242.

Contract by Agent of Government.—On February 1, 1865, B., representing himself to be the agent of the Confederate States government to take tobacco into Maryland and exchange it for bacon, applied to D., living near the Potomac river, in W. county, to store for him in D.'s barn for the night, eighty-four boxes of tobacco. D. being unwilling to do it, B. agreed with him that if he would receive the tobacco in his barn, and should sustain any damages or injury from the forces of the United States in consequence of the tobacco being there deposited, B. would make good all losses he might sustain thereby. Under this agreement the tobacco was deposited in D.'s barn, where it remained until March 17, B. undertaking to pay for any loss D. might sustain thereby. At that time the enemy's gunboats on the river approaching D.'s house, he removed and concealed the tobacco, and his house and outbuildings and furniture were destroyed by the enemy, his loss amounting to \$6,352. It was held, that B. being the agent of the Confederate government, which could enforce obedience upon all within its jurisdiction, the contract was valid, and B. was bound to pay D. for the loss which he sustained. *Bier v. Dozier*, 24 Gratt. 1.

Acts of Person Acting as Clerk of Court Null and Void.—A writ was is-

sued out of what was claimed to be the clerk's office of the circuit court of G. county on May 18, 1863, signed by C. A. S. as clerk. A bill, answers and some depositions were filed shortly afterwards in the cause. On April 12, 1866, the following order was entered: "This cause having originated and being proceeded in before the late so-called circuit court of the county of Greenbrier, a court in rebellion against the government of the United States, having no legal or political status or existence, and whose judicial acts and privileges (as well as officers) whether civil or criminal, can not be recognized as valid by this court: It is therefore adjudged, ordered and decreed by this court that the institution of the said suit and all the acts and proceedings had herein before the late so-called circuit court of the county of G. are null and void. And on motion of the defendants by their counsel it is ordered that this cause be dismissed from the docket of this court. But without prejudice," etc. It was held, that C. A. S., the clerk, was by the proclamation of the executive department of the government of the United States, declared to be "in insurrection and rebellion" against its authority on July 1, 1862, and under the ordinances of the convention that reorganized and restored the government of Virginia, at Wheeling, the offices of all who attempted to exercise the functions thereof in the interest of the insurgent government were declared to be vacant; therefore, he was not exercising the functions of an office de jure, and his acts were null and void. Such person was not acting in subordination to the authority of the United States, but was acting in subordination to the authority of the insurrectionary government of the state of Virginia, then in "insurrection and rebellion" and committing acts of hostility, against the government of the United States; and having been by the latter declared to be in "insurrection and rebellion," the

acts of the clerk were not the acts of a de facto officer exercising the functions of a de facto office, as the insurrectionary government was never acknowledged by the political department of the United States government to be a de facto government. *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 532.

After Inauguration of State of West Virginia.—The acts of persons claiming to act as officers under the authority of the usurped government at Richmond, within the county of Monroe, after the inauguration of the state of West Virginia, and who certified themselves to be officers of the said usurped government are void in law. *Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781.

No act of the general assembly of Virginia, passed after June 20, 1863, the date of the foundation of the state of West Virginia, can give validity to the acts of persons acting as officers without authority in 1861, within the limits of West Virginia. *Burkhart v. Jennings*, 2 W. Va. 242.

IV. Powers of Government.

A. POWER TO RAISE ARMIES.

The Confederate congress had the constitutional power to raise armies, either by contract or by coercion. *Burroughs v. Peyton*, 16 Gratt. 470.

But congress had no power to coerce officers of the state government into the military service of the Confederate States. *Burroughs v. Peyton*, 16 Gratt. 470.

B. POWER TO CONFISCATE PROPERTY OF ALIEN ENEMIES.

Money received by an executor during the war, belonging to a citizen of Indiana, was confiscated by the Confederate government. It was held, that the Confederate government in the exercise of her belligerent rights, had authority to confiscate the property of alien enemies, and the executor was

not responsible for the money confiscated. *Newton v. Bushong*, 22 Gratt. 628.

V. Courts—Validity of Judgments, Decrees and Orders.

Order of Confederate States Court No Protection to Trustee.—Preston, in 1869, owed Dorr a debt, and secured it by trust deed to Gibboney. This debt Rohr attempted to attach in this suit in July, 1861. In 1862 the Confederate States court sequestrated this debt as the property of an alien enemy. On suggestion that this debt was attached, the Confederate States court directed Gibboney to pay it to the receiver, to be loaned out. It was so paid, and was loaned to Rohr. Later, in this suit, the court below adjudged Rohr to be entitled to the money as a credit on Dorr's alleged indebtedness to him. In 1878 Dorr got a decree in the United States circuit court against Gibboney's estate for his Preston debt. His executrix in this suit filed her cross bill, alleging that her testator had in effect paid this Preston debt into the state court, though, in fact, he had paid it to the receiver of the Confederate States court, and prayed that said decree of the United States circuit court in favor of Dorr against Gibboney's estate be perpetually enjoined. The injunction was awarded. On appeal by Dorr's administrator, it was held, that the order of the Confederate States court afforded no protection to the trustee, Gibboney, and that the injunction should be dissolved. *Dorr v. Rohr*, 82 Va. 359.

A decree rendered in November, 1861, by the pretended court of appeals of Virginia, at Richmond, acting under the authority of the citizens of Virginia in insurrection and open war with the United States and the restored Government of Virginia, is not obligatory upon parties to a cause pending in said court on April 17, 1861. *Snider v. Snider*, 3 W. Va. 200.

The judges of the court of appeals who were in office under military appointment when the state was restored to the union, holding over and continuing to exercise their office, their judgments and decrees are valid and binding. *Griffin v. Cunningham*, 20 Gratt. 31.

The proviso to § 2 of the act of March 5, 1870, called the enabling act, which authorized the court of appeals organized under the present constitution to rehear and affirm or reverse the decrees made by the military-judges at its term, commencing January 11, 1870, the term having ended before the passage of the act, is unconstitutional; and the present court has no authority to rehear such cases. *Griffin v. Cunningham*, 20 Gratt. 31. See the title CONSTITUTIONAL LAW.

VI. Issuance by Municipal Corporations of Notes as Currency.

The act of March 29, 1862, "to provide a currency of notes of less denomination than five dollars," by which all cities and towns of the state having a population of over 2,000 were authorized to issue notes as currency of a less denomination than five dollars, to an amount double the amount of state taxes assessed on property real and personal, within such city or town for one year, was intended to be temporary in its operation. *Miller v. Lynchburg*, 20 Gratt. 330.

The city of L. on May 8, 1862, passed an ordinance for the issue of \$120,000 of small notes, and directed its treasurer to exchange them for coin or currency, which should be held or invested for the redemption of the notes. From May 8 to October, \$72,418 was received in currency in exchange for the notes, of which \$68,000 was invested in Confederate bonds, and the balance was held in hand. The notes were directed to express and did express, on their face—received in payment for taxes and all

other city dues. The city did not levy a tax for the redemption of the notes. It was held, that the notes were issued and received with reference to Confederate currency as a standard of value; that by the act of March 29, 1862, the notes were required to be redeemed within the period prescribed by such act; that the city having provided for the issue of her notes, under the act of March 29, the act of May 15, extending the time of redemption, did not apply to the notes issued by such city; that the city having provided ample funds for the redemption of her notes, she was not required to levy a tax for their redemption; that some of the notes not having been presented for redemption within the time prescribed by the act of March 29, the holders of them were not entitled, after the war, to set them off against taxes due from them to the city; and the fund which had been provided and held ready for their payment, having perished without fault of the city, the city was not under any obligation in law or equity, to redeem them. *Miller v. Lynchburg*, 20 Gratt. 330. See the title MUNICIPAL SECURITIES.

VII. Payment in and Contracts Relating to Confederate Currency—Scaling Acts.

See the title PAYMENT.

VIII. Fiduciaries Receiving Confederate Money or Investing in Confederate Securities.

See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INSANITY; TRUSTS AND TRUSTEES.

IX. Suspension of Statute of Limitations.

See the title LIMITATION OF ACTIONS.

X. Exemption from Military Service—Substitution.

Effect of Act Authorizing Substitution.—The act of congress authorizing persons in the military service to put in substitutes did not constitute a contract between the government and such persons. *Burroughs v. Peyton*, 16 Gratt. 470.

But if it is to be regarded as a contract, it did not apply to exempt the person who had put in a substitute from any call which might thereafter be made upon him for military service. *Burroughs v. Peyton*, 16 Gratt. 470.

A person who put in a substitute who had been regularly received and continued in the military services of the Confederacy, was not thereby entitled to be discharged from service, under a call made upon him by virtue of a subsequent law of congress. *Burroughs v. Peyton*, 16 Gratt. 470.

Congress had no power to make a contract with a citizen, whereby that body should be forbid to call him into the military service of the country. *Burroughs v. Peyton*, 16 Gratt. 470.

Exemption of Millers and Millwrights.—In April, 1862, M. joined a volunteer company, and was mustered into the service of the Confederate States. In May, 1862, he put in a substitute who was regularly received; the substitute being over forty but under forty-five years of age, and not then liable to military service. In September, M., who had been before a millwright working regularly at his trade, was employed as a miller in a large flouring mill, and so continued to be employed. Under subsequent acts of congress, the substitute became liable to military service, and millers and millwrights working at their vocation were exempted. It was held, that M. was exempted. *Mann v. Parke*, 16 Gratt. 443.

Mode of Asserting Claim to Exemption.—A person who was embraced by

the terms of the conscript act, but claimed exemption on grounds exempting him from its operation, must have asserted and proved his claim to the officer having him in charge in the mode, if any, prescribed by the lawful regulations of the department; and if he failed to obtain his discharge in that way in a reasonable time, then, and not till then, he might complain of being unlawfully detained, and have the benefit of the writ of habeas corpus. *Mann v. Parke*, 16 Gratt. 443.

XI. Contracts between Citizens of Confederate States and Citizens of United States.

"It is a general principle of law, that war operates as an interdiction of all commercial and other specific intercourse and communication with the public enemy; and it follows as a corollary from this principle, that every species of private contract made with subjects of the enemy during war is unlawful." This rule was applicable to contracts made between citizens of the Confederate States and citizens of the United States during the war. *Billgerry v. Branch*, 19 Gratt. 393.

Bills or Checks Payable within Enemy's Lines.—Bills or checks drawn by a bank in Richmond, Va., upon a bank in New Orleans, were endorsed in Petersburg, Va., in February, 1863, to a resident of Vicksburg. The late war was then in progress, and Petersburg, Richmond and Vicksburg, were within the Confederacy, whilst New Orleans was in the permanent possession of the Federal forces. It was held, that the endorsement was illegal and void, and that the endorsee could not recover against the endorser, in an action brought after the war. The international law applied to all transactions between persons residing within the limits of the authority of the Confederacy and persons residing in the United States, outside of the Confed-

erate authority. *Billgerry v. Branch*, 19 Gratt. 393.

After Vicksburg had been taken possession of by the Federal forces; viz., on October 23, 1863, the bills were presented for payment at the New Orleans Bank, and payment was refused. Under the proclamation of the president of the United States of April 2, 1863, intercourse between Vicksburg and New Orleans was still prohibited. It was held, that the demand of payment was illegal. *Billgerry v. Branch*, 19 Gratt. 393.

A certificate of deposit executed by a bank within the Confederate lines, is null and void, and in violation of the law and policy of the government of the United States forbidding commercial intercourse with rebels. *Morrison v. Lovell*, 4 W. Va. 346.

But the assignment of such a certificate of deposit is a new contract, founded upon a new and valuable consideration, and if made within the Federal lines, is entirely disconnected with the illegal act of its making, and is to be governed by the law of the place where made. *Morrison v. Lovell*, 4 W. Va. 346.

Suspension of Rights under Contract Made Prior to War.—Where a vendee, who before the beginning of the late civil war, and during the continuance thereof, resided in Madison county, Virginia, east of the Allegheny mountains, purchased a tract of land before the commencement of said war, situated in Fayette county, Virginia, from his vendor who then resided, and who during said war continued to reside, in the county of Kanawha, Virginia, partly for cash, and partly upon credit, payable in installments, which did not become due, until after the proclamation of the president of the United States, dated August 16, 1861, declaring certain states, and parts of states; in a state of insurrection against the government of the United States, the right of the said vendor to a specific execu-

tion of said contract from August 16, 1861, to the end of said war, was suspended; and during the same period, it became and was unlawful for such vendee to enter the military lines of the United States to pay said installments as they became payable. *Grinnan v. Edwards*, 21 W. Va. 347.

XII. Liability of Present State Government for Acts and Contracts of Richmond Government.

The present state government is not legally responsible for any debt contracted, or liability incurred, by the authorities having control of the state after the ordinance of secession was adopted. *De Rothschilds v. Auditor*, 22 Gratt. 41.

Between May and November, 1860, D. deposited tobacco, for inspection and storage, in the public warehouse at Richmond, and paid the inspection fees. The tobacco remained in the warehouse until March, 1863, when the warehouse was accidentally consumed by fire, and the tobacco was burned. It was held, that the present state government was not responsible to D. for the loss. *De Rothschilds v. Auditor*, 22 Gratt. 41.

N. was elected storekeeper of the penitentiary prior to 1861, for a term commencing on January 1, 1861, and to continue for two years. In the last of the year 1861, and the first of the year 1862, he, as such storekeeper, purchased of C. leather and findings, to be manufactured by the convicts in the penitentiary, both N. and C. recognizing the authority of the Richmond government. C. not having been able to obtain payment of his debt from the Richmond authorities, he, in December, 1866, instituted proceedings to recover the amount due him from the present government of Virginia. It was held, that he had no claim, either in law or equity, upon the present government,

for its payment. *Com. v. Chalkley*, 20 Gratt. 404.

XIII. Liability for Acts Done in Prosecution of War.

Exemption from Liability under Constitution of West Virginia.—Section 35 of article VIII of the constitution of West Virginia, which declares, that "no citizen of West Virginia, who participated in the war between the government of the United States and a part of the people thereof on either side, shall be held liable civilly or criminally; nor shall his property be seized or sold on final process issued on judgments heretofore recovered or otherwise because of an act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto," operates *ex proprio vigore*. *White v. Crump*, 19 W. Va. 583.

A special plea, to an action of debt on a supersedeas bond, that the original judgment, which on writ of error had been affirmed by the supreme court of appeals of the state, "was recovered because of an act done by a citizen of this state according to the usages of civilized warfare in the prosecution of the late war between the government of the United States and a part of the people thereof," presents a complete defense to the action. *White v. Crump*, 19 W. Va. 583.

Section 35 of article VIII of the constitution of West Virginia treats judgments as property and provides for the carrying out of the provision by "due process of law;" and such judgments, as were contemplated by said section, were not to be declared void, until "by due process of law" it was ascertained, that they were recovered "because of acts done according to the usages of civilized warfare in the prosecution of the war," and when so ascertained, they were to be treated as nullities. *White v. Crump*, 19 W. Va. 583.

"Due process of law" as used in said

section means, in the due course of legal proceedings, according to the rules and forms, which have been established for the protection of private rights, securing to every person a judicial trial before he can be deprived of his property. *White v. Crump*, 19 W. Va. 583.

A trial in an action on a supersedeas bond upon issues joined upon special pleas, which set up the defense, that the original judgment was "recovered because of an act done by a citizen of this state according to the usages of civilized warfare, etc.," and which issues were found for the defendants, and judgment for the defendants on the only ground, that the original judgment was void, and in effect deprived the plaintiff of the benefit of his judgment, was "due process of law." *White v. Crump*, 19 W. Va. 583.

If in time of war an act is done in good faith with a view to assist the side, in whose service the actor was engaged, and was such an act as would be recognized by civilized nations as according to the usages of civilized warfare, although done without special orders, the actor could not be held liable therefor. *White v. Crump*, 19 W. Va. 583.

An instruction in the language of the pleadings although general is not erroneous; therefore, it was not error to instruct the jury: "If they believed the act done by the defendants was according to the usages of civilized warfare, they must find for the defendants." If the plaintiff had desired, he had the right to have the court define to the jury the meaning of the phrase, "usage of civilized warfare." *White v. Crump*, 19 W. Va. 583.

In time of war an officer has the right to arrest and imprison any one, whom he suspects and has reason from general representation or otherwise to suspect of giving aid and comfort to the enemy or of intending to give such aid and comfort; and such arrest and imprisonment is "according to the

usages of civilized warfare." *White v. Crump*, 19 W. Va. 583.

Statutes Exempting Persons from Liability for Acts Done in Suppression of Rebellion.—The West Virginia statute of February 27, 1866, provided as follows: "No suit or action shall be maintained in the courts of this state, against any person for any act done in the suppression of the late rebellion; and it shall be a sufficient defense to such suit or action to show that such act was done in obedience to the orders, or by the authority of any civil or military officer of this state, of the reorganized government of Virginia, or the government of the United States; or that said act was done in aid of the purposes and policy of said authorities in retarding, checking and suppressing the late rebellion." It was held, that this statute was not unconstitutional. *Hess v. Johnson*, 3 W. Va. 645.

In an action for seizing and taking away eight barrels of whiskey, during the late rebellion, the seizure being made upon the alleged ground that the whiskey was being conveyed into and along the military lines of the United States forces, one instruction, given at the instance of the plaintiff, was that the defendants 'could not justify the seizure under the orders of one C., who was claimed to be a United States officer, unless they showed that he had lawful authority to do as they had done. Another instruction, given at the instance of the defendants, was that the latter were allowed to justify under the orders of any civil or military officer of this state, or the United States; or that the act was done in aid of the purpose and policy of the authorities, in retarding, checking and suppressing the late rebellion. It was held, that the instructions were inconsistent and calculated to mislead the jury; that the instructions given at the instance of the defendants propounded the law correctly. *Hess v. Johnson*, 3 W. Va. 645.

Plea of Belligerent Rights Admissible.—Belligerent rights having been conceded by the national government to the confederates, in the late civil war, it is the duty of the judiciary of this state to recognize the same principle, in actions against belligerents for acts done in conformity with military authority and under a military order. *Carskadon v. Williams*, 7 W. Va. 1, in effect overruling *Caperton v. Bowyer*, 4 W. Va. 176; *Caperton v. Nickel*, 4 W. Va. 173; *French v. White*, 4 W. Va. 170; *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Echols v. Staunton*, 3 W. Va. 574; *Lively v. Ballard*, 2 W. Va. 496; *Williams v. Freeland*, 2 W. Va. 306; *Hedges v. Price*, 2 W. Va. 192.

In such actions the plea of belligerent rights is admissible. *Carskadon v. Williams*, 7 W. Va. 1, in effect overruling *Caperton v. Bowyer*, 4 W. Va. 176; *Caperton v. Nickel*, 4 W. Va. 173; *French v. White*, 4 W. Va. 170; *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Echols v. Staunton*, 3 W. Va. 574; *Lively v. Ballard*, 2 W. Va. 496; *Williams v. Freeland*, 2 W. Va. 306; *Hedges v. Price*, 2 W. Va. 192.

Necessary Allegations in Plea of Belligerent Rights.—Pleas of belligerent rights must allege, specifically, all matters necessary to show that the defendant acted in conformity with military authority and under a military order. *Carskadon v. Williams*, 7 W. Va. 1.

Where a plea, intended to be a special plea of belligerent rights, does not allege that the defendant committed the act complained of, but does allege that others committed the act, it simply amounts to the plea of "not guilty" and the general issue having been pleaded, it is proper to reject the intended special plea. *Carskadon v. Williams*, 7 W. Va. 1.

False Arrest and Imprisonment—When Law Will Imply Malice.—It was

held, not to be error in the court below to instruct the jury in an action for false arrest and imprisonment, that if the jury believed from the evidence that the defendant assuming to act as an officer of the so-called Confederate government, and at the time of committing the wrong complained of, was engaged in an effort to subvert the government, and that in pursuance of such illegal and reasonable purpose, and as a means to its accomplishment, arrested and imprisoned the plaintiff, that then the law would imply malice from such illegal proceedings and arrest, and that such presumption of malice could not be rebutted. *French v. White*, 4 W. Va. 170. But see *Carskadon v. Williams*, 7 W. Va. 1. See also, the constitution of West Virginia, art. VIII, § 35.

Admissibility of Evidence in Action for False Arrest and Imprisonment.—

It was proved in an action of trespass for false arrest and imprisonment, that the plaintiff was imprisoned by the defendant, the latter acting as provost marshal for the so-called Confederate authorities, in the jail of M. county; that he was afterwards surrendered by the jailor to the provost guard and taken to Richmond, where he was held on a charge of disloyalty to the so-called Confederate government, and subsequently removed to Salisbury prison, North Carolina; that by general orders it was the duty of defendant to turn over persons charged with like offenses with the plaintiff to the nearest Confederate military authorities, which were at the time of the arrest at a certain place in M. county, and that the defendant had no authority to make other disposition of persons charged with like offenses with the plaintiff. The defendant moved to exclude that part of the testimony which related to the imprisonment at Richmond and Salisbury. It was held, that it was not error in the court below to refuse the motion to exclude, as

the evidence was pertinent and proper. *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270.

A party was sued for false arrest and imprisonment committed by him during the war, and whilst he was in the service of the so-called Confederate States, and on the trial offered to put in evidence a pardon granted him by the president of the United States, granting amnesty for all offenses by him committed, arising from participation in the rebellion. It was held, that it was not proper or competent evidence. *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270. See also, *Hedges v. Price*, 2 W. Va. 192.

Liability for Trespass of Officer in Command.—It is not necessary to render a party commanding in the armies of the so-called Confederate States liable for a trespass, that it should be done directly through or by his orders; it is sufficient if he advised or aided or abetted those who committed the trespass. *Echols v. Staunton*, 3 W. Va. 574.

But the fact that a party was in command of armed forces of the co-called

Confederate States does not render him liable for a trespass committed by his command, unless the jury believes, from the evidence, that that fact and the evidence connects him with the trespass or with those who did commit it. *Echols v. Staunton*, 3 W. Va. 574.

Where it appears that a party was in command of armed forces of the so-called Confederate States, and had his headquarters at a certain place, and property was taken by persons under his command in pursuance of orders from headquarters, it is sufficient to connect him with the trespass and make him liable therefor. *Echols v. Staunton*, 3 W. Va. 574. But see *Carskadon v. Williams*, 7 W. Va. 1. See also, the constitution of West Virginia, art. VIII, § 35.

A Confederate district commissary in Virginia during the late war between the government of the United States and the Confederate States is not responsible for the misfeasance and wrongful acts of his subagents, unless he co-operated in or authorized the wrong. *Tracy v. Cloyd*, 10 W. Va. 19.

Confessions and Avoidance.

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CROSS REFERENCES.

See the titles AGENCY, vol. 1, p. 240; APPEAL AND ERROR, vol. 1, p. 418; ATTORNEY AND CLIENT, vol. 2, p. 144; BAIL AND RECOGNIZANCE, vol. 2, p. 196; CHAMBERS AND VACATION, vol. 2, p. 767; CLERKS OF COURT, vol. 2, p. 834; CONTRIBUTION AND EXONERATION; DEFAULTS; FOREIGN JUDGMENTS; FORMER ADJUDICATION OR RES ADJUDICATA; FORTHCOMING AND DELIVERY BONDS; FRAUDULENT AND VOLUNTARY CONVEYANCES; INJUNCTIONS; JUDGMENTS AND DECREES; JURISDICTION; PARTIES; PARTNERSHIP; PLEADING.

As to confessing judgment as a prerequisite to obtaining injunction against action at law, see the title INJUNCTIONS. As to judgments or decrees by consent, see the title JUDGMENTS AND DECREES.

I. General Consideration.

Of Common-Law Origin.—Judgments entered for the plaintiff upon the defendant's admission of the facts and the law, were known to the common law and exist independently of

statutes. *Saunders v. Lipscomb*, 90 Va. 647, 652, 19 S. E. 450.

Confessed Judgment Has All Incidents of Other Judgments.—"If a creditor accepts and ratifies a confession of judgment in his favor, it becomes

from the moment of its acceptance, valid; and is attended with all the results incident to other valid judgments. Although no adjudication is in fact required in entering a judgment of confession without action, yet it has all the qualities, incidents and attributes of other judgments, and can not be valid unless entered in a court which might have lawfully pronounced the same judgment in a contested action." *Beazley v. Sims*, 81 Va. 644. See the title JUDGMENTS AND DECREES.

"A judgment by confession, accepted in satisfaction of a larger demand, partakes of the nature, and has more or less the effect of both an ordinary compromise and a judgment rendered at the end of a litigated controversy. It certainly has, to say the least, as grave a sanction and as binding validity, as if it had been recovered upon a verdict." *Morehead v. DeFord*, 6 W. Va. 316, 320.

Foreign Judgment by Confession.—A judgment by confession, valid under the laws of the state where it is obtained, is entitled to "full faith and credit" in every other state, under § 1, art. 4, of the constitution of the United States. *Coleman v. Waters*, 13 W. Va. 278. See the title FOREIGN JUDGMENTS.

II. Time and Place of Making Confession.

A. IN COURT DURING TERM.

While the statute (Va. Code, 1904, § 3283; W. Va. Code, 1899, ch. 125, § 43) makes provision, only for confession of judgments in the clerk's office, it is the uniform practice of the courts to allow a defendant to acknowledge the plaintiff's action when the court is in session, at any stage of the cause. *Stringer v. Anderson*, 23 W. Va. 482; *Insurance Co. v. Barley*, 16 Gratt. 363; *Brown v. Hume*, 16 Gratt. 456. See also, *Richardson v. Jones*, 12 Gratt. 53; *Compton v. Cline*, 5 Gratt. 137.

A judgment may be confessed either

in court or in the clerk's office by an attorney in fact, though the attorney is not a lawyer. *Insurance Co. v. Barley*, 16 Gratt. 363.

B. IN CLERK'S OFFICE.

1. In General.

"In any suit a defendant may in vacation of the court and whether the suit be on the court docket or not, confess a judgment for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for. The same shall be entered of record by the clerk in the order or minute book and be as final and as valid as if entered in court on the day of such confession." But "the court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings, or correct any mistake therein and make such order concerning the same as may be just." Va. Code, 1860, ch. 171, §§ 41, 51; Va. Code, 1904, §§ 3283, 3293; W. Va. Code, 1899, ch. 125, §§ 43, 60; *Brown v. Hume*, 16 Gratt. 456; *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276; *Insurance Co. v. Barley*, 16 Gratt. 362; *Harner v. Price*, 17 W. Va. 523.

Prior to the passage of the act to be found in 2 Rev. Va. Code, 1819, App. 6, ch. 1, while the courts could receive a confession of judgment at any stage of a cause, there was no power in the clerk to take such confession in the office. *Brown v. Hume*, 16 Gratt. 456; *Insurance Co. v. Barley*, 16 Gratt. 362.

"In receiving the confession of judgment the clerk, pro hac vice, performs the functions of the court,—functions, which, in the absence of legislative enactments, could have been performed only by the judges or justices in session in their respective courts." *Brown v. Hume*, 16 Gratt. 456.

Clerk Acts in Ministerial Capacity.

—In cases of statutory confessions of judgment, the duties of the clerk are purely ministerial, and he acts "as the

agent of the statute in receiving and entering such confession of judgment." *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276. See post, "Entry," VII.

Substantial Compliance with Statute Sufficient.—In *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450, it is said that "the Virginia statute, § 3283, Code, 1887, being mainly declaratory to the common law, requires only substantial compliance, in order to render valid a judgment bona fide confessed in the clerk's office."

2. Must Be in Vacation.

Va. Code, 1849, ch. 171, § 41, authorizes a confession of judgment in the clerk's office only in vacation. *Brown v. Hume*, 16 Gratt. 456.

Notwithstanding the generality of the language used in Va. Code, 1849, ch. 171, § 41, that "in any suit a defendant may confess a judgment or decree, in the clerk's office for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for," it was held, that "the fair implication arising from the reading of the whole of that section and of the fifty-first section together, is that the judgment is to be confessed in vacation, and that it is to be subject to the same control that is given to the court over all other proceedings in the office had in vacation." *Brown v. Hume*, 16 Gratt. 456, 458. See also, Va. Code, 1904, § 3283; W. Va. Code, 1899, ch. 125, § 43, which expressly provide for a confession of judgment in the clerk's office "in vacation of the court."

Confession on Morning of First Day of Term.—A judgment confessed in the clerk's office on the morning of the first day of the term of the court before the hour for the opening of the court is a judgment confessed in vacation and is valid. *Brown v. Hume*, 16 Gratt. 456.

C. CONFESSION BEFORE ACTION BROUGHT.

In Clerk's Office.—Although it is provided by statute (Va. Code, 1887, §

3233) that "the defendant in any suit" may confess judgment in the clerk's office, a judgment confessed in the clerk's office is not invalid because at the time it was confessed there was no suit pending and no previous process had been issued. *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Shadrack v. Woolfolk*, 32 Gratt. 707. See also, *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

Judgment confessed in the clerk's office, though no process appears to have been issued or served, and though the clerk has failed to enter it upon the order or minute book or any other book in his office, and the only evidence of it is an unsigned memorandum endorsed on a declaration which seems to have been filed, and the bond enclosed in the declaration, is a valid judgment and entitled to rank as such as against other creditors of the debtor. *Shadrack v. Woolfolk*, 32 Gratt. 707.

"In *Shadrack v. Woolfolk*, 32 Gratt. 707, Judge Staples, speaking for the whole court, said: 'If the judgment was confessed without writ or previous process, we think it would not, on that ground, be void. In *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, it was held, that a judgment confessed in court is valid, though no action was pending. * * * No satisfactory or substantial difference is perceived between a judgment of that sort and a judgment confessed in the clerk's office. It is very true the statute provides that in any suit the defendant may confess judgment in the clerk's office. Inasmuch, however, as the object of the writ is to notify the defendant of the claim asserted, and to give him opportunity of making defense, if he consents to appear, or waives service of process, and confesses the demand, he can not afterwards be heard to say that no process was in fact issued. To permit him to do so would be to perpetrate a fraud on the plaintiff, who has been led by the defendant's conduct into an accept-

ance of the judgment as a valid security.'" *Saunders v. Lipscomb*, 90 Va. 647, 651, 19 S. E. 450.

In Court.—A judgment confessed in court on a bond by the obligor, although no process had issued and no suit had been previously instituted, is not void so as to be open to collateral attack. *Brockenbrough v. Brockenbrough*, 31 Gratt. 599. See also, *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Shadrack v. Woolfolk*, 32 Gratt. 707.

III. Who May Confess Judgment.

A. IN GENERAL.

Attorney in Fact.—A judgment may be confessed either in court or in the clerk's office by an attorney in fact although such attorney is not a member of the bar. *Insurance Co. v. Barley*, 16 Gratt. 363. See post, "Power of Attorney to Confess Judgment," IV.

The mere confession of judgment "not being within the peculiar province of an attorney at law, may be done by an attorney in fact, according to the general principle that what a man does by another he does himself." *Insurance Co. v. Barley*, 16 Gratt. 363, 390.

Person of Weak Understanding.—A confession of judgment will be supported though made by a person of weak understanding, in the habit of making improvident bargains and addicted to intoxication; and though such confession was induced by the plaintiff giving him time to pay the money, if no other influence was exerted in obtaining the confession, and it was made deliberately and voluntarily by the defendant, or by virtue of a power of attorney deliberately and voluntarily executed by him. *Mason v. Williams*, 3 Munf. 126.

An administrator, who has not notice of a specialty debt, may pay, or confess judgment to, a simple contract creditor. *Mayo v. Bentley*, 4 Call 528.

See the title **EXECUTORS AND ADMINISTRATORS**.

A clerk of the court may enter his own confession of judgment in favor of his creditor, and it will be valid. *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276.

Confession of Judgment by Husband to Wife.—Under acts of 1876-77, p. 333, a married woman can sue at law, and she is capable of suing her husband as well as another. A confession of judgment from her husband to her is therefore valid under this act; and while the husband will have to be joined with the wife in order to take the confession, he is only joined for conformity, and this will not affect the validity of the judgment. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335. See the title **HUSBAND AND WIFE**.

A judgment confessed by a husband in favor of his wife, free from fraud, for a just debt due from him to her on account of her separate estate, will not be held void in a court of equity at the instance of his creditors, but will be a lien on his land. If fraudulent it is void as to them. *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638.

Person for Whose Benefit Suit Is Brought.—Wherein a suit brought in the name of one person for the benefit of another, the judgment stated that the parties appeared by their attorneys and by consent the suit was dismissed and judgment entered for defendant's costs against the person for whose benefit the suit was brought, it was held, that the consent was the consent of the latter, and that the judgment was proper. *Pates v. St. Clair*, 11 Gratt. 22.

B. CONFESSION BY ONE OF SEVERAL JOINT DEFENDANTS.

1. In Ejectment.

It is not error to permit one of several defendants in ejectment, from whom the other defendants purchased, to confess judgment in favor

of the plaintiff when there is no evidence that he is induced to do so by any improper motive, or by any intent to injure or embarrass his vendees and codefendants. *Va., etc., Coal, etc., Co. v. Fields*, 94 Va. 102, 26 S. E. 426.

On a *scire facies* to revive a judgment in ejectment, brought against several heirs and devisees, where one of the defendants confesses the plaintiff's right to revive the judgment in the *scire facias* mentioned, such defendant can not complain of a judgment entered against him that the plaintiff have execution for the whole tract of land in question. *Jones v. Doe*, 6 Munf. 105.

2. In Actions on Contract.

a. In General.

It is a general rule of the common law, that in a joint action on contract, there can be but one final judgment, which must be either for or against all the defendants; and this rule applies whether the contract on which the action is founded is joint or joint and several. So firmly is this principle fixed, that even where one of the joint defendants confesses the action, no judgment can be rendered against him until the issues made up by his codefendants are tried, and then the confessing defendant must receive the same judgment as his codefendants. *Taylor v. Beck*, 3 Rand. 316; *Stephoe v. Read*, 19 Gratt. 1; *Baber v. Cook*, 11 Leigh 605; *Snyder v. Snyder*, 9 W. Va. 415; *Hoffman v. Bircher*, 22 W. Va. 537. See the title JUDGMENTS AND DECREES.

In an action on a contract against two defendants, though one of them confess a judgment, if the other proves a defense that goes to the foundation of the entire contract sued on, there must be a final judgment in favor of both defendants. *Stephoe v. Read*, 19 Gratt. 1; *Taylor v. Beck*, 3 Rand. 316; *Baber v. Cook*, 11 Leigh 605.

"By the common law the plaintiff, in his joint action against joint obligors,

was entitled to a joint judgment against all of them or none of them. He could not, without his consent, be deprived of this right by part of the defendants appearing in court, and confessing a judgment in his favor, for even the whole of his demand." *Hoffman v. Bircher*, 22 W. Va. 537, 544.

Confession Interlocutory Only.—A confession of judgment by one of several joint defendants is interlocutory only, until the final decision of the case as to the rest, and the confessing defendant must receive the same judgment as his codefendants. *Taylor v. Beck*, 3 Rand. 316. See also, *Payne v. Ladd*, 4 Munf. 483.

If in a joint action, on a joint, or on a joint and several obligation, where all the defendants are alive and served with process therein, or have entered a general appearance thereto, and pleaded to the issue, one of the joint defendants appears in open court and confesses the plaintiff's action, even where such confession is accepted by the plaintiff, and a formal judgment is rendered upon such confession, and the action is not discontinued as to the other defendants, but is continued for the trial of the issues as to them, such confession, and formal entry of judgment thereon, have not the force or effect of a final judgment, but are to be taken as the mere *cognovit actionem* of such defendant, and await the final judgment to be rendered upon the verdict found upon the trial of the issues as to the other defendants. *Hoffman v. Bircher*, 22 W. Va. 537.

b. Effect of Entering Judgment on Confession.

"By the common law, a sole defendant, and in any action, all the defendants had the right at any time to appear in court in term, and confess judgment for the whole of the plaintiff's demand but less than the whole could not do so, for his right to a joint judgment against all who were

jointly bound was perfect. But as it often happened that one of the defendants did not care to resist the plaintiff's demand, he was willing to acknowledge the plaintiff's action as to him, leaving the others to carry on the controversy if they desired to do so. This acknowledgment is familiarly known as a *cognovit actionem*. Sometimes in practice a formal judgment upon such confession was entered against the party making the same, while the plaintiff continued to prosecute his action to judgment against all the other defendants, and as the plaintiff was only entitled to recover, and the court had only authority to render one judgment in the cause, and that judgment was required to be jointly against all, for the amount ascertained by the verdict of the jury, on the trial of the issues as to the other defendants, or against none, it necessarily followed, that the formal entry of a judgment upon such *cognovit actionem* did not change its character, or invest it with the force and effect of a judgment, but that on the contrary it could only have effect by virtue of the judgment thereafter to be rendered upon the verdict, which might diminish or extinguish it altogether." *Hoffman v. Bircher*, 22 W. Va. 537.

Nor, in such case, is it material whether the issues as to the defendants not confessing be tried and judgment be rendered thereon, at the same term at which the confession by one defendant is made and formal judgment is entered thereon, or at any subsequent term. *Hoffman v. Bircher*, 22 W. Va. 537.

Where in a joint action against two obligors process was served on both, and one confessed judgment on which a separate judgment against him was entered, and the other went to trial, and after verdict a separate judgment was entered against him, at a subsequent term of the court, the separate judgments were erroneous and should

be reversed with direction that a joint judgment be entered against both defendants. *Snyder v. Snyder*, 9 W. Va. 415.

Where pending an action of debt against two persons one of the defendants died, and the suit was revived against his personal representative, and the personal representative and the surviving defendant separately confessed judgments, it was held, not to be erroneous to enter separate judgments against each. *Richardson v. Jones*, 12 Gratt. 53.

Under W. Va. Code, 1868, ch. 13, § 19, which provides "that in an action founded on a contract against two or more defendants, although the plaintiff may be barred as to one or more of them, he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only," it was held, that in a joint action of debt against two defendants, where the declaration showed that the obligation sued on was several as well as joint, and that for this reason the plaintiff could have recovered against either defendant had he sued him separately, separate judgments entered against the defendants, one of whom had confessed the action, were not erroneous. *Hoffman v. Bircher*, 22 W. Va. 537.

IV. Power of Attorney to Confess Judgment.

A. IN GENERAL.

A debtor may authorize a confession of judgment against himself by a power of attorney. *Insurance Co. v. Barley*, 16 Gratt. 363; *Coker v. Wynne*, 1 Va. Dec. 305. See also, *Wilson v. Bank*, 6 Leigh 570; *Calwells v. Shields*, 2 Rob. 305.

Power Executed in Name of Partnership.—In the absence of proof of nonassent on the part of some of the members of a firm, a power of attorney to confess judgment executed in the

firm name must be held valid when assailed collaterally, although the power be under seal. *Alexander v. Alexander*, 85 Va. 365, 7 S. E. 335.

Foreign Judgment by Confession—Denial of Execution of Power of Attorney.—In an action of debt on a judgment rendered in the state of Ohio upon confession, under power of attorney made before action brought, the defendants pleaded that they never executed such power of attorney, and had no notice of the commencement or pendency of the suit in Ohio; on general demurrer to the plea, it was held, that the plea was well pleaded and a good bar. *Wilson v. Bank*, 6 Leigh 570. See also, *Coleman v. Waters*, 13 W. Va. 278. And such plea can not be objected to for the first time in the appellate court because not sworn to, as required by statute. *Wilson v. Bank*, 6 Leigh 570.

B. FORM OF POWER.

Necessity for Seal.—A power of attorney to confess judgment need not be under seal. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335; *Coker v. Wynne*, 1 Va. Dec. 305.

It is not necessary that the appointment of an attorney should be by deed except to authorize the making of a deed. *Coker v. Wynne*, 1 Va. Dec. 305.

Necessity for Attesting Witness.—The law does not require that there should be an attesting witness to a power of attorney to confess judgment. *Insurance Co. v. Barley*, 16 Gratt. 363.

C. AUTHORITY OF ATTORNEY.

Authority of Attorney to Confess a Judgment with a Stay of Execution.—A general power to an attorney in fact to make a confession of judgment, is sufficient authority to enable him to make a confession of judgment with a stay of execution. *Calwells v. Sheilds*, 2 Rob. 305.

Where in an entry of judgment against a principal and his sureties,

the latter of whom appeared by an attorney in fact under a power, who confessed judgment for them, it is expressed that such judgment was given with a stay of execution for a given time, it is not competent even in a court of equity to aver or prove that so much of the entry as relates to the stay of execution was without the consent of the attorney for the sureties. *Calwells v. Sheilds*, 2 Rob. 305.

Power to Confess in Favor of Three Plaintiffs, Used to Confess in Favor of Two Only.—Although a power of attorney gives authority to an attorney in fact to confess judgments in favor of three parties, and it is used to confess judgments in favor of two only of the three parties named, the two judgments confessed are valid. *Coker v. Wynne*, 1 Va. Dec. 305.

D. POWER EXECUTED BEFORE ACTION BROUGHT.

A judgment confessed under a power of attorney is valid, though confessed under a power executed before action brought. *Insurance Co. v. Barley*, 16 Gratt. 363.

At common law a power or warrant of attorney to confess judgment in an action to be brought after the making of the power was valid, and this was the law in Virginia until September 1744, when an act was passed making powers of attorney to confess judgment, given before action brought, illegal. This act continued in force without material change until the Virginia Code of 1849 took effect, in which Code there was no provision making such powers illegal, and the general repealing clause contained in that Code operated as a repeal of the acts, making such powers illegal, and restored the common law. *Insurance Co. v. Barley*, 16 Gratt. 363.

V. For What Debts Judgment May Be Confessed.

Claims Barred by Limitation.—A debtor may properly confess a judg-

ment for a just debt, after it is barred by the statute of limitations; and there is nothing inequitable in such confession in the absence of fraud or fraudulent misrepresentation or concealment on the part of the creditor in the procurement of such confession, to require the interference of a court of equity at the instance of the debtor to prohibit the collection of the judgment, because the debt was barred by the statute of limitations, at the time the action was brought and judgment confessed. *Harner v. Price*, 17 W. Va. 523, 551.

VI. Form and Requisites of Judgment.

A. JURISDICTION.

A judgment by confession can not be valid unless entered in a court which might have lawfully pronounced the same judgment in a contested action. *Beazley v. Sims*, 81 Va. 644; *Wynn v. Scott*, 7 Leigh 63. See the title JURISDICTION.

When county courts had no jurisdiction at their monthly terms of any suit at law where the amount in controversy exceeded \$20, a confession of judgment for a debt of a larger amount entered at a monthly term of a county court was of no effect whatever. *Wynn v. Scott*, 7 Leigh 63.

B. NECESSITY FOR WRIT OF INQUIRY.

A confession of judgment, for no certain sum, in an action sounding in damages, is not sufficient to authorize the court to assess the damages, and enter judgment for a certain sum; but a writ of inquiry should be executed. *Dunbar v. Linbenberger*, 3 Munf. 169. See the title INQUESTS AND INQUIRIES.

In an action of debt on a bond in the penalty of £ 1,800 Pennsylvania currency, of the value of £ 1,400 Virginia currency, the defendant confessed judgment, and it was entered for £ 1,800 Pennsylvania currency of the

value of £ 1,400 Virginia currency to be discharged by the payment of £ 700 Virginia currency with interest. It was held, that the confession of judgment fixed the value of the money and furnish the clerk with a standard for ascertaining the value of the sum mentioned in the condition, and rendered the interference of a jury unnecessary. *Strode v. Head*, 2 Wash. 149.

C. CONFORMITY TO CONFESSION.

1. In General.

Upon a scire facias against heirs and devisees to revive a judgment in ejectment, if one of the defendants confess the plaintiff's right to revive the judgment in the scire facias mentioned, and thereupon judgment be entered against him, that the plaintiff have execution for the whole tract of land in question, there is no error in such judgment of which that defendant can complain. *Jones v. Doe*, 6 Munf. 105.

2. Judgment against Two Defendants on Confession of One.

A judgment against two defendants on the confession of one is erroneous. *Ward v. Johnston*, 1 Munf. 45. See also, *Wrenn v. Thompson*, 4 Munf. 377; *Garland v. Marx*, 4 Leigh 323.

Where two defendants have appeared and pleaded, an entry in the record "that the parties came, etc., and the defendant, L., acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. *Ward v. Johnston*, 1 Munf. 45.

Where a judgment has been erroneously entered against two defendants, on the confession of one only, the appellate court in reversing the judgment should direct a proper judgment to be entered against the defendant who confessed, and further proceedings against the other. *Ward v. Johnston*, 1 Munf. 45.

Where the record in a case states that two defendants appeared and pleaded, the fact that it appears by an indorsement on the writ that only one of them was served with process does not affect the validity of judgment confessed in the action. *Wrenn v. Thompson*, 4 Munf. 377. See also, *Garland v. Marx*, 4 Leigh 321.

D. FORM OF JUDGMENT.

The confession may be made either before or after plea. If made in court before plea the form is simply that the defendant acknowledges the plaintiff's action; but if after plea he withdraws his plea and acknowledges the plaintiff's action. *Stringer v. Anderson*, 23 W. Va. 482.

An entry that the defendant, relinquishing his plea of payment, saith he can not gainsay the plaintiff's action for the sum of, etc., and judgment accordingly, is a judgment by confession, and releases all previous errors in the proceedings in the cause. *Richardson v. Jones*, 12 Gratt. 53; *Cooke v. Pope*, 3 Munf. 167.

In an action of ejectment a judgment for the plaintiff for the land which reads: "This day came the parties by their attorneys, and the defendant withdraws his plea of not guilty heretofore pleaded by him, and says that he can not gainsay the plaintiff's action," is a judgment by confession and not by default. *Stringer v. Anderson*, 23 W. Va. 482.

An entry which reads: "This day came the parties, by their attorneys, and the defendants, by their attorney, withdrew their plea at a former day pleaded; thereupon the plaintiffs having proved their cause, it is considered by the court that the plaintiffs recover against the defendants," etc., is not a judgment by confession, but is a judgment rendered upon proof of the cause made to the court without issue joined between the parties. *Holliday v. Myers*, 11 W. Va. 276; *Carlton v. Ruffner*, 12 W. Va. 297.

VII. Entry.

A. DUTY TO ENTER.

In General.—The statute (Va. Code, 1849, ch. 171, § 41; Va. Code, 1904, § 3283), after providing for the confession of judgments in the clerk's office in vacation, further provides that "the same shall be entered of record by the clerk in the order or minute book and be as final and valid as if entered in court on the day of such confession." *Shadrack v. Woolfolk*, 32 Gratt. 707; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276. See also, W. Va. Code, 1899, ch. 125, § 43.

As to entry of judgments generally, see the title JUDGMENTS AND DECREES.

Duty Ministerial Only.—Whatsoever may be the functions of the clerk in recording a confession of judgment, his duty in entering up the judgment upon the minute book, under the statute, is purely ministerial; and if he fails to do so, it is simply a clerical misprison which may afterwards be corrected by the court or by the clerk himself. *Shadrack v. Woolfolk*, 32 Gratt. 707, 713; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276.

Clerk May Enter His Own Confession.—In entering a confession of judgment, under Va. Code, 1873, ch. 167, § 42, the clerk acts purely as a ministerial officer, and he may enter his own confession of judgment in favor of his creditor. *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276.

B. EFFECT OF FAILURE TO ENTER.

Va. Code, 1887, § 3283 (Va. Code, 1873, ch. 167, § 42), requiring the clerk to enter in his order or minute book a judgment confessed in his office, is directory only, and the failure of the clerk to make the proper entry does not invalidate the judgment. *Shadrack v. Woolfolk*, 32 Gratt. 707;

Saunders v. Lipscomb, 90 Va. 647, 19 S. E. 450.

"The omission of the clerk to make the proper entry will not be permitted to prejudice the creditor; and if necessary, the court will at any time, upon application, direct the omission to be supplied." *Shadrack v. Woolfolk*, 32 Gratt. 707.

"The validity of the judgment arises from the confession, the actual consent of the defendant, and not from the entry of the clerk. The object of the entry is to give the judgment a more enduring form; where it might be preserved, seen and inspected." *Shadrack v. Woolfolk*, 32 Gratt. 716; *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276.

A judgment confessed in the clerk's office, though no process appears to have been issued or served, and though the clerk has failed to enter it upon the order or minute book or any other book in his office, and the only evidence of it is an unsigned memorandum endorsed on a declaration which seems to have been filed, and the bond enclosed in the declaration, is a valid judgment, and entitled to rank as such as against other creditors of the debtor. *Shadrack v. Woolfolk*, 32 Gratt. 707.

C. ENTRY NUNC PRO TUNC.

If the clerk fails to enter on the order or minute book, at the proper time, a judgment confessed in vacation, he may make such entry at any time; and if he fails to do so the court may at any time direct him to make the entry. *Shadrack v. Woolfolk*, 32 Gratt. 707; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450.

Time of Entry.—Where the clerk has failed to enter a judgment confessed in the office in vacation, the court may compel him to do so at any time, and is not confined to the term next succeeding the vacation in which the judgment was confessed. *Shadrack v. Woolfolk*, 32 Gratt. 707.

"After the judgment is entered on the order or minute book, it becomes as final and valid as if entered in court. It would, therefore, be beyond the control of the court but for the provision giving the court control of all proceedings in the office during the preceding vacation. These provisions were not intended, however, to limit the power of the courts in correcting the mistakes and misprisions of clerks, but to give control of judgments which would otherwise be beyond the reach of the court." *Shadrack v. Woolfolk*, 32 Gratt. 707, 714, 715. See post, "Control Over Judgments Confessed in Vacation," X, A.

VIII. Effect of Confession.

A. AS RELEASE OF ERRORS.

In General.—A confession of judgment is a release of all previous errors in the proceedings in the cause. *Cooke v. Pope*, 3 Munf. 167; *Worsham v. McKenzie*, 1 Hen. & M. 342; *Edmonds v. Green*, 1 Rand. 44; *McRae v. Turnpike Co.*, 3 Rand. 160; *Stanard v. Timberlake*, 3 Leigh 681; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Com. v. Offner*, 2 Va. Cas. 17; *Richardson v. Jones*, 12 Gratt. 53; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Taylor v. Beck*, 3 Rand. 316; *Shadrack v. Woolfolk*, 32 Gratt. 707; *Wynn v. Scott*, 7 Leigh 63; *Holliday v. Myers*, 11 W. Va. 276; *Mandeville v. Holey*, 1 Pet. (U. S.) 136; Va. Code, 1904, § 3448; W. Va. Code, 1899, ch. 134; § 2. See the title APPEAL AND ERROR, vol. 1, p. 418.

Error Subsequent to Confession.—Under the statute making a confession of judgment equal to a release of errors, a confession releases all errors antecedent thereto, but does not justify subsequent irregularities by the court. *Taylor v. Beck*, 3 Rand. 316.

A confession of judgment on a forthcoming bond is a release of errors in the original judgment. *McRae v.*

Turnpike Co., 3 Rand. 160; Stanard *v.* Timberlake, 3 Leigh 681; Edmonds *v.* Green, 1 Rand. 44 (see opinion in this case in note appended to *McRae v. Turnpike Co.*, 3 Rand. 161). See the title FORTHCOMING AND DELIVERY BONDS.

Where an office judgment was erroneously entered up against the principal and special bail, and the latter afterwards gives a forthcoming bond, and confesses judgment on the bond, he can not avail himself of the error in the original judgment. *Edmonds v. Green*, 1 Rand. 44.

Cures Want of Declaration.—A confession of judgment by the defendant in a pending cause cures the want of a declaration. *Leftwich v. Stovall*, 1 Wash. 303; *Pickett v. Claiborne*, 4 Call 99.

Curing Want of Jurisdiction.—Although a confession of judgment is equal to a release of errors it can not give jurisdiction of the subject matter. *Wynn v. Scott*, 7 Leigh 63. See the title JURISDICTION.

Confession on a Defective Resentment for Gaming.—Where defendant confessed judgment on a presentment for gaming, for fine and cost, although the presentment might have been defective on a special demurrer, it was held, that judgment could not be reversed on a writ of error. *Com. v. Offner*, 2 Va. Cas. 17.

Curing Want of Process.—A judgment by confession is valid although no process had been previously issued or served. *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Shadrack v. Woolfolk*, 32 Gratt. 707; *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450. See ante, "Confession before Action Brought," II, C.

B. AS ESTOPPEL.

In General.—"A confessed or agreed judgment operates as fully as an estoppel as a judgment on the verdict of a jury." *Ohio River R. Co. v. John-*

son, 50 W. Va. 505, 40 S. E. 407. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

A judgment by confession is an estoppel against the relitigation of all such direct questions as were or might have been in issue and determined thereby, in a collateral proceeding in equity between the same parties. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

If there be judgment by confession without a declaration, the plaintiff, in a second action, must show two subsisting debts, or he can not sustain his action, if the former recovery is pleaded. *Pickett v. Claiborne*, 4 Call 99.

Equities Existing at Time of Confession.—A confession of judgment precludes a party from availing himself of an equity of which he was or must be presumed to have been acquainted at the time of the confession. *Syme v. Johnston*, 3 Call 558; *McFarland v. Fish*, 34 W. Va. 560, 12 S. E. 552; *Mason v. Williams*, 3 Munf. 126.

Confession by Administrator, Quando Acciderint.—A creditor of a decedent accepting from the administrator a confession of judgment when assets, is thereby estopped at law from alleging that the administrator at the time of the judgment had assets applicable to the demand. *Dupuy v. Southgates*, 11 Leigh 92.

A creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, filed a bill in equity against the administrator for a discovery and account, and upon taking the account it appeared, that at the time of the judgment there were assets in the hands of the administrator, which he afterwards applied in discharge of another specialty, on which he was bound as the endorser or assignor thereof. Held, under such circumstances, the technical estoppel will avail in equity as a defense against the

creditor's claim. *Dupuy v. South-gates*, 11 Leigh 92.

C. AS MERGER OF ORIGINAL CAUSE OF ACTION.

A judgment by confession merges the original cause of action like any other judgment. *Beazley v. Sims*, 81 Va. 644.

In an action on a bond against two joint obligors, one confessed judgment, and the suit was suffered to abate as to the other, who had never been summoned. Several years afterwards, the obligee having died, his administrator instituted a second action on the bond against both obligors, to which they pleaded the former recovery. The trial court admitted the plea as to the obligor who had confessed judgment, and caused the action to proceed as a separate action against the other obligor, and rendered judgment against him. Upon error it was held, that the bond was merged in the judgment confessed in the first action, and that the second action was barred by the recovery in the first. *Beazley v. Sims*, 81 Va. 644.

Confession of Judgment by One Partner No Bar to Recovery against Other in Same Action.—Where in a joint action against partners, a judgment was confessed by one, and later, during the same term a judgment was rendered against the other, it was held, that the cause of action was not merged by the confession, and that the judgment rendered was valid, though the rule is, that a judgment against one of a firm on a joint liability, merges the original cause of action, and bars another suit against the remaining partners. *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501. See also, *Snyder v. Snyder*, 9 W. Va. 415.

IX. Lien.

Judgment Confessed in Vacation.—The lien of a judgment by confession, confessed in vacation, begins on the

first moment of the day on which it is confessed, regardless of the time of day at which it is confessed. It will, therefore, take precedence over a deed of trust admitted to record on the same day even though the deed of trust is admitted to record before the judgment is confessed. The law takes no notice of a fraction of a day as to the lien of the judgment. *Hockman v. Hockman*, 93 Va. 455, 25 S. E. 534. But see Va. Code, 1904, § 3283, which provides that the clerk in entering a judgment by confession, shall enter upon the margin of the order or minute book, "opposite where said judgment or decree is entered, the date and time of day at which the same was entered, and the lien of the said judgment or decree shall run only from the time of day of the confession."

As to lien of judgments generally, see the title JUDGMENTS AND DECREES.

Judgment Confessed in Court—Priorities.—A judgment confessed in a pending suit, and the oath of insolvency taken thereon, by the debtor upon his surrender by his bail, has relation to the first moment of the first day of the term; but a forfeited forthcoming bond which is not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon, has no relation, and hence the assignment by operation of law under the first has priority over the lien of the forthcoming bond. *Jones v. Myrick*, 8 Gratt. 179.

Where a debtor confessed judgment in court on the first day of the term, and on the last day of the term an office judgment against the same debtor was confirmed, it was held, that the latter judgment related back to the first day of the term, and that, as the law did not regard a fraction of a day, both judgments stood as of the same date. *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

X. Relief against Judgments by Confession.

A. CONTROL OVER JUDGMENTS CONFERRED IN VACATION.

In General.—It is provided by statute that: "The court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings, or correct any mistake therein and make such order concerning the same as may be just." Va. Code, 1849, ch. 171, § 51; Va. Code, 1904, § 3293; W. Va. Code, ch. 125, § 60; *Insurance Co. v. Barley*, 16 Gratt. 363; *Brown v. Hume*, 16 Gratt. 456; *Coker v. Wynne*, 1 Va. Dec. 305; *Shadrack v. Woolfolk*, 32 Gratt. 707; *Harner v. Price*, 17 W. Va. 523, 554. And this provision is made specially applicable to judgments confessed in the office during vacation. Va. Code, 1904, § 3283; W. Va. Code, 1899, ch. 125, § 43.

The "preceding vacation" referred to in Va. Code, 1849, ch. 171, § 51, in its application to actions at law in the county courts, was held to mean the interval between the quarterly terms of the court; and therefore as actions at law in the county courts were cognizable only at the quarterly terms thereof, so motions to set aside judgments confessed in the office in such actions were cognizable only at the quarterly term. *Insurance Co. v. Barley*, 16 Gratt. 363.

After Succeeding Term Has Passed.—A court of general jurisdiction has the power at the next term, after a confession of judgment in the clerk's office during vacation, to set aside, amend, or correct such a judgment by confession for any defect or error therein; but after that term it becomes a final judgment of the court which can not be questioned collaterally, but only by writ of error or other proceeding applicable to other judgments. *Coker v. Wynne*, 1 Va. Dec. 305.

B. AMENDMENT AT SUBSEQUENT TERM.

Judgment Entered by Confession Instead of by Nil Dicit.—Where a judgment is entered by mistake of the clerk as one by confession, instead of by nil dicit, the error is not one proper to be corrected by a writ of error coram nobis, and hence it can not be made the subject of a summary motion under Va. Code, 1849, ch. 181, § 1 (Va. Code, 1904, § 3447). Nor can the error be corrected by motion under Code, 1849, ch. 181, § 5 (Va. Code, 1904, § 3451), which authorizes the correction at a subsequent term of mere clerical, as distinguished from judicial, errors, where such errors may be safely amended from some other part of the record. *Richardson v. Jones*, 12 Gratt. 53.

Judgment Entered for Erroneous Rate of Interest.—When an action was brought on a note, which was executed at the time when five per centum was the legal rate of interest, upon which the defendant acknowledged the action for the principal with interest from the date of the note; on which acknowledgment a judgment was rendered for the principal, with interest at the rate of six per centum per annum; it was held, that this was not such a clerical error as the court might correct on motion, but was one which could only be rectified by an appellate court. *Bent v. Patten*, 1 Rand. 25.

Variance between Declaration and Bond Sued On—Judgment Entered for Amount Claimed in Declaration.—Where a declaration in an action of debt brought on a bond for one hundred and eighty-eight dollars, through mistake only demanded one hundred and eight dollars, and the defendant confessed judgment for the debt in the declaration mentioned, and judgment was entered for one hundred and eight dollars, it was held, that this was not such a clerical error as the court might correct on motion under the statute of

jeofails (1 Rev. Va. Code, ch. 128, p. 512). *Compton v. Cline*, 5 Gratt. 137.

Where a judgment is by confession and not by default, no remedy can be had for any error committed in entering judgment in the case, under W. Va. Code, 1868, ch. 134, § 5, which provides that the court in which there is a judgment by default may on motion reverse such judgment or decree for any error for which an appellate court might reverse it. *Stringer v. Anderson*, 23 W. Va. 482.

Erroneous Description of Land in Judgment in Ejectment.—Where, in an action of ejectment, the land was described in the declaration by metes and bounds, and the defendant confessed judgment, upon which judgment was rendered describing the land in the terms of the declaration, but concluding with a provision fixing a certain line as the boundary between the plaintiff and defendant, which latter provision did not appear to be founded upon any matter in the record, and seemed to be in conflict with the description of the land given in the former part of the judgment, it was held, that if the matter in the conclusion of the judgment was erroneous, it was not of that class of errors which could be corrected by a motion at a subsequent term under W. Va. Code, 1868, ch. 134, § 5, which authorizes the correction of mere clerical errors, such as miscalculations or misrecitals, where the same may be safely amended from some other part of the record. *Stringer v. Anderson*, 23 W. Va. 482.

C. EQUITABLE RELIEF.

Defenses Available at Law.—A judgment by confession will not be restrained by injunction on grounds purely legal, unless a defense at law has been prevented by fraud on the one side, or ignorance of facts unmixed with negligence on the other. *Harner v. Price*, 17 W. Va. 523; *Alleman v. Kight*, 19 W. Va. 201; *Morehead v. DeFord*, 6 W. Va. 316.

Where a debtor, by way of compromise, confessed a judgment for a less sum, which was accepted in satisfaction of a larger one, and afterward seeks relief in a court of equity because he was entitled to a credit of which he was not aware, he should allege and prove that, though he used proper diligence, or such diligence would have been unavailing, he was by fraud, accident, mistake, or surprise prevented from ascertaining the fact or from making defense. *Morehead v. DeFord*, 6 W. Va. 316.

As to equitable relief against judgments generally, see the titles **INJUNCTIONS; JUDGMENTS AND DECREES.**

Mistake of Law.—A court of equity will not relieve against a judgment a party, who was prevented from making his defense at law by a mistake of law, although it was a mutual mistake by both parties to the suit. *Richmond, etc., R. Co. v. Shippen*, 2 Pat. & H. 327.

Judgment Fraudulently Confessed.—If an executrix for the fraudulent purpose of protecting her testator's estate from the demands of creditors, gives her own bond, as executrix, for a fictitious debt, and confesses a judgment for same, she is not entitled to relief in equity, nor will equity give its aid to the obligee, but will leave him to his remedy at law. Yet if the obligee be entitled independently of the transaction in question, to an account of assets, the court would decree such an account, and allow him what might be justly due, not exceeding the amount of the judgment, the rule in such case being that the obligee was bound by his own fraud, so far as it operated against him. *Clay v. Williams*, 2 Munf. 105.

Judgment Confessed by Person of Weak Understanding.—A court of equity will not relieve against a judgment confessed by a man of weak understanding, in the habit of making improvident bargains, addicted to intoxication, and embarrassed in his circum-

stances, though such confession was induced by the plaintiff giving him an extension of time, if no other influence was exerted and no fraud was committed in obtaining the confession; but it was made deliberately and voluntarily by the defendant, or by virtue of the power of attorney deliberately and voluntarily executed by him. *Mason v. Williams*, 3 Munf. 126.

Judgment Confessed by Executor.—After a confession of judgment by an executor, in an action brought on his executorial bond, for the purpose of recovering against him and his sureties for a devastavit, he can not resort to a court of equity for relief, on the ground that he had fully administered the estate of his testator. *Worsham v. McKenzie*, 1 Hen. & M. 342. See also, *Freelands v. Royall*, 2 Hen. & M. 575; *Clay v. Williams*, 2 Munf. 105.

XI. Conditional Confession of Judgment.

Where a personal representative confesses judgment on condition that if the demand be improper it shall be corrected, the estate of his decedent is entitled to credit on the judgment to the extent that the demand is improper. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

Condition That Execution Be Stayed.—On a motion for award of execution against three obligors in a forthcoming bond, one of whom was principal and the other two were sureties, the entry upon the record stated that as well the plaintiffs came by their attorney, "as the defendant M." (the principal) "in

his proper person, and the other defendants by their attorney, and said defendants, acknowledge judgment." In the same entry (after the judgment) was the following: "And the plaintiff by their attorney here in court release to the defendants 183 dollars, 60 cents, and agree to stay execution of this judgment until the first of the next term." It was held, that the entry must be taken together, and regarded as the record of a judgment between the parties upon the confession of the defendants therein, with the condition of a stay of execution. *Calwells v. Sheilds*, 2 Rob. 305.

Condition to Abide by Result of Another Case.—Where two actions of debt between the same parties were pending in the same court at the same time, in one of which there was a verdict and judgment for the plaintiff, from which an appeal was taken, and in the other case the following entry was made: "Judgment by consent in favor of the plaintiff for the debt in the declaration mentioned * * *. Execution on this judgment to be stayed for ninety days; and in the event of an appeal being taken and perfected in [the other case between the same parties], decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case," it was held, that such entry, if a judgment at all, was a judgment by consent or confession, not absolute, but on the terms and conditions set out in the agreement. *Bank v. McVeigh*, 32 Gratt. 530.

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CROSS REFERENCES.

See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74; APPEAL AND ERROR, vol. 1, p. 418; CONSPIRACY; CRIMINAL LAW; DECLARATIONS AND ADMISSIONS; EVIDENCE; HEARSAY EVIDENCE; INSTRUCTIONS.

As to privileged communications, see the title WITNESSES.

I. Admissibility of Confessions.

A. EXTRAJUDICIAL CONFESSIONS.

1. General Rule.

See post, "General Rule," I, A, 2, a.

Voluntary extrajudicial confessions of one charged with crime, are admissible in evidence against him, and involuntary confessions are not. *Hite v. Com.*, 96 Va. 489, 31 S. E. 895; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Mitchell v. Com.*, 33 Gratt. 845; *Wolf v. Com.*, 30 Gratt. 833; *Page v. Com.*, 27 Gratt. 980; *Venable v. Com.*, 24 Gratt. 643; *Thompson v. Com.*, 20 Gratt. 724; *Vaughan v. Com.*, 17 Gratt. 576; *Shifflet v. Com.*, 14 Gratt. 659; *Smith v. Com.*, 10 Gratt. 734; *Moore v. Com.*, 2 Leigh 701. See also, *Oneale v. Com.*, 17 Gratt. 582; *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *State v. Morgan*, 35 W. Va. 267, 13 S. E. 385; *State v. Kinney*, 26 W. Va. 141; *State v. Douglass*, 20 W. Va. 770; *Fredrick v. State*, 3 W. Va. 695. See also, *State v. Madison*, 49 W. Va. 96, 38 S. E. 492.

Admitted with Caution.—"In a criminal case admissions and confessions of the accused are admitted with caution." *Flick v. Com.*, 97 Va. 766, 34 S. E. 39; *Horner v. Speed*, 2 Pat. & H. 631. See post, "In General," IV, A; "Necessity for Corroboration," IV, C. See the title DECLARATIONS AND ADMISSIONS.

Reasons for Rule.—The confession of a person charged with a criminal offense is received in evidence upon the presumption that no one will make a statement contrary to his own interest if it be untrue. *Smith v. Com.*, 10 Gratt. 734.

"It is therefore declared as the condition of the admissibility of a confession, that it be free and voluntary, and not made under the influence of such a bias upon the mind of the party as will in the judgment of the law, disturb the free exercise of volition, and destroy the presumption that the confession so made is true." *Smith v. Com.*, 10 Gratt. 734.

"A deliberate confession of guilt is generally credited, because it is presumed to flow from the highest sense of guilt?" *Schwartz v. Com.*, 27 Gratt. 1025.

Reason for Rejecting Extorted Confessions.—The reasons for rejecting extorted confessions are, first, the apprehension that the prisoner may have been induced to say what is false; second, because it is prejudicial to good morals and the real public interest to convict even criminals by using against them evidence, which has been improperly extorted from them either by threats or promises. *State v. Douglass*, 20 W. Va. 770. See post, "Doctrine in West Virginia," I, A, 6, d.

Trial for Homicide.—Voluntary extrajudicial confessions of one charged with homicide, concerning its commission, are admissible in evidence against him. *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676. See generally, the title HOMICIDE.

Trial for Bigamy.—On a trial for bigamy a prisoner's confessions are admissible to establish the first marriage. *Oneale v. Com.*, 17 Gratt. 582. See the title BIGAMY, vol. 2, p. 372.

Trial for Seduction.—On a trial for seduction under § 3677, Va. Code, 1887, confessions of the accused to the matron of the hospital to which he took

the prosecutrix, that he had seduced her, are relevant and competent evidence. *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683. See post, "A Question for the Jury," IV, B. See the title SEDUCTION.

2. When Confessions Are Voluntary.

See post, "A Question for the Court," I, A, 2, f, (1).

a. General Rule.

See ante, "General Rule," I, A, 1; post, "Effect of Inducements and Threats," I, A, 2, b.

A confession is voluntary unless it appear that it was obtained from the party by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offense or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such a person. *Hite v. Com.*, 96 Va. 489, 31 S. E. 895; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Mitchell v. Com.*, 33 Gratt. 845; *Wolf v. Com.*, 30 Gratt. 833; *Page v. Com.*, 27 Gratt. 980; *Venable v. Com.*, 24 Gratt. 643; *Thompson v. Com.*, 20 Gratt. 724; *Vaughan v. Com.*, 17 Gratt. 576; *Shifflet v. Com.*, 14 Gratt. 659; *Smith v. Com.*, 10 Gratt. 734; *Moore v. Com.*, 2 Leigh 701; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *State v. Morgan*, 35 W. Va. 267, 13 S. E. 385; *State v. Kinney*, 26 W. Va. 141; *Fredrick v. State*, 3 W. Va. 695; *State v. Douglass*, 20 W. Va. 770. See also, *State v. Madison*, 49 W. Va. 96, 38 S. E. 492.

A confession which is made without the influence of hope or fear exerted by a person in authority, or with the apparent sanction of such person is voluntary. *Early v. Com.*, 86 Va. 921, 11 S. E. 795. See post, "Who Are Persons in Authority," I, A, 2, d, (2).

b. Effect of Inducements and Threats.

See ante, "General Rule," I, A, 2, a.

(1) Proposal to Confess Coming from Accused.

"If the proposal to confess comes from the prisoner, it seems his confession is admissible, although the prosecutor, in the consideration of his doing so, says he will do all he can for him." *Shifflet v. Com.*, 14 Gratt. 652.

"I take it, no man ever makes a confession voluntarily (says Taunton, J.), without proposing to himself in his own mind some advantage to be derived from it. *Green's Case*, 25 Enc. C. L. R. 581. But such inducement can not render the confession inadmissible." *Shifflet v. Com.*, 14 Gratt. 652.

(2) Confession with a View to Spiritual Benefit.

See post, "Nature of Inducement," I, A, 2, b, (5), bb.

Confessions induced by exhortation or persuasion to confess with a view to spiritual benefit are admissible in evidence on a trial for felony. "The inducement must relate to temporal or worldly advantage as contradistinguished from exhortation of persuasion to confess with a view to spiritual benefit. *Gilham's Case*, 1 Mood. C. C. 186; *Sarah Nute's Case*, 1 Burn's Justice 688, and cited 2 Russ. 832; *Gibney's Case*, cited Joy on Confessions, 57." *Smith v. Com.*, 10 Gratt. 734.

(3) Alarm or Agitation.

See post, "A Question for the Jury," IV, B.

"No degree of alarm or agitation will, of itself, render confessions made during its existence inadmissible. *Smith's Case*, 10 Gratt. 734, is a striking instance of that fact." *Venable v. Com.*, 24 Gratt. 643. See post, "Nature of Inducement," I, A, 2, b, (5), bb.

The fact that a prisoner was under fear and excitement does not exclude his confession. *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385, citing *Smith v. Com.*, 10 Gratt. 734; *Venable v.*

Com., 24 Gratt. 643. See post, "Effect of Warning," I, A, 2, c.

A confession which was made under the influence of fear, produced by the presence and the threats of a large number of negroes, some of whom were armed, who attended the person who made the arrest and threatened to hang the accused, is clearly inadmissible in evidence. *Thompson v. Com.*, 20 Gratt. 724. See post, "Inducements Held Out by Persons Not in Authority," I, A, 2, b, (4); "Inducements Held Out by Persons in Authority," I, A, 2, b, (5).

(4) Inducements Held Out by Persons Not in Authority.

See ante, "Alarm or Agitation," I, A, 2, b, (3).

aa. General Rule.

"A confession is clearly admissible, though obtained by threats or inducements, if such threats or inducements, were held out by a person not in authority." *Smith v. Com.*, 10 Gratt. 734. See ante, "General Rule," I, A, 2, a; post, "Who Are Persons in Authority," I, A, 2, d, (2).

Inducements held out by a person not in authority and without the apparent sanction of a person in authority does not render a confession inadmissible. *Hite v. Com.*, 96 Va. 489, 31 S. E. 895; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Mitchell v. Com.*, 33 Gratt. 815; *Wolf v. Com.*, 30 Gratt. 833; *Page v. Com.*, 27 Gratt. 980; *Venable v. Com.*, 24 Gratt. 643; *Thompson v. Com.*, 20 Gratt. 724; *Vaughan v. Com.*, 17 Gratt. 576; *Shifflet v. Com.*, 14 Gratt. 659; *Smith v. Com.*, 10 Gratt. 734; *Moore v. Com.*, 2 Leigh 701; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *State v. Morgan*, 35 W. Va. 267, 13 S. E. 385; *State v. Kinney*, 26 W. Va. 141; *State v. Douglass*, 20 W. Va. 770; *Fredrick v. State*, 3 W. Va. 695.

A statement to one accused of a criminal offense by a person not in authority, that he (the accused) will have to go to the penitentiary or will

be punished does not render a confession involuntary. *Shifflet v. Com.*, 14 Gratt. 652. See post, "Nature of Inducement," I, A, 2, b, (5), bb.

The inducement must have been held out by or with the apparent sanction of some person holding such a relation to the party accused, or the offense, or the prosecution, as shall cast upon him the character of a person "in authority" in the matter. *Smith v. Com.*, 10 Gratt. 734. See post, "Who Are Persons in Authority," I, A, 2, d, (2).

In *State v. Morgan*, 35 W. Va. 267, 13 S. E. 385, the court said: "It is so well settled that, to exclude confessions, they must be made, not only under inducements, but under inducements held out by persons in authority, that I shall not discuss the subject, but simply refer to *Smith's Case*, 10 Gratt. 734; *Shifflet's Case*, 14 Gratt. 659; *Thompson's Case*, 20 Gratt. 724; *Venable's Case*, 24 Gratt. 643; *Page's Case*, 27 Gratt. 980; *Mitchell's Case*, 33 Gratt. 845."

bb. Private Detectives.

See post, "Nature of Inducement," I, A, 2, b, (5), bb.

Confessions made by a prisoner to one who is merely a private detective, are admissible in evidence against him. *Early v. Com.*, 86 Va. 921, 11 S. E. 795. See post, "Who Are Persons in Authority," I, A, 2, d, (2).

In *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385, the court refused to exclude confessional statements of the prisoner made to one Craig, a private detective, who had stated to her "that he had discovered circumstances strongly implicating her, that he would favor her, and suppress the evidence which he claimed to have." It was clearly true that she made these statements under the inducements held out by Craig. The court said: "And clearly, if Craig had been a person in authority, the evidence would be rejected. But Craig was only a detective, ferreting out the

crime, who interviewed the prisoner in jail. Though perhaps admitted to the jail by the jailer, he was not a person in authority. The only reason suggested for deeming him a person in authority is that presumably he was admitted to the jail by the jailer, and that the statements were made under his apparent sanction." See ante, "General Rule," I, A, 2, a.

In the case of *Brown v. Com.*, 89 Va. 379, 16 S. E. 250, a confession alleged to have been obtained from the prisoner by detectives, being susceptible of an innocent construction and the testimony of the detectives being replete with suspicion, the verdict of guilty was set aside as unwarranted. One detective testified to a confession made to him about the time of the commission of the crime which he never mentioned on either of two previous trials though he was a witness at both; and another detective testified to a confession made to him in jail since the second trial, when he was kept in the accused's cell for several days and nights, ostensibly as a murderer, and acknowledging his guilt to the accused.

(5) Inducements Held Out by Persons in Authority.

See ante, "Alarm or Agitation," I, A, 2, b, (3); post, "Effect of Being Made to Persons in Authority," I, A, 2, d.

aa. General Rule.

See ante, "General Rule," I, A, 2, a, (4), aa.

A confession can not be given in evidence if it appears that it was obtained from the party by some inducement of a worldly or temporal character in the nature of a threat or promise of benefit, held out to him in respect of his escape from the consequences of the offense, or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such a person. *Smith's Case*, 10 Gratt. 734, 739; *Thompson's Case*, 20 Gratt. 724;

Hite v. Com., 96 Va. 489, 31 S. E. 895. For complete list of cases sustaining this point, see ante, "General Rule," I, A, 2, a.

bb. Nature of Inducement.

See ante, "General Rule," I, A, 2, a; "Private Detectives," I, A, 2, b, (4), bb.

"The inducement, * * * must have reference to the prisoner's escape from the consequences of the offense, or to the mitigation of the punishment. And it must be calculated to lead the prisoner to suppose it would be better for him to admit himself to be guilty of the offense, though he never committed it." *Shifflet v. Com.*, 14 Gratt. 652. See ante, "Confession with a View to Spiritual Benefit," I, A, 2, b, (2); "Alarm or Agitation," I, A, 2, b, (3).

A suspended policeman, W., who was drawing his pay as a policeman and acting as private detective, obtained a confession from a prisoner suspected of burning a dwelling house. He represented that himself and another person were commission merchants and had a house they wanted burnt for which they would give \$150. The accused agreed to do it; and when told that this was a job that required secrecy, and no blab-mouth would do for it, said that they need have no fear of him for he had burned twelve or thirteen houses on one farm. W. then told the accused to tell Mr. L., his partner, all about it, and the accused did so. It appeared that W. was not dressed in police clothes or had on any badge or insignia of office, and that he offered him no inducement or reward. Mr. L. stated that at the time of the confession he held no office whatever, that while he was at the policeman's office he heard him say nothing about his being a partner of his; but that he said to the prisoner: "I want you to tell this gentleman all about those burnings or fires;" and that he knew nothing about money being offered to the prisoner. It was held,

that the confession so obtained was admissible. The court said "certainly whatever promise of benefit, if any, was held out to the prisoner to obtain the confession in this case, it was not held out to him in respect of his escape from the consequences of the offense or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such a person." Page *v. Com.*, 27 Gratt. 980. See ante, "Private Detectives," I, A, 2, b, (4), bb.

A prisoner is told, in answer to his assertion of his innocence, that the person to whom he is speaking does not believe one word he says, but that such person believes he knows all about it; and his mother too. Prisoner declares that his mother knew nothing about it. He is then told he need not say anything more about it, for that he had to go to the penitentiary anyhow. He says he knows that; but that his mother is innocent of it; and he requests the person to whom he is talking to go and tell certain persons he names to come to him. The person then says. What do you mean by what you say? In the name of God and all that is holy, have you let this charge rest on your mother, and she innocent of it? Prisoner again repeats she was innocent, and requests that the persons he had named may be sent for; which is done, and he makes confessions to them. Held, there was no inducement held out to the prisoner which will exclude his confession. *Shifflet v. Com.*, 14 Gratt. 652. See ante, "General Rule," I, A, 2, b, (4), aa.

cc. Persons Having Custody of the Accused.

See post, "Who Are Persons in Authority," I, A, 2, d, (2).

"As a general rule, the confessions of the accused, made under inducements to officers in whose custody he was at the time, or others having authority over him, are to be excluded

on the trial." *Fredrick v. State*, 3 W. Va. 697. See post, "Advising Accused That He Had as Well Confess," I, A, 2, b, (5), dd.

Exception to Rule.—The confessions of the accused, made under inducements, to officers in whose custody he was at the time, or others having authority over him, are not to be excluded on the trial when the confession is accompanied with the surrender and restoration of the stolen property. *Fredrick v. State*, 3 W. Va. 695. See post, "Doctrine in West Virginia," I, A, 6, d.

dd. Advising Accused That He Had as Well Confess.

"If the prisoner be told that it will be better for him to confess, or worse for him not to confess, or words to that effect be addressed to him, the inducement will be sufficient to exclude the confession. 1 Greenl. Ev. § 219. In such a case, the question does not turn on what may have been the precise words used, but whether the words used were such as to convey to the mind of the prisoner an intimation that it will be better for him to confess that he committed the crime, or worse for him if he does not. *Wharton* 259; *Garner's Case*, 1 Denn. C. C. 329." *Shifflet v. Com.*, 14 Gratt. 652.

A person committed on a charge of larceny by a justice, is sent in charge of a special constable and the prosecutor to jail, and on the way this constable says to him, "You had as well tell all about it." After they had rode about a mile after this remark, without any other remark being addressed to the prisoner, he voluntarily says to the prosecutor, "I will tell you all about it;" and proceeds to tell how and by whom the breaking and larceny was committed. The constable was one in authority over him, and the statement is not admissible in evidence. *Vaughan v. Com.*, 17 Gratt. 576. See ante, "Persons Having Custody of the Accused," I, A, 2, b, (5),

cc; post, "Who Are Persons in Authority," I, A, 2, d, (2).

The confession, though not made immediately after the remark of the constable to the prisoner, seems evidently to have been induced by it. The form of the prisoner's first remark to prosecutor indicates that it was made with reference to what the constables had said to him, and as the result of reflection in the interval. His reflection upon the remark of the constable seems to have led him to the conclusion that it would be better for him to "tell all about it;" and he therefore proceeded to do so. *Vaughan v. Com.*, 17 Gratt. 576, 580. See post, "Removal of Influence from Mind of Accused," I, A, 2, b, (5), ee; "Presumption as to Voluntary Character," I, A, 2, f, (2).

ee. Removal of Influence from Mind of Accused.

"The rule, universally recognized, is that even though promises or threats have been used by persons in authority, yet if it appears to the satisfaction of the judge that their influence was totally done away before the confession was made, the evidence will be received. 1 Greenl. Ev. § 221." *Early v. Com.*, 86 Va. 928, 11 S. E. 795. See ante, "Advising Accused That He Had as Well Confess," I, A, 2, b, (5), dd; post, "A Question for the Court," I, A, 2, f, (1); "Presumption as to Voluntary Character," I, A, 2, f, (2); "Burden of Proof," I, A, 2, f, (3).

If a threat be made or a promise held out, to a person in custody on a charge of felony, to induce him to make confession, and he denies his guilt at the time, but afterwards makes a confession, which appears, from the time and circumstances, not to have been induced by such previous threat or promise, this confession, so afterwards made, is a voluntary one, and proper evidence against him on his trial. *Moore v. Com.*, 2 Leigh 701.

Upon the trial of a prisoner for murder, he twice makes a confession,

both of which are admitted in evidence. There is very little doubt that the first confession was made without any promise or threat to induce it; and there is no doubt the last was so made. Held, the evidence was admissible. *Mitchell v. Com.*, 33 Gratt. 845. See post, "Rule as to Repeated Confessions," I, A, 2, e.

ff. Who Are Persons in Authority.

As to who are persons in authority within the meaning of the rule, see post, "Who Are Persons in Authority," I, A, 2, d, (2).

c. Effect of Warning.

A confession made by an accused person after having been cautioned or warned that any confession he may make may be used against him on his trial, is admissible. This is true whether the person was warned by a police officer, by his counsel, or by the justice before whom he had his preliminary examination, and would seem to be true even if the warning were given by a private person only. *Venable v. Com.*, 24 Gratt. 639.

A detective informed a witness that a prisoner wished to make a confession to him. The witness, accompanied by the detective, went to the prisoner, and had a conversation with him. In the course of that conversation the detective stated to the prisoner that if he made any statement at all, it must be with the understanding that it was freely and voluntarily made, without the influence of hope or fear, and thereupon the confession was made. It was held, that under such circumstances the confession was admissible in evidence. *Early v. Com.*, 86 Va. 921, 11 S. E. 795.

Prisoner charged with murder, makes a confession to a police officer on the morning of the day he is examined by the police justice. Before that examination he has employed counsel, and he is warned, both by his counsel and the police justice, against making any statement or confession. Being

committed by the justice, on getting to the jail he appears to be very much frightened and agitated; and upon getting there he makes a confession, and again on the same day confesses the deed to a woman of his acquaintance who is in the jail. Though the confession to the police officer was properly excluded, the confession made after the warnings given him are proper evidence. *Venable v. Com.*, 24 Gratt. 639. See ante, "Alarm or Agitation," I, A, 2, b, (3).

d. Effect of Being Made to Persons in Authority.

(1) General Rule.

See ante, "General Rule," I, A, 2, a.

A confession made by an accused person is not inadmissible, because it was made to a person in authority, as to the examining justice, provided the confession was voluntarily made, and not elicited by any threat or promise of benefit. *Wolf v. Com.*, 30 Gratt. 833. See ante, "Inducements Held Out by Persons in Authority," I, A, 2, b, (5).

(2) Who Are Persons in Authority.

See ante, "General Rule," I, A, 2, a; "General Rule," I, A, 2, b, (4), aa.

Persons in authority, within the meaning of the rule, excluding a confession unless it appears that it was not obtained from the party by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit held out to him in respect of his escape from the consequences of the offense or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such a person, are such as are engaged or concerned in the apprehension, prosecution, or examination of the accused. *Early v. Com.*, 86 Va. 928, 11 S. E. 795; *Smith v. Com.*, 10 Gratt. 734; *Thompson v. Com.*, 20 Gratt. 724; *Shifflet v. Com.*, 14 Gratt. 652.

"The prosecutor, the officer who makes the arrest, and the magistrate before whom the prisoner is carried, are clearly persons in authority; and

inducements held out in their presence, without their objection, are regarded as held out by them. There are others who may also be persons in authority. If a jailer in whose jail the party making the confession is confined, be such a person (as to which I express no opinion), there is, I think, neither reason nor authority for saying, that a mere member of the family of the jailer, holding no office of any kind, nor having any connection with the prisoner further than to attend about the jail and in the absence of the jailer to have control of it and carry the keys, is a person in authority within the meaning of the rule. If he is, so also, it seems, would be the wife of the jailer in this case, who kept the keys when the witness was not using them; and the son of the jailer, who sometimes acted for him. What power could any such subordinates be reasonably supposed to have, to execute any promise or threat they might make to a prisoner, 'in respect of his escape from the consequences of the offense, or the mitigation of the punishment.' It has been sometimes held, that the wife of a prosecutor is a person in authority. But only, it seems, where the offense, in some way or other, especially concerns her." *Shifflet v. Com.*, 14 Gratt. 652.

A young man living in the jailer's family, and who occasionally, in the absence of the jailer, attended on the prisoners and kept the keys of the jail, is not a person in authority, whose threat or promise will exclude the confessions of a prisoner in the jail awaiting his trial. *Shifflet v. Com.*, 14 Gratt. 652.

Master or Mistress.—The simple relation of master or mistress to a party making a confession under inducements, per se and unconnected with any other circumstance creating an interest or concern in the matter, is not sufficient to exclude the confession as made to a person in authority,

within the meaning of the rule. *Smith v. Com.*, 10 Gratt. 734.

It is only where an offense concerns the master or mistress of a prisoner that their holding out the threat or promise renders the confession inadmissible. *Smith v. Com.*, 10 Gratt. 734; *Shifflet v. Com.*, 14 Gratt. 652.

A person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such, and no way affected by the offense, is not a person in authority in the sense of the rule which excludes confessions made to a person in authority. *Smith v. Com.*, 10 Gratt. 734.

Magistrates.—"The cases in which confessions have been excluded because of inducements held out by magistrates, were where such magistrates were in some way concerned in the arrest or examination of the party or otherwise connected with the prosecution, and where their official character was recognized and appreciated by him in connection with the matter." *Smith v. Com.*, 10 Gratt. 734.

Where it appeared that after the preliminary examination of the prisoner a justice of the peace, who was not the acting justice of the peace on that occasion, asked the defendant what made him kill the deceased and that he without any inducement whatever, gave the answer which was admitted in evidence over his objection; it was held, that the evidence was clearly admissible. *Hite v. Com.*, 96 Va. 489, 31 S. E. 896.

Private Detectives.—One who is merely a private detective employed to "work up the case," as the phrase is, is not a person in authority within the meaning of the rule. *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385. See ante, "Private Detectives," I, A, 2, b, (4), bb.

Officer Having Custody of Accused.—The officer having the accused in custody is a person in authority.

Vaughan v. Com., 17 Gratt. 576; *Fredrick v. State*, 3 W. Va. 697. See ante, "Persons Having Custody of the Accused," I, A, 2, b, (5), cc; "Advising Accused That He Had as Well Confess," I, A, 2, b, (5), dd.

A special constable having charge of a person who has been committed to jail on a criminal charge by a magistrate, is a "person in authority" within the rule excluding confessions made under inducements held out by a person in authority or with the apparent sanction of a person in authority. *Vaughan v. Com.*, 17 Gratt. 576.

e. Rule as to Repeated Confessions.

"Though a confession may be inadmissible because not voluntary, it may become admissible by being subsequently repeated by the accused, when his mind is perfectly free from the undue influence which induced the original confession." Prima facie, the undue influence will be considered as continuing; though the presumption may be repelled by evidence; which, however, must be strong and clear. *Thompson v. Com.*, 20 Gratt. 724; *Venable v. Com.*, 24 Gratt. 639. See post, "A Question for the Court," I, A, 2, f, (1); "Evidence Admissible," I, A, 2, f, (4).

"The rule on this subject has been well stated to be, 'that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. In the absence of any such circumstances, the influence of the motives proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is

shown by clear evidence, and the confession will therefore be rejected.' 2 Russ. on Crimes 838; Greenl. Ev. 257; and cases cited. It follows that the burden of showing the contrary devolves on the commonwealth, as the condition on which the confession will be admissible." *Thompson v. Com.*, 20 Gratt. 724; *Venable v. Com.*, 24 Gratt. 639; *Mitchell v. Com.*, 33 Gratt. 845. See ante, "Removal of Influence from Mind of Accused," I, A, 2, b, (5), ee; "Effect of Warning," I, A, 2, c.

f. Voluntary Character of Confessions.
(1) A Question for the Court.

See ante, "Removal of Influence from Mind of Accused," I, A, 2, b, (5), ee.

The question of the admissibility of a confession belongs to the court and not to the jury. *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Smith v. Com.*, 10 Gratt. 734; *Thompson v. Com.*, 20 Gratt. 724; *Hunter v. Com.*, 7 Gratt. 642; *Mitchell v. Com.*, 33 Gratt. 845; *Shifflet v. Com.*, 14 Gratt. 652; *Venable v. Com.*, 24 Gratt. 639.

"It is the province of the judge to say whether the confession is of such character as to be admissible as evidence." *Smith v. Com.*, 10 Gratt. 734; *Thompson v. Com.*, 20 Gratt. 724.

"Before a confession can be rightly admitted, the court must be satisfied that it was voluntary. *Early v. Com.*, 86 Va. 928, 11 S. E. 795; *Thompson v. Com.*, 20 Gratt. 724. See ante, "General Rule," I, A, 2, a.

The judge in cases where it is claimed that a confession has been extorted from an accused person by threats or promises held out by a person in authority or with the apparent sanction of such person, must decide whether, under all the circumstances, the words used express or imply a promise or threat, and were so understood by the prisoner. *Shifflet v. Com.*, 14 Gratt. 652.

"It will not do, to say that because certain words have been held in certain

cases to imply a promise or a threat, the same or similar words must be held in every case to imply a promise or a threat. About the rule itself there is no dispute; that there must be a promise or a threat. The only difficulty is in the application of the rule; and in that there is sometimes much difficulty." *Shifflet v. Com.*, 14 Gratt. 652.

Repeated Confessions.—Where an original confession was obtained by improper means, and subsequent confessions of the same or like facts have been made by the accused it is for the court to decide if from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *Thompson v. Com.*, 20 Gratt. 724; *Venable v. Com.*, 24 Gratt. 639. See ante, "Rule as to Repeated Confessions," I, A, 2, e.

(2) Presumption as to Voluntary Character.

"If an inducement is held out and a confession immediately made, the presumption would be conclusive, in the absence of evidence to the contrary, that the confession was obtained by the inducement." *Shifflet v. Com.*, 14 Gratt. 652. See ante, "Advising Accused That He Had as Well Confess," I, A, 2, b, (5), dd; "Removal of Influence from Mind of Accused," I, A, 2, b, (5), ee.

Where an inducement is held out and a confession immediately made, the circumstances of the case may repel the presumption that the confession was obtained by the inducement irrespectively of the supposed inducement. *Shifflet v. Com.*, 14 Gratt. 652. See post, "Evidence Admissible," I, A, 2, f, (4).

Repeated Confessions.—As to presumptions where an originally involuntary confession has been repeated, see

ante, "Rule as to Repeated Confessions," I, A, 2, e.

(3) Burden of Proof.

"That the confession is voluntary, being therefore a condition precedent of its admissibility, and the duty of deciding on its admissibility being a duty which devolves on the court, it follows, necessarily, that the court must be satisfied that the confession was voluntary, before it can be permitted to go before the jury; in other words, that the burden of proof that it was voluntary, devolves on the commonwealth." *Thompson v. Com.*, 20 Gratt. 724; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Shifflet v. Com.*, 14 Gratt. 657. See ante, "Removal of Influence from Mind of Accused," I, A, 2, b, (5), ee.

It is incumbent on the commonwealth to show by affirmative testimony, that the confession was not obtained by promise or threats. *Mitchell v. Com.*, 33 Gratt. 845.

The burden of proving a confession to be voluntary is upon the state. *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385.

Repeated Confessions.—As to burden of proof where an originally involuntary confession is subsequently repeated, see ante, "Rule as to Repeated Confessions," I, A, 2, e.

(4) Evidence Admissible.

See ante, "Presumption as to Voluntary Character," I, A, 2, f, (2).

Evidence to show that a confession was not forced from a prisoner by "the flattery of hope or the torture of fear" is admissible. *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Venable v. Com.*, 24 Gratt. 639.

If an inducement is held out and a confession is immediately made, evidence to prove that it was made irrespectively of the supposed inducement is admissible. *Shifflet v. Com.*, 14 Gratt. 652.

Repeated Confessions.—Where an original confession is not voluntary

and the accused has subsequently confessed the same or like facts, evidence may be admitted to show that the subsequent confessions were not produced by the same motive which is supposed to have produced the first; or that from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes, under the influence of which the original confession is supposed to have been obtained, were entirely dispelled. *Venable v. Com.*, 24 Gratt. 639; *Thompson v. Com.*, 20 Gratt. 724. See ante, "Rule as to Repeated Confessions," I, A, 2, e.

3. Confessions of Client to Attorney.

See the title ATTORNEY AND CLIENT, ante, p. 145.

The confessions of an accused person to his attorney can not be admitted in evidence against him. *State v. Douglass*, 20 W. Va. 770.

4. Confessions by Silence.

See post, "A Question for the Jury," IV, B.

In criminal trials confessions by silence are admissible in evidence, where a party remains silent, who has an opportunity to speak, after something has been said in his presence and hearing which gives rise in some fairly appreciable degree to the natural and reasonable inference that it calls for a reply, it being otherwise relevant. "In order to make silence admissible as evidence of acquiescence in something said, it must (1) plainly appear that it was heard and understood, and (2) that it naturally and reasonably called for some reply." The officer making an arrest on a charge for felonious housebreaking told the prisoner of following the tracks from the scene of the crime. The prisoner put out his foot and asked if the shoe then on it had made the track. Afterwards an old pair of boots of his were produced, the prisoner saying he had not

worn them for some time. The officer examined them and said in the presence of the prisoner: "Yes, these are the boots that made the tracks." The prisoner made no reply. The court held, that the inference from the silence of the accused was natural and reasonable enough for the evidence to go to the jury. *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

5. Confessions While Asleep.

The question as to whether a confession made by an accused person while asleep is admissible in evidence, is raised but not decided in *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385.

In *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385, an exclamation made by a person at night, while in bed, not addressed to any one, was offered against her in evidence on trial for murder, and objected to, because made in sleep. About 12 or 1 o'clock at night the prisoner was heard to exclaim: "They have deviled me so much about this that I don't care how it goes; I only consented to his death, and gave him the poison." It did not appear anywhere whether the accused was asleep or awake. It was held, not to be incumbent on the state to show that the prisoner was not asleep as a condition precedent to the introduction of the exclamation, in analogy to the law that it is a condition precedent to the admissibility of a confession that it be voluntary and that the burden of showing it to be voluntary is upon the state. It was properly allowed to go to the jury, it being for them to say "whether it was made in sleep and therefore worthless, or whether though in sleep it was but the divulgence of truth springing from guilt which rested heavy on the soul, and broke forth through voice and lips." See ante, "General Rule," I, A, 2, e; "Burden of Proof," I, A, 2, f, (3); post, "A Question for the Jury," IV, B.

6. Inadmissible Confessions Disclosing Other Incriminating Evidence.

a. English Doctrine.

"The modern English decisions seem to incline to permitting so much of the confession as relates strictly to the fact discovered by it, but no more, to be given in evidence. The reason for this seems to be, that it is considered, that the only reason for rejecting extorted confessions is the apprehension, that the prisoner may have been induced to say what is false, but the fact discovered shows, that so much of the confession as immediately relates to it is true. 2 East P. C. c 16 s 94 p. 658—Reg. v. Gould, 9 C. & P. 364; (38 Eng. C. L. R. 156). But this can hardly be fairly regarded as the settled law in England." *State v. Douglass*, 20 W. Va. 785.

"Where a prisoner indicted for stealing a number of diamonds and pearls, had been improperly induced to make a confession from which it appeared, that he had disposed of a part of them to a certain person; it was held, allowable on the part of the prosecution, to call that person to prove that he had received the property from the prisoner." *State v. Douglass*, 20 W. Va. 784.

"Although a confession obtained by means of promises or hopes of immunity held out, could not be used in evidence against a party, yet the fact, that the goods were recovered or the corpse found in consequence of the confession, at the place mentioned in the confession, was held to be receivable in evidence." *State v. Douglass*, 20 W. Va. 784.

"Some cases have gone even further than these three and have held, that where the prisoner has been induced by improper means to confess to the stealing of goods, and to tell where they were concealed, testimony has been permitted not only to prove the finding of the goods and the place where they were found, but also to

prove that the prisoner in his confession described this as the place where they would be found." *State v. Douglass*, 20 W. Va. 784.

b. Weight of Authority under American Decisions.

"The American decisions show the same diversity of opinion on the question, whether a confession obtained from a prisoner by threats or promises, can be used against him for any purpose, or whether when such confession is corroborated by the finding of the stolen goods or dead body, where the prisoner said it could be found; so much of the confession as is thus shown to be true; that is, the admission of the prisoner that he knew where the goods stolen, or the dead body was hidden, may not be used against the prisoner. The weight of mere authority here as in England, seems to be in favor of admitting so much of an extorted confession to go to the jury as shows the knowledge of the prisoner where the stolen property or corpse was hid, when it is found, where the prisoner in the confession extorted from him said it was." *State v. Douglass*, 20 W. Va. 786.

"The American as well as the English cases, only differ as to whether you can show the knowledge of the prisoner, as to where the stolen goods or the corpse of the dead man was found by such extorted confessions, and thus by his confession, connect him with the fact, that the goods or corpse had been concealed in that particular place. Some holding you may, others that you cannot, but all agreeing, that the simple fact, that the goods stolen or the corpse was found in a particular place, no matter in what manner the information was obtained, which led to the finding of the goods or body in such place." *State v. Douglass*, 20 W. Va. 786.

"The American authorities all agree, that though a confession obtained by threats or promises from a prisoner,

ought to be excluded, yet if in such confession he states where the stolen goods or the body of the murdered person are to be found, and in consequence thereof they are found in the place indicated, the fact may be proven where and when the stolen goods or the corpse of the murdered man was found." *State v. Douglass*, 20 W. Va. 786.

c. Doctrine in Virginia.

The rule is thus stated in 1 Arch. Crim. Prac. & Pl., p. 424 top, 134 marg., that "'even in cases where the confession of a prisoner is not receivable in evidence, on account of it having been obtained by means of some threat or promise, any discovery made in consequence of it may be proved; and in such a case the counsel for the prosecution is merely allowed to ask the witness, whether, in consequence of something he heard from the prisoner, he found anything, and where, etc., and the witness in answer can only give evidence of the fact of the discovery.' But the thing found, or the discovery made, in consequence of the confession, must be material in itself, and appear to have some connection with the crime or the charge, independently of the confession." *Williams v. Com.*, 27 Gratt. 997.

"The rule and the reason of it is thus laid down in 1 Greenleaf on Ev. '§ 231. The object of all the care, which, as we have now seen, is taken to exclude confessions which are not voluntary, is to exclude testimony not probably true. But where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed

by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire, whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire, whether he confessed that he had concealed it there." *Williams v. Com.*, 27 Gratt. 997.

"§ 232 (1 Greenleaf on Ev.) If, in consequence of the confession of the prisoner, thus improperly induced, and of the information by him given, the search of the property or persons in question, proves wholly ineffectual, no proof of either will be received. The confession is excluded, because being made under the influence of a promise, it can not be relied upon; and the acts and information of the prisoner, under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession, may also produce groundless conduct." *Williams v. Com.*, 27 Gratt. 997.

Cases Seeming to Expound the Law Correctly.—"In Jones' Case (1 Russell and Ryan 152) which was for the larceny of money to the amount of one pound, eight shillings, the prosecutor asked the prisoner on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced said, 'he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased.' Upon which prisoner took 11s. 6½d. out of his pocket, and said it was all he had left of it. Held, that the confession ought not to have been received." *Williams v. Com.*, 27 Gratt. 997.

"In Jenkin's Case (1 Russell and Ryan 492) which was decided in 1882, the charge was stealing several gowns and other articles. The prisoner was induced by a promise from the prose-

cutor to confess his guilt, and after that confession he carried the officer to a particular house, as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it. That person denied knowing anything about it, and the property was never found. The evidence of the confession was not received; the evidence of his carrying the officer to the house as above mentioned was; but as Mr. Justice Bayley, before whom the prisoner was convicted, thought it questionable whether that evidence was rightly received, he stated the point for the consideration of the judges. They accordingly considered it, and were (it seems unanimously) of opinion that the evidence was not admissible, and that the conviction was therefore wrong. 'The confession was excluded, because being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct.'" *Williams v. Com.*, 27 Gratt. 997.

"In the State *v. Due* (7 Foster's R. 256), * * * in which most of the authorities on this subject are reviewed, it was held, that on a charge of larceny, the production of property by a prisoner, made in consequence of inducements held out to confess, will not be competent evidence against him, unless the property be identified by other evidence as that which has been stolen. The prisoner was charged with stealing two one-hundred-dollar bills and a wallet. On inducements held out to him to confess, he produced a hundred-dollar bill, saying to the complainant 'this is yours;' or, as another witness understood him, 'this is one of the bills which I took with the wallet.' It was held, that the evidence was incompetent, un-

less the bill should be identified by other evidence as one of those which had been stolen. This case, as well as Jones's and Jenkins's, *supra*, seems to expound the law correctly." *Williams v. Com.*, 27 Gratt. 997.

W. was indicted for stealing \$150, the money of S. On the trial it was proved that J., a detective, arrested W. who made a confession, which was made under a promise, and was excluded as evidence. In this confession he directed J. to go to certain gamblers and get the money back from them. J. sent for the gamblers named, told them what W. had said, and they paid over to J. for S. \$104, though one of them protested that W. had not been at his house, and the others denied that he had lost the money claimed with them; the balance of the money, \$46, was paid over by the father of W. Held, it not being proved that the money paid to J. was the same lost by S., the statement of W. to J. and of what passed between J. and the gamblers and the father of W. is not competent evidence. *Williams v. Com.*, 27 Gratt. 997.

d. Doctrine in West Virginia.

See ante, "General Rule," I, A, 1; "Persons Having Custody of the Accused," I, A, 2, b, (5), cc.

"If the assumption, that * * * the only ground for excluding from evidence an extorted confession (is that if it was improperly obtained, it is almost or quite as likely to be false as true; and that as the body in such case was found buried where the prisoner stated it was to be found, it proves incontestably the truth of that portion of his confession, which stated it was buried there, and therefore this much and this much only of such confession, ought to be allowed to go to the jury in evidence), then it must be admitted that this reasoning is sound. But I must be permitted to express my doubt as to the truth of this assumption, though the text writers generally

assign the probability of its falsity, as the reason for excluding such extorted confession. But I am rather inclined to the opinion, that while this is unquestionably one of the reasons for this exclusion, yet it is not the only one, and that it is or should be excluded also, because it is prejudicial to good morals and the real public interest, which is not to convict even criminals by using against them evidence, which has been improperly extorted from them by either threats or promises. And if this be so, nothing should be permitted to be proven in such case, but the simple fact, that the body of the murdered man was found buried in such remote place and the fact that the prisoner knew it, which was improperly extorted from him, ought not to be permitted to go to the jury, but it is unnecessary to form a definite conclusion on this subject in order to arrive at correct conclusions in this case." *Douglass v. State*, 20 W. Va. 788; *State v. Boker*, 33 W. Va. 319, 10 S. E. 639; *Fredarick v. State*, 3 W. Va. 695.

"It may be regarded as well settled, that though the confessions improperly obtained are not admissible, yet any facts, which have been brought to light in consequence of such confession, may be received in evidence. Thus where a prisoner was indicted as an accessory after the fact for having received property, knowing it to be stolen, and had under promise of favor, made a confession, and in consequence of it, the property had been found in his lodgings concealed between the shuckings of his bed; it was held, that the fact of finding the stolen property in his custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession." *State v. Douglass*, 20 W. Va. 784.

If a murder is committed, and the prisoner by threats or promises is induced to confess his guilt, this confession can not be used against him. If

in such confession he states, that the corpse of the murdered man is buried under the prisoner's house, and it is found there, the fact that it was found there may be proved at the trial, though it might have a strong tendency to establish the guilt of the prisoner. *State v. Douglass*, 20 W. Va. 787.

The confession of the accused, made under inducements, to officers in whose custody he was at the time, or others having authority over him, are not to be excluded on the trial when the confession is accompanied with the surrender and restoration of the stolen property. *Fredrick v. State*, 3 W. Va. 695.

7. Confessions of Coconspirators, Accomplices and Accessories.

As to admission of confessions of coconspirators, accomplices and accessories, see the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 78; CONSPIRACY; DECLARATIONS AND ADMISSIONS.

8. Confessions upon a Legal Examination.

See the titles CRIMINAL LAW; HEARSAY EVIDENCE; WITNESSES.

Section 20, ch. 152, W. Va. Code, 1891, provides that "in a criminal prosecution, other than perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." This clearly includes confession of guilt. *Hall's Case*, 31 W. Va. 505, 7 S. E. 422. *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. See post, "A Question for the Jury," IV, B.

9. Statements Not Amounting to Confessions.

If a prisoner, in speaking of the testimony of a witness who had testified against him, says, "that what C. said was true as far as he went, but that he did not say all or enough," this is not admissible as confession of the prisoner. It is not a confession of

guilt at all nor is it a confession that the witness's evidence was true; nor does it lay any foundation for proving to the jury what C. did swear. *Finn v. Com.*, 5 Rand. 701. See the titles CRIMINAL LAW; DECLARATIONS AND ADMISSIONS; EVIDENCE.

10. Confessions Obtained by Fraud.

See ante, "Private Detectives," I, A, 2, b, (4), bb; "Nature of Inducement," I, A, 2, b, (5), bb.

11. Proof of Confessions by the Accused.

See the titles CRIMINAL LAW; DECLARATIONS AND ADMISSIONS; HEARSAY EVIDENCE.

If the prosecutor for the commonwealth, on the examination of the prisoner in the examining court, give in evidence the confession of the prisoner, but on the trial before the superior court, he does not give that confession in evidence, it is not competent for the prisoner to prove what the commonwealth had proved in the other court, touching the said confession. *Mendum v. Com.*, 6 Rand. 704. See also, *Sprouse v. Com.*, 81 Va. 374; *Earhart v. Com.*, 9 Leigh 671.

B. JUDICIAL CONFESSIONS.

See § 3895, Va. Code, 1895; W. Va. Code, 1899, ch. 143, § 3; ch. 152, §§ 16, 20. See ante, "Confessions upon Legal Examination," I, A, 8; post, "Judicial Confessions," III, A; "A Question for the Jury," IV, B.

II. Manner of Proof.

A. EXAMINATION OF WITNESSES.

The fact that a confession was made irrespectively of a supposed inducement held out by a person in authority or with the apparent sanction of such person may be shown by the testimony of witnesses. *Shifflet v. Com.*, 14 Gratt. 662; *Page v. Com.*, 27 Gratt. 954-980; *Mitchell v. Com.*, 33 Gratt. 845; *Venable v. Com.*, 24 Gratt. 639; *Smith v. Com.*, 10 Gratt. 734.

In *Shifflet v. Com.*, 14 Gratt. 662, a witness to whom the confession was made was permitted to swear that he had never made use of any threat or promise to induce the person to make any confession.

B. WHOLE CONFESSION MUST BE ADMITTED.

See post, "A Question for the Jury," IV, B.

"When the confession of a party, either in a civil or criminal case (for the rule is the same in both) is given in evidence, the whole, as well as that part which makes for him as that which is against him, must be taken together and go to the jury as evidence in the case." *Brown v. Com.*, 9 Leigh 634; *Parrish v. Com.*, 81 Va. 1-15; *Earhart v. Com.*, 9 Leigh 676.

"The third bill of exceptions, was taken to the opinion of the court overruling the prisoner's motion to exclude Joseph Crane's evidence of the prisoner's confession, on the ground that the witness had not heard the whole but only detached parts of it; and permitting the said evidence to go to the jury in connection with the testimony of other witnesses who were present during the whole of the conversation, and whom the commonwealth's attorney proposed to introduce, and did introduce to prove the same conversation and confession. I think this evidence was clearly admissible." *Shifflet v. Com.*, 14 Gratt. 652.

C. SUBSTANCE OF CONFESSION SUFFICIENT.

The substance of the accused's confession will be sufficient. It is not necessary for a witness to repeat the exact language of the accused. *Finn v. Com.*, 5 Rand. 701.

III. As Establishing the Corpus Delicti.

A. JUDICIAL CONFESSIONS.

"A full judicial confession is perhaps sufficient to found a conviction upon in

any case. It is substantially the same as a plea of guilty to the indictment." *Schwartz v. Com.*, 27 Gratt. 1025.

B. EXTRAJUDICIAL CONFESSIONS.

1. Doctrine in Virginia.

"There is abundant authority, and little dissent to the proposition, that extrajudicial confessions alone, uncorroborated by other evidence, are inadequate to establish the corpus delicti." *Brown v. Com.*, 89 Va. 382, 16 S. E. 250. But see *Schwartz v. Com.*, 27 Gratt. 1025. See post, "Necessity for Corroboration," IV, C.

In the absence of proof that the body of the person found was the same as charged in the indictment, the confessions of the prisoner must be distinct and specific, before it can be said, that upon his confession, the corpus delicti is made out, or in other words that the body found is that of the person charged in the indictment as murdered by the prisoner. *Smith v. Com.*, 21 Gratt. 818.

Until there is clear proof of the death of the person for whose murder the prisoner has been indicted and tried, the confessions of the prisoner as to his having committed the act must be clear and explicit. If there may be doubt as to his meaning, he ought not to be convicted. *Smith v. Com.*, 21 Gratt. 809.

2. Doctrine in West Virginia.

See the titles CRIMINAL LAW; DECLARATIONS AND ADMIS- SIONS.

Confessions are competent evidence tending to prove the corpus delicti. Though they may not be sufficient proof of the corpus delicti they certainly are competent evidence tending to prove that the crime charged has been committed. *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

In *State v. Hall*, 31 W. Va. 505, 7 S. E. 422, it was held, not error to refuse to give the following instructions:

"The instructions are: 'The court instructs the jury that it is incumbent on the state to prove the corpus delicti or offense in this case beyond a reasonable doubt, by evidence other than the confessions of the prisoner, proved on the trial.' And also: 'The court further instructs the jury that satisfactory proof of the corpus delicti or offense, either by direct evidence or cogent and irresistible grounds of presumption, is absolutely necessary to a conviction in this case; and if, from the evidence, there remains a reasonable doubt as to the offense charged having been committed by the prisoner, they must find him not guilty. And they are further instructed that the corpus delicti must be established, independent of any admission, beyond a reasonable doubt.'"

The court said: "We know of no decisions anywhere that hold the admissions of the defendant are not competent evidence tending to prove the corpus delicti. Such admissions may not be sufficient proof of the corpus delicti, but they certainly are competent evidence tending to prove that the crime charged has been committed. The authority cited by plaintiff in error does not sustain his proposition. That authority (Whart. Crim. Ev., § 633) says: 'It should be remembered that the corpus delicti consists not merely of an objective crime, but of the defendant's agency in the crime;' citing *Johnson v. Com.*, 29 Gratt. 811, and two Texas cases [*Merritt v. State*, 2 Tex. App. 177; *Davis v. State*, Id. 588], and continues, 'and unless the corpus delicti in both these respects is proved, a confession is not of itself enough to sustain a conviction.'" *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

IV. Weight and Sufficiency.

A. IN GENERAL.

"Perhaps no general proposition can be predicated concerning the weight and degree of credit to be given to a confession; because this must depend

in every case upon the age, character and mental capacity of the party, and the share of education which he has enjoyed, and all the surrounding circumstances which attended it." *Smith v. Com.*, 10 Gratt. 734.

Evidence as to confessions of parties is to be received with great caution, no matter how pure the source from which it is derived, because of the liability of witnesses to mistake or misunderstand the admission when made, and to remember inaccurately or misrepresent it afterwards. *Horner v. Speed*, 2 Pat. & H. 616. See also, *Flick v. Com.*, 97 Va. 766, 34 S. E. 39.

B. A QUESTION FOR THE JURY.

See ante, "Whole Confession Must Be Admitted," II, B.

"The jury are to weigh confessions, like other evidence, and believe or disbelieve them, in whole or in part, as reason may decide; and if, from opposing evidence, or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be rejected." *Earhart v. Com.*, 9 Leigh 676; *Brown v. Com.*, 9 Leigh 634; *Page v. Com.*, 27 Gratt. 954-980.

The jury can not by a mere arbitrary exercise of the will, take a part to be true, and reject the residue. If, therefore, there be nothing in the case warranting such a discrimination, the whole must be taken to be true. *Brown v. Com.*, 9 Leigh 634.

"It is for the jury to weigh the confession as well as all the other evidence in the cause, and to give to it exactly that degree of credit to which it is entitled, and no more." *Smith v. Com.*, 10 Gratt. 734; *Page v. Com.*, 27 Gratt. 980.

The jury may take as true that part of a confession of a prisoner which tends to prove his guilt and reject that which tends to exculpate him. *Brown v. Com.*, 9 Leigh 631.

May Consider Attendant Circumstances.—"In considering extrajudicial

confessions, they, the jury, have the right to take into consideration the circumstances under which they were made, the credibility of the witness or witnesses by whom they are detailed, the condition and circumstances of the party alleged to have made them, and probability or improbability of such confessions, and have the right to consider the same in connection with all the evidence in the case." *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385.

It is the province of the jury to consider all the circumstances under which the confessions of the accused were made and to determine their exact nature, import and meaning. *Flick v. Com.*, 97 Va. 766, 34 S. E. 39.

Effect of Alarm or Agitation.—If a confession is induced by alarm or agitation that matter is for the consideration of the jury, and affects the credit, but not the competency of the evidence. *Venable v. Com.*, 24 Gratt. 643; *Smith v. Com.*, 10 Gratt. 734. See ante, "Alarm or Agitation," I, A, 2, b, (3).

Confession by Silence.—The weight of confessions by silence is a question for the jury. *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507. See ante, "Confessions by Silence," I, A, 4.

Pleading Guilty to Charge of Seduction before Committing Magistrate.—Where a prisoner charged with a felonious seduction hears the warrant of arrest read, admits his guilt and pleads guilty before the committing magistrate, and also voluntarily states to other persons at other times that it was all his fault, but on his trial testifies that he did not mean to confess, and was not guilty of the seduction charged, it is the province of the jury to consider all the circumstances under which the alleged admissions were made, and determine their exact nature, import

and meaning. *Flick v. Com.*, 97 Va. 766, 34 S. E. 39.

Where a prisoner charged with felonious seduction hears the warrant of arrest read, admits his guilt and pleads guilty before the committing magistrate, and also voluntarily states to other persons at other times that it was all his fault, but on his trial testifies that he did not mean to confess, and was not guilty of, the seduction charged, it is not error to instruct the jury "that it is their province to consider all the circumstances under which the alleged admissions were made, and determine their exact nature, import and meaning" and to refuse to instruct them further that if they believe from the evidence that the admissions of the accused that he was guilty meant only, as used by him, that he was guilty of having sexual intercourse with the prosecutrix, then such admissions can be considered by them as corroborating evidence of the illicit connection alone, and not as corroborating evidence of the alleged seduction. *Flick v. Com.*, 97 Va. 766, 34 S. E. 39. See ante, "General Rule," I, A, 1.

C. NECESSITY FOR CORROBORATION.

Evidence as to confessions of parties is intrinsically weak, and is inconclusive to establish a fact, without aid of other testimony. *Horner v. Speed*, 2 Pat. & H. 616. See also, *Vangilder v. Hoffman*, 22 W. Va. 1-12. See ante, "General Rule," I, A, 1; "Doctrine in Virginia," I, A, 6, c.

If the corpus delicti is proved a conviction based upon a confession will not be set aside for want of other corroborating testimony. *Smith v. Com.*, 21 Gratt. 809. See ante, "As Establishing the Corpus Delicti," III.

Confidential Communications.

See the titles LIBEL AND SLANDER; WITNESSES.

CONFIRMATION.—See the titles **AGENCY**, vol. 1, p. 240; **EXECUTORS AND ADMINISTRATORS**; **JUDICIAL SALES**; **SHERIFF'S SALES**.

In *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 235, it is said: "Here is the word **confirm**. It has a legal force under the law of conveyances. 'A **confirmation** is of a nature similar to a release. Lord Coke defines it to be: "A conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or a particular state increased."' 2 Lomax, Dig. 101; 2 Tuck. Bl. Comm. 253. To make sure a voidable estate is the proper office of **confirmation**. 2 Minor's Inst. 717."

Judicial Sale.—In *Langyher v. Patterson*, 77 Va. 473, Fauntleroy, J., speaking for the whole court, said: "**Confirmation** is the judicial sanction of the court, and by **confirmation** the court makes it a sale of his own; and the purchaser is entitled to the full benefit of his contract, which is no longer executory but executed, and which will be enforced against him and for him." See also, *Whitlock v. Johnson*, 87 Va. 326, 12 S. E. 614; *Hyman v. Smith*, 13 W. Va. 765.

In *Terry v. Coles*, 80 Va. 695, it is said: "**Confirmation** is the judicial sanction of the court. Until then the bargain is incomplete. Until confirmed by the court the sale confers no rights; until then it is a sale in a popular and not in a judicial or legal sense." See also, *Carr v. Carr*, 88 Va. 740, 14 S. E. 368.

CONFISCATION.—In *Read v. Read*, 5 Call 208, it is said: "Forfeitures of lands and goods for offenses (and this right is founded on the offense of an alien in presuming to purchase lands contrary to law, 1 Bl. Com. 372, 2 Bl. Com. 274), says Sir William Blackstone, 'are called by the civilians, bona confiscata, because they belonged to the fiscus or imperial treasury, or, as our common lawyers term them, bona foris facta.' 1 Bl. 299. Indeed, Lord Coke seems, in one passage, to consider **confiscation** and 'forfeiture,' as synonymous terms, 3 Inst. 227; and the author of the commentaries appears also, in a few passages of his work, to have used the term **confiscation**, as descriptive of a forfeiture into the treasury; but keeping in view the distinction, which this elegant and accurate writer has taken, between the terms as above stated (the one being a civil law, and the other a common law term); and finding that he has expressly treated of the right now in question in a chapter headed 'title by forfeiture,' 2 Bl. Com., 267, I must conclude that the technical and appropriate term, descriptive of this right, is forfeiture, and not **confiscation**.'" .

Conflicting Claims.

See the title **INTERPLEADER**.

Conflict of Jurisdiction.

See the title **JURISDICTION**.

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I. Extraterritorial Operation of Laws in General.

"It is a fundamental maxim of international jurisprudence that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory, and the 'direct consequence of this rule is,' says a learned author, 'that the laws of every state effect and bind directly all property, whether real or personal within its territory.'

Story's Conflict of Laws, 5, 18." *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536.

"Another consequence of this maxim is, that no state can, by its laws, and no court, which is but a creature of the state, can, by its judgments or decrees, directly bind or effect property beyond the limits of that state." *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536.

"It is absolutely incompatible with the equality and exclusiveness of the

sovereignty of different states or nations that any one nation should be at liberty to exercise dominion over property within the territory of another state." *Parker, C. J., in Blachard v. Russell*, 13 Mass. 4, quoted in *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536.

It is a principle universally recognized that the laws of one state have no effect in another state *ipso facto*, but their authority is limited to the territorial jurisdiction of the state or country that enacts them, so far as their right or power of enforcement or claim to obedience is concerned. They are permitted to have effect within the jurisdiction of another state because of the courtesy or comity of the latter state rather than because of any strict right. This is especially true when the municipal laws of one country are enforced by the courts of another country. *Banks v. Greenleaf*, 6 Call 275; *Stevens v. Brown*, 20 W. Va. 451; *Warder v. Arell*, 2 Wash. 282; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

The municipal laws of the respective states of the United States are foreign in respect to the sister states. *Warder v. Arell*, 2 Wash. 282, 1 Am. Dec. 488.

"But where a right to sue is given by statute in one state, we can see no good reason why an action to enforce that right should not be entertained in the courts of another state, on the ground of comity, just as if it were a common-law right, provided, of course, it be not inconsistent with the laws or policy of the latter state." *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

"If this were not so, a cause of action of any sort arising in a state whose laws are codified could not be asserted in another state because the right to sue is statutory." *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

"The true test, therefore, in all such cases would seem to be this: Is the

foreign statute contrary to the known policy, or prejudicial to the interest, of the state in which the suit is brought? And if it is not, then it makes no difference whether the right asserted be given by the common law or by statute." *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

The courts of one state will not from comity go to the extent of enforcing the laws of another state, when to do so would be *contra bonos mores* or violative of the feelings, interests, or convenience of its own citizens or rights of its own citizens and (as is said in one case) of the citizens of a sister state, or would be violative of some positive law or policy of the forum. The cases in which this principle is laid down are usually those in which a contract made in one state is sought to be enforced in the courts of another state (the forum). *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866; *Bowman v. Miller*, 25 Gratt. 331; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Stevens v. Brown*, 20 W. Va. 451; *Fant v. Miller*, 17 Gratt. 47; *Lewis v. Fullerson*, 1 Rand. 15.

For example, if the law of a place where a contract is made be contrary to the laws of the country in which the suit is brought (*lex fori*) in which a contract is also made inconsistent with the contract made in the foreign country, the courts of the forum will enforce their own law rather than the foreign law so that the contract made there will prevail. *Banks v. Greenleaf*, 6 Call 271.

But see *Dulin v. McCaw*, 39 W. Va. 731, 20 S. E. 681, which says that the courts of the forum will enforce a contract made in another state valid by its laws even though it would be invalid by the laws of the forum, provided that the contract is not in itself wrongful.

Foreign Judgments.—"The constitution of the United States requires (art. IV, § 1) that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress

may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.' The act of congress of May 26, 1790, after providing the mode by which they shall be authenticated, declares that 'said records, and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.'" *Piedmont, etc., Ins. Co. v. Ray*, 75 Va. 821.

It is a question of constitutional obligation not of state policy, whether our courts will enforce a judgment of another state court of competent jurisdiction, having jurisdiction in the case. *Stewart v. Stewart*, 27 W. Va. 167.

When a judgment or decree of the court of another state is sought to be enforced in a court in this state, the court in this state may inquire into the jurisdiction of the court, which rendered the judgment or decree, and if it appears that such court had no jurisdiction, the judgment or decree is void, but if it had jurisdiction, the judgment or decree is valid and binding in this state. *Stewart v. Stewart*, 27 W. Va. 167.

In deciding upon the effect to be given to a judgment or decree so rendered in another state it must be regarded as well settled, that the record of the decree must have the same effect in this state as in the state where rendered. *Stewart v. Stewart*, 27 W. Va. 167.

If the court of another state, which rendered the decree, was a court of general jurisdiction, the presumption is, it had jurisdiction of the particular case, and, to render the decree void, this presumption must be overcome by proof. *Stewart v. Stewart*, 27 W. Va. 167.

For a full and exhaustive treatment of the effect of a foreign judgment or the

judgment of a sister state, see the title FOREIGN JUDGMENTS.

The record of a decree of the court of common pleas of a county in another state in the absence of evidence to the contrary must be regarded as the record of a decree of a court of general jurisdiction. *Stewart v. Stewart*, 27 W. Va. 167. See the titles FOREIGN JUDGMENTS; RECORDS.

II. Status of Slaves—Effect of Emancipation in Another State.

A slave removing from one estate to another where slavery is abolished, with the consent of his master, for a mere transitory purpose, and with the animus revertendi, does not thereby acquire a right to freedom in the former state. Nor does a judgment on a habeas corpus in the latter state, in favor of the slave, establish such right. *Lewis v. Fullerson*, 1 Rand. 15.

By the Maryland statute of 1796, all slaves brought into that state to reside were declared to be free. A., a Virginia born slave, was carried by his master to Maryland; the master settled there and kept A. there in bondage for twelve years, the statute being in force all the time; he then brought A. as a slave to Virginia and sold him here. In an action brought by A. against the purchaser it was held, that he was free. *Hunter v. Fulcher*, 1 Leigh 172.

The owner of slaves in Virginia took them with him in November, 1831, to New York, with the intention to emancipate them, and there he executed a deed of emancipation attested by one witness. After remaining in New York a few days, he returned to Virginia, bringing the negroes with him; and ever after during his life he treated them as free. It was held, that the owner of the slaves having taken them to New York for the purpose of emancipating them, they were by the laws of New York free, and so continued

after their return to Virginia; that the act of the owner was not such a fraud upon the laws of Virginia as rendered his act null and of no effect. *Foster v. Foster*, 10 Gratt. 485.

The act of Pennsylvania of 1780, for the gradual abolition of slavery, clearly includes all negro and mulatto children born of slave mothers after the passage of the act, except in the cases excepted by § 10, such as domestic slaves attending on delegates to congress, etc., etc. If, therefore, a citizen of Pennsylvania, after the passage of the act, bequeath a female slave to a citizen and resident of Virginia, and after the legatee's title has accrued, the slave have a child born in Pennsylvania, and the child be then brought to Virginia, together with its slave mother, by her master, such child may recover its freedom in the courts of Virginia. It seems, however, that though by the act of Pennsylvania, the condition of the mother is so far changed, that her children born there can not be slaves, yet if she be removed by her master, her children born in Virginia are slaves, though those born in Pennsylvania are free. *Spotts v. Gillaspie*, 6 Rand. 566.

III. Realty.

A. IN GENERAL.

"It is settled law that real estate is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it. Story's Conflict of Laws, § 591, and it was said by Chancellor Zabriskie in *Davis v. Headley*, 7 C. E. Green 115: 'I find no case in which a statute, judgment, or proceeding in one country has been held to affect such property when situate in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree.'"
Hotchkiss v. Middlekauf, 96 Va. 649, 32 S. E. 36. See the titles FOREIGN JUDGMENTS; JURISDICTION.

B. VALIDITY OF PATENT.

A patent for land, granted by a sister state, is one of those public acts to which every other state is bound to give full faith and credit, under the constitution of the United States; therefore, the validity of such patent can not be collaterally drawn in question, in the courts of any other state, on a suggestion that the survey on which it was founded was a forgery. *Lassly v. Fontaine*, 4 Hen. & M. 146. See the titles CONSTITUTIONAL LAW; PUBLIC LANDS.

C. JURISDICTION OF ACTIONS AFFECTING REALTY.

See the titles FOREIGN JUDGMENTS; JURISDICTION.

In actions at law affecting lands or other immovable property the forum rei sitæ has exclusive jurisdiction; and the judgment of such forum as to such property is conclusive. *Witten v. St. Clair*, 27 W. Va. 762.

"The well-settled general rule is, that the court of one state has no jurisdiction to make a decree which will directly affect either the legal or equitable title to land situated in another state. The doctrine is, that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority operating territorially within the foreign jurisdiction, the court may act in personam, and oblige the party to convey, or otherwise to comply with its decree. But it is not competent to the court to decree touching a foreign subject, when the act to be done can be accomplished and perfected only by an authority operating territorially." *Poindexter v. Burwell*, 82 Va. 507; *Gibson v. Burgess*, 82 Va. 650. See also, *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536; *Guerrant v. Fowler* 1 Hen. & M. 5.

Jurisdiction to Decree Sale of Land.

—A court of one state can not decree so as directly to affect land in another state; e. g., to sell the land. *Hotch-*

kiss v. Middlekauf, 96 Va. 649, 32 S. E. 36; *Poindexter v. Burwell*, 82 Va. 507, distinguishing *Barger v. Buckland*, 28 Gratt. 850.

A judgment or decree of a court of another state has no effect to pass title to or affect land in West Virginia, nor can a sale or conveyance under it by a trustee or commissioner appointed by it do so. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367.

Sale of Land in Enforcement of Trust.—A deed of trust was executed to secure a debt, on a tract of land situated in two counties, both then in Virginia, but one of which afterwards became part of West Virginia, the other remaining in Virginia. Upon default of payment, there being no trustee to execute the contract of the parties to sell the land and pay the debt, under the circumstances the court, in order to perform the contract of the parties and to fulfill its own maxim, that "a trust shall not fail for want of a trustee," decreed that unless the grantor should pay the debt within a prescribed period, then certain named persons should execute the trust by selling the land and applying the proceeds in payment of the debt. Such was the agreement of the parties, and to it was applicable that most elementary principle of law relative to contracts; viz., *modus et conventio vincunt legem*. *Barger v. Buckland*, 28 Gratt. 850.

Jurisdiction to Compel Conveyance.—In Virginia it has been held, that a court of one state can act upon the person, if he be within its jurisdiction, and compel him to convey land located in another state or otherwise comply with its decree. *Poindexter v. Burwell*, 82 Va. 507; *Guerrant v. Fowler*, 1 Hen. & M. 5.

"Hence, in a suit for specific performance against a defendant within the jurisdiction and duly served with process, it is no defense that the lands to be affected by the decree are in another state or country. See White and

Tudor's notes to *Penn v. Lord Baltimore*, 2 Lead. Cas. in Eq., 1823, et seq., and authorities there cited." *Poindexter v. Burwell*, 82 Va. 507.

In cases of fraud, trust, or contract, courts of equity having jurisdiction over the parties, may administer full relief, without regard to the nature or situation of the property, and may even compel the conveyance of property which lies beyond its jurisdiction, provided it can enforce its decree by the exercise of its powers over the persons before it. It is no violation of the sovereignty of one state for a court of equity of another state to compel a party before it to do an act which, if done voluntary anywhere, would not be such violation. *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36. See also, *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536.

Jurisdiction to Partition Lands.—Courts in Virginia have no jurisdiction to partition lands situated in another state, because such right can only be exercised under the *lex loci rei sitæ*. *Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536; *Poindexter v. Burwell*, 82 Va. 507.

IV. Personality.

A. IN GENERAL.

"The general rule is, that rights as to personal and transitory things, are to be determined by the laws of the country where the right accrued." *Jones v. Hook*, 2 Rand. 303.

"The legal situs of personal property follows the domicile of the owner, and the laws of the actual situs protects the claims of creditors domiciled there only against transfers by operation of law." *Speed v. May*, 17 Pa. 91, quoted in *Yost v. Graham*, 50 W. Va. 199, 40 S. E. 361. See post, "Involuntary Assignments—Bankruptcy and Insolvency," VIII.

"It is one of the maxims of international jurisprudence that personal property, as a rule, has no situs but appertains to the person of the owner

and that, as a consequence, such owner can dispose of it by any instrument or in any method and to such uses as are authorized by the law of the place where the conveyance is executed, * * * The principle that personal effects have no locality arises out of the necessities of trade. It is accordingly held almost universally that an assignment or transfer valid by the laws of the state where it is made will be upheld everywhere." Bump on Fraudulent Conveyances, § 510, quoted in *Yost v. Graham*, 50 W. Va. 199, 40 S. E. 361. See post, "Transfer of Personal Property," V, E, 2.

B. SITUS OF DEBT.

"A debt has no situs and is deemed in contemplation of law to be attached to and to follow the person of the creditor." Bump on Fraudulent Conveyance, § 510, quoted in *Yost v. Graham*, 50 W. Va. 199, 40 S. E. 361.

Situs of Debt for Purpose of Taxation.—The situs of a debt for the purposes of taxation is the domicile of the creditor. The domicile of the holder of the evidence of debt is the situs of the debt for taxation purposes. The creditor can not be taxed in the place of the domicile of the debtor unless he resides there, nor has the legislature power to tax choses in action held by nonresidents. And it can not be done by taxing the debtor and allowing him to deduct the amount from the debt. *State Bank of Virginia v. Richmond*, 79 Va. 113; *Com. v. Chesapeake*, etc., R. Co., 27 Gratt. 344.

V. Contracts.

A. GENERAL RULE STATED AND ILLUSTRATED.

The *lex loci contractus* generally governs a contract as to its nature, interpretation, validity, obligation and effect. In the cases in which this rule was laid down the *locus contractus* was taken to be the place where the contract was either made and to be performed or where the contract was

made and there was nothing to show that it was to be performed in any other state. *Hefflebower v. Detrick*, 27 W. Va. 16; *Klinck v. Price*, 4 W. Va. 4; *Warder v. Arell*, 2 Wash. 282; *Dickinson v. Hoomes*, 8 Gratt. 353; *Banks v. Greenleaf*, 6 Call 275; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Bowman v. Miller*, 25 Gratt. 331; *Fant v. Miller*, 17 Gratt. 47; *Turpin v. Povall*, 8 Leigh 93; *Urton v. Hunter*, 2 W. Va. 83; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866; *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98; *Lewis v. Fullerson*, 1 Rand. 15; *Stevens v. Brown*, 20 W. Va. 451; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587; *Banks v. Greenleaf*, 6 Call 271; *Backhouse v. Selden*, 29 Gratt. 581; *Jackson v. Rose*, 2 Va. Cas. 34.

The general rule is that all instruments made and executed in a country, take effect and are to be construed as to their nature, operation and effect, according to the laws of the country where they are made and executed. *Hefflebower v. Detrick*, 27 W. Va. 16.

The laws of the country where a contract is made (the contract not being made with a view to performance elsewhere), must govern it. *Warder v. Arell*, 2 Wash. 282, 1 Am. Dec. 488.

The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract; and that whether such laws affect its validity, construction, discharge or enforcement. *Roberts v. Cocke*, 28 Gratt. 207.

Whatever relates to the essence of a contract, is to be governed by the law of the place where the contract was formed. *Jones v. Hook*, 2 Rand. 303.

"The place of the performance of the final act, which is to give effect to the contract by its own word, is conclusive to show where the contract was

made." *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

Generally, the place of the acceptance of a proposal is the place of contract. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

Contract for Payment of Money Secured by Deed on Realty.—Where a contract for the payment of money is made in one state secured by a deed on real property situated in another state, the laws of the latter state determine as to whether the deed is a mortgage or not, but the laws of the former state (*lex loci contractus*) determine as to the nature, construction and validity of the contract and would determine whether the loan is usurious or not. *Klinck v. Price*, 4 W. Va. 4. See post, "Contracts Relating to Real Estate," V, E, 1.

An Apparent Exception.—In *Turpin v. Povall*, 8 Leigh 93, it is said that where a contract is void according to the *lex loci contractus* but valid by the *lex fori*, the contract is not to be governed by the law of the place where it was made, but the *lex fori* must prevail. The facts in the case are that Povall, a resident of Pennsylvania, made a loan to Johnson of Virginia. The loan was made and the money advanced in Pennsylvania but the bond to secure the loan was taken in Virginia by the agent of Povall with another party as surety. The contract was to pay ten per cent. interest, which it seems was usurious by Pennsylvania as well as Virginia law; but in the first state the debtor was entitled to relief only against the usurious excess, while in the second, the entire debt was forfeited. The court held, that the contract was to be governed by Virginia and not by Pennsylvania law. In *Fant v. Miller*, 17 Gratt. 47, and *Bowman v. Miller*, 25 Gratt. 331, it is said that the result reached in this case was correct, but that the ground of the decision was that the contract being made in Virginia was to be governed by Virginia

law (*lex loci contractus*), and that the principle laid down above was mere dictum. See post, "Contracts Fixing Rate of Interest—Usury Laws," V, E, 8.

B. LAW OF PLACE OF PERFORMANCE AS GOVERNING CONTRACT.

The validity of the contract is to be decided by the law of the place where it is made, unless it is to be performed in another country, when it is to be presumed that the parties contracted with reference to the laws of the latter as to the validity, nature, obligation and interpretation of the contract, and that those laws will govern. *Pugh v. Cameron*, 11 W. Va. 523; *Nickels v. People's Bldg., etc., Ass'n*, 93 Va. 380, 25 S. E. 8; *Lewis v. Fullerson*, 1 Rand. 15; *Ware v. Building Ass'n*, 95 Va. 680, 29 S. E. 744; *National Bldg., etc., Ass'n v. Ashworth*, 91 Va. 706, 712, 22 S. E. 521; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587; *Freeman's Bank v. Ruckman*, 16 Gratt. 126; *Warder v. Arell*, 2 Wash. 282; *People's Bldg., etc., Ass'n v. Tinsley*, 96 Va. 322, 31 S. E. 508.

For example, although money is loaned in Virginia, and a bond therefor is executed in Virginia, and it is secured by a deed of trust on real estate situated in Virginia, yet if the bond is in good faith payable in New York, it will be deemed to be a New York contract and governed by the laws of that state, the place of performance as to its validity, interpretation and effect. *Ware v. Building Ass'n*, 95 Va. 680, 29 S. E. 744.

C. CONTRACT GOVERNED BY LAWS OF COUNTRY WITH REFERENCE TO WHICH IT IS MADE.

A contract, so far as relates to its validity, nature, interpretation and effect, is to be governed by the laws of the place with reference to which it is made, and an express stipulation of

the parties that it is to be held and construed as made with reference to a certain jurisdiction shows by what law they intended the transaction to be governed. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Nelson v. Fotterall*, 7 Leigh 179; *Lewis v. Fullerson*, 1 Rand. 15.

Whether a bond executed in Virginia, for money borrowed in Pennsylvania, is to be deemed a Virginia contract, or a contract made with reference to the law of Pennsylvania, and to be governed by that law? It seems, it is a Virginia contract. *Turpin v. Povall*, 8 Leigh 93.

Presumption in Favor of Legality of Contract.—Where a contract is made in one state where the contract is illegal, but is to be performed in another state where it is legal the presumption is that the parties contracted with reference to the laws of the state which recognized the legality of the contract. *Nickels v. People's Bldg., etc., Ass'n*, 93 Va. 380, 25 S. E. 8.

D. DISCHARGE FROM CONTRACT DEBTS.

Tender and Refusal.—If a person be discharged from a debt by a tender and refusal made in a foreign country, by force of the laws of that country he may defend himself in the courts of another state by relying upon such tender and refusal, and the laws under which he was discharged. *Warder v. Arell*, 2 Wash. 282, 1 Am. Dec. 488.

Discharge in Bankruptcy.—See post, "Involuntary Assignments—Bankruptcy and Insolvency," VIII.

E. PARTICULAR CONTRACTS.

1. Contracts Relating to Real Estate.

The *lex rei sitæ* governs as to contracts relating to real estate, as to the rights of parties thereto, the mode of transfer and alienation and the nature and extent of the interest therein. *Burners v. Keran*, 24 Gratt. 42; *Klinck v. Price*, 4 W. Va. 4; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

For example, in a controversy between several parties to whom the same piece of land has been granted with general warranty, the courts of the state where the land is situated have jurisdiction to determine to whom the land belongs, even though one of the necessary parties reside out of the state and is only served by publication. *Burners v. Keran*, 24 Gratt. 42.

Again, when money is loaned and the conveyance to secure it is on land situated in another state, the law of the place where the land is situated and not the place where the conveyance was made is to govern as to whether the conveyance is a mortgage or not. *Klinck v. Price*, 4 W. Va. 4.

Breach of Warranty as Affecting Heirs.—Where land in Virginia is conveyed with general warranty on the part of the grantors and their heirs, and the heirs subsequently set up a title to the land against the assignee of the original grantee, the question as to whether certain Kentucky lands descended to the heirs from the grantor is assets in the hands of the heirs for the payment of the breach of warranty is to be determined by the law of Kentucky (*lex loci rei sitæ*) and not by Virginia law. *Dickinson v. Hoomes*, 8 Gratt. 353.

2. Transfer of Personal Property.

a. In General.

It is well settled as a general rule that a transfer of movable property good by the law of the owner's domicile, is valid wherever else the property may be situated and should prevail. *Bockover v. Life Ass'n*, 77 Va. 85; *Wickham v. Martin*, 13 Gratt. 427.

Qualification of General Rule.—In *Kurner v. O'Neil*, 39 W. Va. 515, 20 S. E. 589, it was held, that the proper forum to decide as to all questions of the priority and preference of the creditors is the place of the domicile of the debtor; and that the law of that place, and not the law of the place of the

contract is to govern in all cases of such priorities and preferences in respect to movables situated in his place of domicile. But as to movables situated elsewhere as well as to immovables the *lex rei sitæ* is to govern.

b. Sales and Assignments of Personal Property.

The sales of personal property, when situated at the place of the domicile, of the vendor, are governed by the law *rei sitæ*, and not by the laws of the state to which it may thereafter be removed. *Kurner v. O'Neil*, 39 W. Va. 515, 20 S. E. 589.

A voluntary assignment by a party, according to the law of his domicile, will pass his personal estate, whatever may be its locality, abroad as well as at home. *Yost v. Graham*, 50 W. Va. 199, 40 S. E. 361.

"The validity of a voluntary assignment of personal estate in trust for creditors, is to be determined by the law of the place of its execution." *Law v. Mills*, 18 Pa. St. 185, quoted in *Yost v. Graham*, 50 W. Va. 199, 40 S. E. 361. •

"The doctrine seems to be well established, that the bona fide and voluntary assignment of personal property and choses in action wherever situated or found, pass to the assignee at the time of the assignment, and consequently will have priority over subsequent lienors, although neither such lienors nor the debtors (in case of a chose in action) had notice of the assignment at the time the lien was created. This is clearly the general rule, and will prevail unless it comes in conflict with some positive or customary law of the state or place where the property or choses in action may be located or found." *Bank v. Gettinger*, 3 W. Va. 309.

A voluntary assignment, made in another state, of a debt due from a citizen and resident of this state, to a resident of such other state, passes the debt to the assignee at the time of the as-

signment so as to defeat a subsequent attaching creditor of the assignor in this state, whose attachment was issued and served on the debtor of the assignor after the assignment and before such debtor had notice of it. *Bank v. Gettinger*, 3 W. Va. 309. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

c. Mortgages.

A chattel mortgage valid under the laws of the state where it was executed both as between the immediate parties thereto and as against third parties is valid in another state to which the property is subsequently removed, although not executed according to the laws of the latter state. *Craig v. Williams*, 90 Va. 500, 18 S. E. 899.

d. Deeds of Trust.

Where a deed of trust is executed in one state on property situated in another state, in a controversy over the property arising in the latter state, the courts of the latter state will apply their own recordation laws in absence of evidence that the laws of the former state are different. *Smith v. Smith*, 19 Gratt. 545.

3. Bills and Notes.

a. Notes.

(1) Governed by Lex Loci Celebrationis.

A note made in a particular country is to be deemed a note governed by the laws of that country, whether it is made payable there, or it is payable generally, without naming any particular place. *Wilson v. Lazier*, 11 Gratt. 477. If a note is both made and discounted in a certain state it is to be governed by the law of that state even though it is made payable at a bank outside of the state. *Hamtramck v. Selden*, 12 Gratt. 28.

If "R.," residing in this state, makes his note to "H.," also residing in this state, and sends the same to "D.," residing in another state, to be there

signed by him and returned to "R.," to be by him delivered to "H.," and the same is there signed and returned to "R.," who delivered the same to "H.," such note is to be held as a contract made in this state, and subject to, and governed by the laws thereof. *Hefflebower v. Detrick*, 27 W. Va. 16.

Law Requiring Stamp.—If the law of the state where a note is made declares that it shall be void unless it is stamped, it is void everywhere and an action can not be maintained upon it in another state. *Fant v. Miller*, 17 Gratt. 47.

But if in such a case the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. *Fant v. Miller*, 17 Gratt. 47.

Accommodation Note.—A paper signed in blank in Virginia was sent to Maryland to be filled up there. It was filled up there, and at the same time and place was endorsed by the payee to the holders, for value; the note being in fact for the accommodation of the payee. It was held, that this was a Maryland contract to be governed by the Maryland law; though the note was headed W., a place in Virginia. *Fant v. Miller*, 17 Gratt. 47.

(2) Situs of New Note Taken for Balance Due on Old Note.

Where a new note is taken for the balance due on an old note, made and indorsed by the same parties as were on the old, this note not being considered a novation of the old note is to be governed by the same law even though entered into and made payable in another state. *Bowman v. Miller*, 25 Gratt. 331.

For example, B. being in want of money, in August 1867, went to the city of Baltimore with a negotiable note for \$3,500, blank as to date and place of payment, but signed by himself and indorsed by five persons, he and they living in Virginia. This note he sold to M., of Baltimore, at a dis-

count of one and one-fourth per cent. per month; the proper date was inserted and the place of payment fixed at the National Exchange of Baltimore. This note was renewed with the same parties, and in April, 1868, B. made a payment on it of \$550, and another note to meet the balance was made by the same parties, payable at the same bank, and M. agreed to take this note at the same discount. The last note not being paid, M. sent it and all the previous notes and papers connected with the loan, with a statement of the amount due him, to a friend residing in Harrisonburg, with a request that he would take B.'s note for what was due, indorsed by the same parties. This was done, and the note was made payable at the national bank at Harrisonburg. It was held, that the taking of the last note was not a novation of the previously existing debt, but the contract was still a Maryland contract, to be governed by the law of Maryland. *Bowman v. Miller*, 25 Gratt. 331.

(3) The Contract of the Maker or Indorser.

The making of a note and the indorsing or assigning of the same are distinct contracts, each governed by the law of the place where the acts were respectively done. *Wilson v. Lazier*, 11 Gratt. 477; *Pugh v. Cameron*, 11 W. Va. 523; *Nichols v. Porter*, 2 W. Va. 13. See also, *Duerson v. Alsop*, 27 Gratt. 229.

An assignor is not liable as an endorser of paper not negotiable according to the laws of this state, although it may have been negotiable under the laws of the place where it was made. *Nichols v. Porter*, 2 W. Va. 13.

b. Bills.

Bill Indorsed in One State and Negotiated in Another.—A foreign bill of exchange for sterling money, drawn by merchants of Petersburg, Virginia, on a merchant at Liverpool, Eng., and dated at Petersburg, expressed on its

face that it was drawn for current money there received, but did not express the amount of current money received for it. The bill was indorsed by merchants of Petersburg, at Petersburg; and was so drawn and indorsed, for the accommodation of the drawers, with purpose to send it to New York to be there sold. It was sent to New York accordingly, and there negotiated, and afterwards was returned protested. In assumpsit by the New York holder against the drawers, *quære*, whether, upon the construction of the statute, 1 Rev. Code, ch. 126, §§ 1, 4, the bill was to be regarded as a New York bill of exchange or a Virginia bill; two judges holding that it was a New York bill, and two that it was a Virginia bill; the other judge holding that upon the pleadings in the case it was to be regarded as a Virginia bill, it being counted upon in the declaration as a Virginia bill, the action being founded on the statute of Virginia, and damages claimed and given by the verdict according to the statute. *Nelson v. Fotherall*, 7 Leigh 179.

When Judicial Notice Taken of Law of State Where Bill Was Drawn.—In an action by an endorsee against the drawer of a bill of exchange it was found by special verdict that the bill was drawn in Maryland on a person in Virginia, and no law of Maryland found declaring such a bill an inland bill. It was held, that the court could not take judicial notice of any law of Maryland to that effect unless it was expressly found; and such bill being a foreign bill of exchange, according to the general law merchant, it was to be so regarded. *Brown v. Ferguson*, 4 Leigh 37.

4. Assignment of Nonnegotiable Instruments.

a. Presumption as to Place Where Made.

Where suit is brought in one state on a nonnegotiable note payable in another state, the court will presume

that the assignment was made in the latter state, the assignment being legal there, rather than in the state of the forum where it would have been void, although it was alleged by special plea that the note was indorsed in the first state. *Bank of Marietta v. Pindall*, 2 Rand. 465.

b. Assignment Governed by Place Where Made.

Where a certificate of deposit is executed in one state where the contract is illegal and void, but the certificate is assigned in another state where the assignment is valid, the assignment is to be considered a separate contract and must be governed by the laws of the place where made. *Morrison v. Lovell*, 4 W. Va. 346.

5. Contract of a Married Woman.

The extent to which a married woman may bind herself or her separate personal estate is *prima facie* determined by the law of the state in which the contract is made, it being also the place of her domicile. *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681.

A contract of a married woman valid where made and to be performed is generally held to be valid everywhere, except when sought to be enforced in a jurisdiction where there is a total incapacity on the part of married women to contract, as at common law. *Young v. Hart*, 101 Va. 480, 44 S. E. 703.

This cause being heard here as on a demurrer to the evidence by the plaintiff in error (a married woman), and there being evidence tending to show that the contract in suit, made by her, was binding on her both in the jurisdiction where made and to be performed, the personal judgment of the trial court rendered against her will be affirmed. *Young v. Hart*, 101 Va. 480, 44 S. E. 703.

Liability of a Married Woman's Real Estate to Be Subjected.—The law of the state where the land, the separate property of a married woman, is situated must determine the question

of its liability to be subjected to the payment of claims against her. *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

The mere fact that a married woman resided in Pennsylvania, during the civil war, whilst her husband was in the army of the Confederate States, would not remove her disability to contract, especially where before, during, and since the war they have fully recognized their marital relations. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624.

6. Insurance Contracts.

Where application is sent by an applicant or his agent from one state to an insurance company of another, and there accepted, and a policy of insurance is there issued, it is a contract of the state where issued. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

If a policy of insurance provides that it shall not be valid until countersigned by its agent at a certain place, it is a contract of the state where so countersigned. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

7. Contracts of Building and Loan Associations.

When the borrowers or shareholders of a building association, chartered in one state, ask for relief in the courts of another state, relief is to be granted according to the laws of the former state if they are not repugnant to the laws of the latter state, even though the borrowers or shareholders reside in the latter state. *Gray v. Baltimore Bldg., etc., Ass'n*, 48 W. Va. 164, 37 S. E. 533. See post, "Contracts Fixing Rate of Interest—Usury Laws," V, E, 8.

8. Contracts Fixing Rate of Interest—Usury Laws.

A contract for the payment of a fixed rate of interest on a debt, if the rate of interest contracted for is authorized by the laws of the place where the contract was made, will be enforced against the payee and real

estate mortgaged to secure such debt and interest by the courts of this state, although the rate of interest thus secured may be greater than that allowed by the laws of this state. *Shipman v. Bailey*, 20 W. Va. 140.

By the usury law of Maryland a contract or evidence of debt, though tainted with usury, is not null and void, but is a valid contract, upon which an action may be maintained to recover the principal and six per cent. per annum interest thereon; and is void for the excess. Therefore, in an action in Virginia upon a note made in Maryland, on which more than six per cent. per annum of interest was charged, the plaintiff may recover the principal and six per cent. per annum; and where a separate note was given for the excess of interest, which is still in the hands of the plaintiff unpaid, he will be permitted to recover the principal of the note sued on and six per cent. per annum interest thereon. *Fant v. Miller*, 17 Gratt. 47.

Building Association Contracts.—A member of a building fund association must be presumed to have contracted with reference to its by-laws. If these provide that the place of performance shall be in another state by the laws of which the contract is made valid, though usurious in this state, and the contract is silent as to the place of performance, it will be deemed valid here. Upon the question of usury, the law of the state where the contract is to be performed controls. *Nickels v. People's Bldg., etc., Ass'n*, 93 Va. 380, 25 S. E. 8.

A Virginia stockholder in a building and loan association, organized under the laws of New York, who has made a loan from it, is chargeable with premiums for the loan, which the statutes of New York expressly authorize and declare shall not be deemed a violation of any statute against usury. *Cowan v. Mutual Bldg., etc., Ass'n*, 2 Va. Dec. 658.

Single Bill Executed in Ohio and

Signed by Surety in Virginia.—J. C., who lived in Ohio, executed his single bill in Ohio, payable to P., and pursuant to a former arrangement with S. C., the brother of J. C., P. took the single bill to Virginia, where he and S. C. lived, and there S. C. signed the bill, which was a joint and several obligation, as surety for his brother. The single bill did not specify where it was to be paid, and on its face was to bear interest at eight per cent. per annum from date. By the laws of Ohio the interest was lawful, but by the law then in force in Virginia, December, 1858, a greater rate of interest than six per cent. per annum rendered the contract void. S. C. died, the single bill still being unpaid; suit was brought in Hancock county against the administrator of S. C. to recover the amount thereof; the administrator pleaded usury; the case was tried before the court, in lieu of a jury, and judgment rendered for the amount of the single bill, with eight per cent. interest. It was held, that the single bill executed by the principal in Ohio, and the surrounding circumstances showing it was to be paid there, S. C., in signing it in Virginia as surety, ratified it as an Ohio contract. It being an Ohio contract and valid under the usury laws of that state, the surety, although he signed it in Virginia, could not avail himself of the plea of usury. *Figh v. Cameron*, 11 W. Va. 523.

A contract entered into in another state, in violation of the usury law of that state, can not be considered as made with reference to the law of the place of contract, but the rights of the contracting parties, if litigated in this state, must be determined by our own law. *Turpin v. Povall*, 8 Leigh 93.

VI. Domicile and Residence.

A. DOMICILE.

1. What Constitutes Domicile.

Domicile is "residence with no present intention of removal." Mere ab-

sence, however long, affects no change of domicile. *Lindsay v. Murphy*, 76 Va. 428.

Two things must concur to establish domicile, the fact of residence at a place and the intention to remain there for an indefinite time. *White v. Tenant*, 31 W. Va. 790, 8 S. E. 596; *Long v. Ryan*, 30 Gratt. 718.

"Jacobs on Domicile (ch. 3, § 75), has gathered together a great deal of authority and information on the subject, and collates and discusses the cases with ability. He discusses the question, 'Is domicile place of legal relation?' Accepting the latter, the author gives us his definition: "'Home' and 'domicile' do not correspond, yet 'home' is the fundamental idea of 'domicile.'" The law takes the conception of "home," and molding it by means of certain fictions and technical rules to suit its own requirements, calls it "domicile." Or perhaps this may be best expressed by slightly altering Westlake's statement, "Domicile is, then, the legal conception of residence," etc., and saying "domicile is the legal conception of home." So combine, then, what has been said in this and the last preceding sections. "Domicile" expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home." *Jac. Dom. ch. 3, § 72.* *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

"'Domicile' is often used to designate a place, the characteristic of which is that it is so related to a person as to be in law his permanent home, abode; one's own dwelling place; that place or country in which he either (1) in fact resides with the intention of residence (*animus manendi*), or (2) in which having so resided, he continues actually to reside, though no longer retaining the intention of remaining (*animus manendi*), or with regard to which, having so resided there, he retains the intention of residence

(*animus manendi*), though he in fact no longer resides there. More briefly, a person's home is that place or country in which either he resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or intention of residence. See Dicey *Dom.*, p. 42, et seq. 'Domicile.' Residence at a particular place, accompanied with an intention to remain there for a time not limited. See Whart. *Confl. Laws*, ch. 2; also, 5 *Amer. & Eng. Ency. Law*, tit. 'Domicil,' p. 854, and authorities cited. The difficulty of definition is that the terms used require definition. Hence, the subject is generally discussed by way of description, illustration, presumption of law and of fact, and the modes and means of proof." *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

In *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596, it is said that if it is shown that a person has entirely abandoned his former domicile in one state with the intention of making his home at a fixed place in another state with no intention of returning to his former domicile and then established a residence in the new place for any period of time, however brief, that will be, in law a change of domicile and the latter will remain his domicile until changed in like manner. For example, where a person entirely abandons his former residence in one state with no intention of resuming it and goes with his family to another residence which he rented in another state with the intention of making the latter his residence for an indefinite time, the latter is his domicile, notwithstanding that after he and his family arrived at his new residence which was only about half a mile from the state line, they go on the same day on a visit to spend the night with a neighbor in the former state, intending to return on the morning of the next day, but he is detained there by sickness until he dies and never does in fact return to his new home.

2. Domicile of an Infant.

The home or domicile of the father is the domicile of the child; so also of a mother whilst a *feme sole*; but a guardian can not fix the domicile of his ward; nor can a mother during coverture with a second husband take a child by the former husband from its native state, where it is domiciled, and carry it into another state thereby changing its domicile and altering the succession to its estate. *Mears v. Sinclair*, 1 W. Va. 185.

3. Domicile of Insurance Company.

An insurance company chartered by another state, but doing business in Virginia in compliance with the statutes of 1855-56, is to be considered, for the purpose of being sued, as domiciled in Virginia, and is entitled to rely on the statute of limitations just as if it were a company which had been chartered by the legislature of Virginia. *Connecticut Mut. Ins. Co. v. Duerson*, 28 Gratt. 630.

So an insurance company chartered by another state, but which is doing business in West Virginia under the statute law of that state or under the Virginia law of 1855-56, is to be considered for the purposes of being sued as domiciled in West Virginia. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

The withdrawal by such a company of its agent from West Virginia or the failure of such a company to appoint an agent in West Virginia, when for any reason there ceased to be one resident in the state, is a departure from the state by the insurance company within the meaning of § 18, ch. 104, W. Va. Code. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

In an action upon a policy of insurance by a citizen of the state of Virginia against a foreign insurance company doing business in Virginia, the foreign corporation is *quoad hoc* domiciled in Virginia by virtue of the statutes authorizing the company to do

business there, and is not entitled under the act of congress of 1867 to have the cause removed to the United States court on the ground that the corporation is a resident of another state. *Continental Ins. Co. v. Kasey*, 27 Gratt. 216. See the title **REMOVAL OF CAUSES**.

4. Burden of Proving Change of Domicile.

Burden of proof of change of domicile is on him alleging it. *Lindsay v. Murphy*, 76 Va. 428.

B. RESIDENCE.

1. What Constitutes Residence.

In *Long v. Ryan*, 30 Gratt. 718, residence is defined to be a place of abode, a dwelling, a habitation, the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time. It is to have a permanent abode for the time being, as contradistinguished from the mere temporary locality of existence.

The question of residence is one of intention, and the old residence is not considered as lost or abandoned so long as the animus revertendi remains. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437.

Personal service of summons does not establish residence, for such service may be had on a temporary sojourner or passing traveller. *Hall v. Packard*, 51 W. Va. 265, 41 S. E. 142. See the title **SERVICE OF PROCESS**.

Facts Constituting One Prima Facie a Resident of Virginia.—A plaintiff in equity whose house where his family lives is fifteen feet on the Virginia side of the line which separates the state from Tennessee, and who so far as known lives with his family, is prima facie a resident in Virginia; and this prima facie case is not removed by proof that a sheriff had gone to the house twice with process against him without finding him, and was told by

the neighbors that the plaintiff would not let him see him. *Evans v. Bradshaw*, 10 Gratt. 207.

Residence as Used in Statute.—What is the meaning of the word residence as used in any particular statute, must be decided upon its particular circumstances. The word is often used to express a different meaning according to the subject matter. *Long v. Ryan*, 30 Gratt. 718.

"Our statutes, and American statutes generally, do not use the term 'domicile,' but the terms resident or nonresident, to express the connection between persons and places; its exact signification being left to construction, to be determined from the context and the apparent object sought to be attained by the enactment." *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

The word residence, in the statute in relation to attachments, is to be construed as meaning the act of abiding or dwelling in a place for some continuance of time. While on the one hand the casual or temporary sojourn of a person in the state, whether on business or pleasure, does not make him a resident of the state within the meaning of the attachment law, especially if his personal domicile is elsewhere, so on the other hand, it is not essential that he should come into the state with the intention to remain here permanently, to constitute him a resident. *Long v. Ryan*, 30 Gratt. 718; *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

In order to sustain an issue that a party is not a nonresident, he has only to establish the fact of actual residence in this state under such concomitant circumstances as make it entirely practicable to serve him with process, and to reach his property according to the course of the common law. If a man's family has been removed to this state, or if, having no family, he has himself removed here, and entered into business, and his means and property

have been brought here, and he dwells here, and his business engagements in this state are such as to render his stay wholly uncertain and indefinite as to duration, he is not a nonresident of this state, within the purview of the attachment law. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 415; *Hall v. Packard*, 51 W. Va. 264, 41 S. E. 142.

2. Residence of Convict in Penitentiary.

The residence of a citizen of this state is not changed by reason of his conviction and confinement in the penitentiary of another state. Residence is a matter of intention and is determined by every man for himself. The penitentiary is not a place of residence, but of confinement as a punishment for crime. Compulsory confinement in the penitentiary can not change the residence of the convict. *Guarantee Co. v. National Bank*, 95 Va. 480, 28 S. E. 909.

3. Residence of a Corporation.

A corporation is a resident of the state by which it was incorporated, no matter where its stockholders reside. *Hall v. Bank*, 14 W. Va. 584.

"If a corporation be chartered in this state, and accepts its charter by actually doing business here as a corporation, it must, in a suit brought here in our courts, be regarded as a domestic corporation having its residence in this state." *Hall v. Bank*, 14 W. Va. 584. See also, *Farmer's Bank v. Gettinger*, 4 W. Va. 305.

And a legislative authority to a foreign corporation to do business in this state, accepted by actually doing business here, has precisely the same effect as a formal charter. Such corporation in a suit here must be regarded as a domestic corporation having its residence in this state, no matter where its officers may reside. *Hall v. Bank*, 14 W. Va. 584. See also, *Farmer's Bank v. Gettinger*, 4 W. Va. 305.

In November, 1864, during the civil

war, a banking corporation located in the city of Richmond, Virginia, and under the absolute control of the Confederate government, could not even by an express statute have been authorized to establish a branch bank in West Virginia, and to carry on business during the war. Such a bank was a nonresident of West Virginia, and liable to be proceeded against as such by attachment, though prior to the war it had had a branch bank within the limits of the territory, then a part of the state of Virginia, which was subsequently organized into the state of West Virginia. *Hall v. Bank*, 14 W. Va. 584, explaining and distinguishing *Farmer's Bank v. Gettinger*, 4 W. Va. 305. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

C. DOMICILE AND RESIDENCE DISTINGUISHED.

There is a wide distinction between domicile and residence. To constitute a domicile two things must concur; first, residence, secondly, the intention to remain there for an unlimited time. Residence on the other hand is to have a permanent abode for the time being as contradistinguished from a mere temporary locality of existence. A man may be a resident of a particular locality without having his domicile there. He can have only one domicile at one and the same time; at least, for the same purpose, although he may have several residences. *Long v. Ryan*, 30 Gratt. 718; *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

VII. Marriage.

General Rule.—The general rule is that a marriage valid where made is valid everywhere. But it is subject to the exception that those marriages involving polygamy and incest or those violative of the statutes or public policy of a country will not be recognized as valid; or to state the rule differently while the forms of entering into the contract of marriage are to be regu-

lated by the *lex loci contractus* the law of the country in which it is celebrated, the essentials of the contract such as capacity, etc., depend upon the law of the country in which the parties are domiciled at the time of the marriage (the *lex domicilii*) and in which the matrimonial residence is contemplated. *Kinney v. Com.*, 30 Gratt. 858; *Greenhow v. James*, 80 Va. 636.

For example, K., a negro man, and M., a white woman, both domiciled in the county of Augusta, Virginia, left Virginia and went to Washington, D. C., and were married there according to the regular forms for celebrating marriages, and after remaining absent from Virginia about ten days, returned to their home in Augusta county, Virginia, where they have since lived as man and wife. By the laws of Virginia (Code, 1873, ch. 105, § 1), all marriages between a white person and a negro are absolutely void. On an indictment for lewdly and lasciviously associating and cohabiting together, it was held, that although such marriages are not prohibited by the laws of the district of Columbia, and this marriage was performed according to the ceremonies there prescribed, it was void under the laws of Virginia, and the parties were liable to the indictment. *Kinney v. Com.*, 30 Gratt. 858.

On a prosecution for bigamy, where a marriage is alleged to have taken place in a foreign country or state, proof must be made of a valid marriage according to the law of that country or state; but no particular kind of evidence is essential to establish the fact, except that it can not be proved by reputation and cohabitation. *Bird v. Com.*, 21 Gratt. 800. See the title *BIGAMY*, vol. 2, p. 372.

VIII. Involuntary Assignments

—Bankruptcy and Insolvency.

"On the question as to the effect of

assignments of personal property or choses in action in one state or country not by the owner, but by operation of law, or by a decree of the court in another state or country, there has been much conflict of opinion. Thus in England it is now settled, that an assignment under the bankrupt law of a foreign country passes all debts due the bankrupt from persons residing in England, and that after such assignment by operation of the law of a foreign country no creditor of the bankrupt could attach such English debts. The laws of Holland and France coincide with the English decisions on this point. See *Story's Conflict of Laws*, §§ 409, 417, pp. 682, 688. These positions are also sustained by considerable weight of American authority and by eminent American jurists, as by Chief Justice Parsons in *Goodwin v. Jones*, 3 Mass. 517, and Chancellor Kent in *Holmes v. Renson*, 4 John. Ch. 460. But the weight of American authorities is, that the voluntary assignment of a party according to the law of his domicile will pass his personal estate or choses in action whatever be its locality, but an involuntary assignment operating by the mere authority of law does not operate like a voluntary assignment, but it operates only to the extent of placing the assignee in the same situation as the bankrupt himself in regard to foreign debts, and they take them subject to equities belonging to foreign creditors and subject to the remedies provided by the laws of foreign countries, where the debt is due. See *Story's Conflict of Laws*, § 412, p. 685." *Hall v. Bank of Virginia*, 14 W. Va. 584.

"It may be assumed, I think, as a well-settled principle in this country, notwithstanding the strong doubts expressed by some eminent jurists, that involuntary or coercive assignments do not operate beyond the territory and jurisdiction of the state or sovereign

under whose laws such compulsory assignment was made." *Bank v. Gettinger*, 3 W. Va. 309.

A discharge in bankruptcy by the laws of one country is no defense to an action on a bond brought in the courts of another country. *Banks v. Greenleaf*, 6 Call 271.

But it has been held, that if a British subject be declared a bankrupt in England, having debts due him in this commonwealth, his British creditors can not recover satisfaction out of such debts in our courts; for the English law will govern in our courts in such a case and by that law such debts would be transferred to the assignee in bankruptcy. *Devisme v. Martin*, Wythe 298. The court said: "An English subject can not recover a debt, contracted before the assignment, by an action against the bankrupt himself, or satisfaction for it out of his effects in the hands of others, although a creditor, who is not a British subject, and consequently not bound by the laws of Great Britain, and perhaps too a British subject not having a domicilium in England, may recover such debt, by an action against the bankrupt, or satisfaction for it out of his effects."

A bond was executed in Virginia by M. to G., both of them being then citizens of and residents in Virginia. M. afterwards removed to Maryland, and G. sued him there on the bond, and recovered a judgment. M. then applied to the court for a discharge under the insolvent laws of Maryland; and G. appeared and opposed his discharge, on the ground that he had not made a fair surrender of his property; but the court granted M. a discharge. Afterwards G. instituted a proceeding by foreign attachment in Virginia, against M., to enforce satisfaction of his debt, and M. set up his discharge under the insolvent laws of Maryland, as a defense to the suit. It was held, that the debt having been contracted in Virginia, between

citizens of Virginia, the discharge in Maryland did not bar the claim in Virginia; and the appearance of G. in the Maryland court and his opposing the discharge of M. there, did not give greater effect to the discharge of M. by that court. *M'Carty v. Gibson*, 5 Gratt. 307.

IX. Wills, Descent and Distribution.

A. WILLS DEVISING REALTY.

A will devising lands lying in Virginia, may be proved in this state, although it may have been declared void in any other of the United States. *Rice v. Jones*, 4 Call 89.

B. WILLS OF PERSONALTY.

It is a rule of the common law that wills of personal property are to be construed according to the law of the place of testator's domicile, wheresoever the judicial inquiry may be made as to its meaning, and there is nothing in the Va. Code of 1860, ch. 110, § 4, amended by the acts of 1865-66, p. 166 (Code 1887, § 2270), indicating an intention to abrogate or change it. *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67; *Bible Society v. Pendleton*, 7 W. Va. 79.

Proceeds from Sale of Realty.—For example, where a party domiciled in Virginia conveys by deed land situated in Pennsylvania to a trustee to be sold and the proceeds of the sale after deducting expenses of trust to be held by him subject to such disposition as the grantor may direct by deed or other writing, and the grantor afterwards makes a will giving such proceeds to various charitable institutions, the will is to be governed by the law of Virginia, the domicile of testatrix, and not by the laws of the place where the land was situated. *Bible Society v. Pendleton*, 7 W. Va. 79.

C. DESCENT AND DISTRIBUTION.

Distribution of Personal Estate.—The laws of the state in which the domicile

of a decedent is at the time of his death and not those of the state where the property is situated control and govern the distribution of his personal estate, although he may die in another state. *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596; *Dickinson v. Hoomes*, 8 Gratt. 353.

Liability of Heirs to Contribute to Payment of Ancestor's Debts.—Where heirs, in Virginia, have received their shares of a decedent's estate, under the laws of Louisiana, where he died, their right to hold and enjoy the same, and their liability to contribute to the payment of debts must be governed by the laws of that state. *DeEnde v. Wilkinson*, 2 Pat. & H. 663.

If children in Virginia inherit from an ancestor lands in Kentucky, the laws of which state subject lands descended to the payment of the ancestor's debts, a court of equity in Virginia may compel the children of such ancestor, residing within its jurisdiction to account for any lands in Kentucky descended to them as heirs, as a trust subject to the payment of the ancestor's debts. *Dickinson v. Hoomes*, 8 Gratt. 353.

Liability of Distributees for Debts of Intestate.—If a debtor in Virginia moves to another state and dies, and his estate is diminished and distributed according to the laws of the state wherein he died, his distributees who reside in Virginia are responsible here for the debts of their intestate to the amount of the assets they received. *Hairston v. Medley*, 1 Gratt. 96.

X. Railroads.

"A railroad extending through two or more states, and incorporated by the laws of each, is not a joint corporation of the two states, but a separate corporation in each state, subject only to the laws of the state within the respective jurisdictions, however those laws may conflict as to the operation of the road. 1 Wood's R. R. Law, p.

33. This is the recognized doctrine of many courts of the highest authority, especially the supreme court of the United States." *Atwood v. Shenandoah V. R. Co.*, 85 Va. 966, 9 S. E. 748.

XI. Torts.

If a right to sue or a public duty is established by the statute of a foreign state there is no reason why an action founded on the violation of this duty or to establish this right may not be enforced by the courts of any other state. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 974, 14 S. E. 838; *Chesapeake, etc., R. Co. v. American Ex. Bank*, 92 Va. 495, 23 S. E. 935. For example, when an action for death by wrongful act is given by a statute of one state, this right of action will be enforced by the courts of another state. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 974, 14 S. E. 838. Again, the violation of a statute of the United States which amounts to a civil injury to a plaintiff may be made by him the basis of an action for negligence in a state court. *Chesapeake, etc., R. Co. v. American Ex. Bank*, 92 Va. 495, 23 S. E. 935.

Where plaintiff sued a railroad company in Virginia, where it was found, for the negligent killing his intestate in West Virginia, it was held, that suit was properly brought, the recovery to be according to the laws of West Virginia, such laws not being inconsistent with the laws or policy of Virginia; this being so, notwithstanding the right to sue for such an injury is statutory. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

But if the statute of West Virginia giving the right to sue in a case like the above mentioned, were a penal statute, an action under it could not be maintained in this state. It is otherwise, as the statute is not penal but compensatory. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838. See post, "Penal Statutes," XII, B.

XII. Criminal Laws and Penal Statutes.

A. CRIMES.

No Extraterritorial Jurisdiction Over Crimes.—"The weight of authority sustains the view that the states are separate and independent; that, in the administration of criminal law, they are sovereign, and, in the respective jurisdictions and the laws which regulate their internal police, they are as foreign to each other as each state is to foreign governments." *Strouther v. Com.*, 92 Va. 789, 22 S. E. 852. But see *Com. v. Gaines*, 2 Va. Cas. 172. See the titles CRIMINAL LAW; JURISDICTION.

Larceny.—It has accordingly been held that one who steals property at a place beyond the jurisdiction of this state, and brings the same into the state, cannot be lawfully convicted of the larceny in this state. *Strouther v. Com.*, 92 Va. 789, 22 S. E. 852. *Harrison, J.*, in delivering the opinion of the court in this case said: "The case of *Com. v. Gaines*, 2 Va. Cas., p. 172, is also relied on as a precedent to support this conviction. That case turned on the construction of a statute which disappeared from our laws in 1819, and, it may be fairly presumed, was repealed because the legislature preferred that the rule in Virginia should continue as at common law. There being no statute in this state, and no decision of this court to which we can look for an answer to the question here raised, we must turn to the common law for the rule that is to govern us. It has been a settled principle of the common law, from an early day, in England, that where property is stolen in one county, and the thief has been found, with the stolen property in his possession, in another county, he may be tried in either. This practice prevailed notwithstanding the general rule that every prosecution for a criminal cause must be

in the county where the crime was committed. The exception to the general rule grew out of a fiction of the law, that, where property has been feloniously taken, every act of removal or change of possession by the thief constituted a new taking and asportation; and, as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession. There is no principle, in respect to larceny, better settled than this, and it has received repeated sanction in this state. *Cousins's Case*, 2 Leigh 709. This rule of the common law, however, was never extended farther than to counties. Where goods were stolen in one country and brought by the thief into another country, the latter country, by the English common law, has no jurisdiction." See the title LARCENY.

Jurisdiction of General Court Over Extraterritorial Offenses.

Under Former Statute.—By the first clause of the seventh section of the act, 1 Rev. Code, 1792, ch. 136, which has since been repealed all treasons, misprisions, etc., and other offenses against the commonwealth, except piracies and felonies on the high seas, though committed beyond the territorial limits of the commonwealth, were indictable and punishable in the general court; the words "in any place out of the jurisdiction of the courts of common law of this commonwealth," meaning a place out of the commonwealth. *Com. v. Gaines*, 2 Va. Cas. 172.

The second clause of the same section by the words, "and all felonies committed by citizen against citizen in any such place," referred to such place as was spoken of in the first clause, and therefore meant felonies committed by citizen against citizen, in any place out of the commonwealth, except on the high seas. *Com. v. Gaines*, 2 Va. Cas. 172.

Therefore, if a citizen of Virginia

stole a horse from another citizen in the District of Columbia, he might under said law, have been indicted, tried, convicted and sentenced in the general court. *Com. v. Gaines*, 2 Va. Cas. 172.

The statute under which *Com. v. Gaines*, was decided has been repealed. See *Strouther v. Com.*, 92 Va. 789, 22 S. E. 852.

Where a blow given in one state is followed by death in another, there can be no prosecution in the state in which the blow was given. *Com. v. Linton*, 2 Va. Cas. 205. See the title HOMICIDE.

Excessive Charge by Ferryman Acting under Ohio Franchise.—The state of Ohio has the right to establish ferries on the Ohio side of the Ohio river and to fix their charges for ferryage over that river from Ohio to West Virginia. Therefore West Virginia can not punish one who acts under a ferry franchise given by the state of Ohio to operate a ferry from its side of the Ohio river over that river, for charging one coming from Ohio more than is allowed by West Virginia law for ferryage over that river. *State v. Faudre*, 54 W. Va. 122, 46 S. E. 269. See the titles FERRIES; NAVIGABLE WATERS.

B. PENAL STATUTES.

The courts of one state will not enforce the penal laws of another state. *Stevens v. Brown*, 20 W. Va. 451; *Warder v. Arell*, 2 Wash. 282, 1 Am. Dec. 488; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838; *Chesapeake, etc., R. Co. v. American Ex. Bank*, 92 Va. 495, 23 S. E. 935.

The penal laws of a state are strictly local. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

So the penal laws of a foreign country can not be enforced in our courts. *Jackson v. Rose*, 2 Va. Cas. 34.

The same principle prevails with respect to the penal laws of congress, which can not be carried into effect in our state courts, they not having

any of the judicial power of the United States. *Jackson v. Rose*, 2 Va. Cas. 34.

A pecuniary penalty inflicted by act of congress on one who violates one of their revenue acts, although to be recovered by action of debt qui tam, can not be recovered in a state court; that penalty being a punishment for an offense against the United States, and the law which inflicts it, a penal law. *Jackson v. Rose*, 2 Va. Cas. 34.

XIII. Remedies.

A. IN GENERAL.

The law of the place where the suit is brought governs the remedy. This includes the mode of proceeding, the form of the judgment or decree, and the modes of carrying them into execution. *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587; *Urton v. Hunter*, 2 W. Va. 83; *Bowman v. Miller*, 25 Gratt. 331; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Jones v. Hook*, 2 Rand. 303.

Thus in respect to the remedy upon valid foreign contracts sought to be enforced in a domestic tribunal, the law of the forum prevails. *Young v. Hart*, 101 Va. 480, 44 S. E. 703; *Jones v. Hook*, 2 Rand. 303.

B. REMEDY TO ENFORCE INDIVIDUAL LIABILITY OF STOCKHOLDERS ESTABLISHED BY STATUTE.

Where the statute law of a state under which a corporation is created not only imposes on the stockholders an individual liability but also prescribes the remedy whereby the same must be enforced, the courts of another state, being unable to ascertain and determine the extent of this individual liability, will refuse to administer such remedy. In cases in which such liability is enforced in another state the statute declaring the liability either prescribes no remedy or leaves the creditor to select such common-law remedies as may be in use within the

jurisdiction in which suit is brought. *Nimick v. Iron Works*, 25 W. Va. 184.

C. EVIDENCE.

Questions relating to evidence being a part of the remedy are to be governed by the *lex fori* and not by the *lex loci contractus*. *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98; *Fant v. Miller*, 17 Gratt. 47; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Lambert v. Jones*, 2 Pat. & H. 144.

Foreign Revenue Law Making Unstamped Documents Inadmissible in Evidence.—"Mr. Robinson, in his new work on Practice, vol. 1, p. 319 and 271, lays down the correct rule, and refers to authority in support of it, 'that although a stamp be required by the revenue laws of a foreign state before a document can be received in evidence there, such document may, nevertheless be admitted as evidence without the stamp in the country wherein the suit is brought.'" *Lambert v. Jones*, 2 Pat. & H. 144.

Thus, though a stamp may be required by the revenue laws of Maryland, on the endorsement of an overdue note, before the endorsement can be given in evidence in a Maryland court, yet such endorsement, though made in Maryland, and unstamped, may, nevertheless, be given in evidence in the courts of Virginia; for the stamp law of Maryland is a local law, and can furnish no rule of evidence for the courts of this state. *Lambert v. Jones*, 2 Pat. & H. 144. In delivering the opinion of the court in this case Field, J., said: "In the language of Chief Justice Denman, in *Brown v. Thornton*, 6 Adol. & El. 185, 33 Eng. C. L. R. 47, I will say, 'we can not here adopt a rule of evidence from a foreign court.'"

A copy of a grant for land in West Virginia, certified according to the laws then in force, by the register of the land office of the commonwealth of Virginia, before the division of the

state of Virginia and the formation of the state of West Virginia, should go to the jury as evidence of title without any other authentication, and is as valid and effective in West Virginia since its formation as before, the laws of Virginia having been continued in force here, unaffected by the division of the state of Virginia, where they are not repugnant to the constitution of this state. *Ott v. McHenry*, 2 W. Va. 73.

D. EXEMPTIONS.

Exemption laws pertain to the remedy and depend upon the law of the forum and not upon the *lex loci* for their enforcement. *Stevens v. Brown*, 20 W. Va. 451. See also, *Mahany v. Kephart*, 15 W. Va. 609.

In so far as *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450, hold that the exemption laws of another state have no extra-territorial force and will not be enforced by the courts of this state, they are reaffirmed in *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300.

E. STATUTE OF LIMITATIONS.

The statute of limitations being considered as part of the remedy is always to be controlled by the *lex fori* and not by the *lex loci contractus*. *Urton v. Hunter*, 2 W. Va. 83; *Johnson v. Anderson*, 76 Va. 766; *Jones v. Hook*, 2 Rand. 303.

Thus in an action brought in Virginia, on a judgment obtained in North Carolina, the act of limitations of North Carolina can not be pleaded in bar, but the law of Virginia must prevail. *Jones v. Hook*, 2 Rand. 303.

F. EFFECT OF WRIT OF ERROR WITHOUT A SUPERSEDEAS.

Under article IV, § 1, of the constitution of the United States, and the act of Congress of May 26, 1790, a writ of error, not operating as a supersedeas, from the supreme appellate court of Texas to a judgment of a district court of that state, will be regarded as having the same effect in

Virginia as in Texas. *Piedmont, etc., Ins. Co. v. Ray*, 75 Va. 821.

In such a case, an action may be maintained upon the judgment in Virginia, notwithstanding the pendency of appellate proceedings in Texas, but the Virginia court may order that no execution shall be issued on a judgment obtained in such action, provided the defendant give bond and security conditioned to satisfy the judgment and pay all damages, costs and fees, etc., in case the writ of error pending

in Texas should be determined adversely to the defendant. *Piedmont, etc., Ins. Co. v. Ray*, 75 Va. 821.

The laws of Texas were not pleaded nor in evidence in this case, but it was held, that in the absence of proof of a difference between the law of that state and this, it would be taken that the law of that state, as it affected the question of the effect of a writ of error without a supersedeas, was the same as in this state. *Piedmont, etc., Ins. Co. v. Ray*, 75 Va. 821.

Confrontation.

See the title CONSTITUTIONAL LAW and references given.

CONFUSION OF GOODS.

Statement of General Rule.—If goods belonging to a party are by him so intermixed with those of another that the goods can not be separated or distinguished from those of such other, they become the property of such other to the extent of his claim against them. This is what is denominated a confusion of goods. *Brakeley v. Tuttle*, 3 W. Va. 86.

Testator's and Executor's Goods.—A brickmaster, having a parcel of bricks on hand, goes abroad, having constituted his wife his agent, and especially directed her to resume and prosecute his brickmaking business; she commences it accordingly, during his life, but he dies abroad before the bricks she had begun are finished, and she completes them after his death; she qualifies as executrix of her husband's will; and, without returning any inventory of his estate, sells the bricks he left on hand, and those she made, without discrimination. Held, this was not a confusion of the testator's goods with the executrix; for the bricks begun by her before and completed after her husband's death, as well as those he left ready made on hand, were all properly assets of his estate, and to be ac-

counted for as such; and all the expenses she incurred in the brickmaking business, whether incurred during his life or after his death, were proper charges against his estate. *Newton v. Poole*, 12 Leigh 112. See generally, the title EXECUTORS AND ADMINISTRATORS.

Effect of Confusion.—If hides and leather belonging to a party are by him so intermixed in his tannery with those of another, that they can not be separated or distinguished from those of such other, they become the property of such other to the extent of any claim he may have for a definite or certain number or quantity of hides and leather. *Brakeley v. Tuttle*, 3 W. Va. 86.

Burden of Proof—Homestead Exemption.—Under the constitution and laws of Virginia, not allowing property to be claimed as exempt for debts contracted for the purchase price of such property or any part thereof, it was held, that where a large portion of goods claimed as exempt has not been paid for, and are so mingled with those that have been, as to put it out of the power of the vendors to distinguish between the two, the onus is on the per-

son claiming the exemption, to show which has been paid for; and he failing to do this, they will all be treated as not having been paid for, as far as the homestead deed is concerned, and therefore not exempt under the law. *Rose v. Sharpless*, 33 Gratt. 153. See generally, the title **HOMESTEAD EXEMPTIONS**.

Fiduciaries — Duty of Trustees.—Where an assignment or conveyance is made by an insolvent firm to a trustee of the assets of the firm for the payment of the claims of creditors, it is the duty of such trustee to keep the property and fund thus intrusted to him separate and distinct from his individual funds. He should when it can be done without inconvenience deposit the money in bank or in some like place for safekeeping and it should be deposited in a separate account in his name as trustee or assignee, so that the

fund may at all times be capable of being traced and identified, and the true state of the account be capable of ready ascertainment. When the trustee violates this duty to the injury or great risk of injury, to those who may be ultimately entitled to the fund the court may and should appoint a special receiver thereof and cause him to duly administer the same under its directions. *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. 735. See generally, the title **TRUSTS AND TRUSTEES**.

Rights of Creditors.—Where a wife allows her separate estate to be undistinguishably mixed with her husband's property, hers is lost to her as separate estate, as regards the husband's creditors. *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 574. See generally, the title **SEPARATE ESTATE OF MARRIED WOMEN**.

Connecting Carriers.

See the title **CARRIERS**, vol. 2, p. 671.

CONSANGUINITY.—See **AFFINITY**, vol. 1, p. 217. And see the title **DESCENT AND DISTRIBUTION**.

CONSECUTIVE.—In *Gorrell v. Bier*, 15 W. Va. 321, it is said: "The defendant in error has not been elected to two consecutive terms, a period of two years having elapsed since the termination of his full term before his second election." See generally, the title **PUBLIC OFFICERS**.

Consent of Parties.

See the titles **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 44; **CHANGE OF VENUE**, vol. 2, p. 780; **CONSOLIDATION OF ACTIONS**; **DISMISSAL, DISCONTINUANCE AND NONSUIT**; **JURISDICTION**; **RAPE**; **REFERENCE**; **REMOVAL OF CAUSES**.

Conservator of the Peace.

As to consent decrees, see the title **JUDGMENTS AND DECREES**. As to whether railroad conductors are, see the title **CARRIERS**, vol. 2, p. 671. As to policemen, see the title **MUNICIPAL CORPORATIONS**. See also, the titles **JUSTICES OF THE PEACE**; **SHERIFFS AND CONSTABLES**.

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See the titles ASSIGNMENTS, vol. 1, p. 767; ASSUMPSIT, vol. 2, p. 1; BILLS, NOTES AND CHECKS, vol. 2, p. 401; CONTRACTS; DEEDS; FRAUDULENT AND VOLUNTARY CONVEYANCES; MORTGAGES; RELEASE; RESCISSION, CANCELLATION AND REFORMATION; SPECIFIC PERFORMANCE.

Consignor and Consignee.

See the titles CARRIERS, vol. 2, p. 671; FACTORS AND COMMISSION MERCHANTS; PLEDGE AND COLLATERAL SECURITY; SHIPS AND SHIPPING.

CONSISTING.—See *Minor v. Dabney*, 3 Rand. 207. And see the title WILLS.

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CROSS REFERENCES.

See the titles ACTIONS, vol. 1, p. 122; SEPARATE TRIALS.

I. Discretion of Court.

See post, "Reversible Error," X, A. The consolidation of actions is not a matter of strict right, but it is addressed to the sound discretion of the court. *McRae v. Boast*, 3 Rand. 481; *Wyatt v. Thompson*, 10 W. Va. 645; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Beach v. Woodyard*, 5 W. Va. 231.

A court of equity may, in its discretion, order causes pending therein to be consolidated and heard together. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; *Hill v. Postley*, 90 Va. 200, 17 S. E. 946.

II. Consolidation in Equity.

A. FORMER RULE.

In *Claiborne v. Gross*, 7 Leigh 331, Judge Carr, after reviewing the English cases, was of opinion that an order for the consolidation of causes in equity was improper.

In *Tavener v. Barrett*, 21 W. Va. 672, it is said, orders to consolidate causes in equity should rarely if ever be made. Citing opinion of Judge Carr in *Claiborne v. Gross*, 7 Leigh 339. Where it is proper, chancery causes should be heard together, but ought not except perhaps in a few special cases to be consolidated.

B. PRESENT RULE

But it is well settled now that the rule for the consolidation of suits is alike in equity and at law, and the matter is always addressed to the discretion of the court. *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 W. Va. 645, overruling *Claiborne v. Gross*, 7 Leigh 331; *Chapman v. Pittsburg*, etc., R. Co., 18 W. Va. 184; *Patterson v. Eakin*, 87 Va. 54, 12 S. E. 144, overruling *Claiborne v. Gross*, 7 Leigh 331; *Hill v. Postley*, 90 Va. 200, 17 S. E. 946; *Devries v. Johnston*, 27 Gratt. 805; *Barger v. Buckland*, 28 Gratt. 850.

Plea of Another Suit Pending.—

Where in a suit in equity a plea is presented of another suit in equity pending in the same court, between the same parties, concerning the same subject, it is not error to reject the plea, consolidate the causes, and proceed in them as in one cause. *Mosby v. Withers*, 80 Va. 82.

Partition suit and creditor's suit consolidated. *Smith v. Wortham*, 82 Va. 937, 1 S. E. 331.

Original and Cross Bill.—And in *Magill v. Manson*, 20 Gratt. 527, the complainant sued to have her bond to the defendant set aside as having been fraudulently obtained, and the defendant filed a cross bill to attach a debt due from a third person to the complainant, for payment of the bond. Held, the cases were properly heard together.

It is also within the discretion of the court whether it will postpone the original cause until a cross bill is ready so that both may be heard together. *McConnico v. Moseley*, 4 Call 360.

C. CONSENT OF PARTIES.

See post, "Identity of Parties," III, B.

Three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt, probably can not be consolidated without the consent of the plaintiffs. They have a right to bring them severally and recover several costs. *Barger v. Buckland*, 28 Gratt. 850, citing *Claiborne v. Gross*, 7 Leigh 331, and distinguishing *Stephenson v. Taverners*, 9 Gratt. 398.

And in *Barger v. Buckland*, 28 Gratt. 868, it is said by Moncure, P., the plaintiff in the several suits had a right to bring them severally and to recover several costs; and it is doubtful whether they could have been consolidated without their consent, citing *Claiborne v. Gross*, 7 Leigh 331.

The bill alleged that G. was seized of the several tracts specified in certain

deeds exhibited, and that the deed of trust covered all the land, but this seemed to be a mistake. The record states that the cause came on to be heard by consent, and an interlocutory decree was entered directing a sale of the land in the bill mentioned. At a subsequent day of the same term it was suggested that there was another suit pending in the same court by another plaintiff against G. and others, to subject the same land to sale; and by consent of parties the suits were amalgamated so far as to be heard together. And by like consent it was ordered that the decree for the sale of the land in the first suit should be considered as having been pronounced in both cases. A sale was made and the executor of S. became the purchaser, and there being no exception to the report, it was confirmed. Held, the consent of the parties merely cured any irregularities as to the time of bringing on the first cause for hearing, the amalgamating the two causes, and in making the decree as entered in the first cause, a decree in both cases without a formal entry in each case. The consent did not extend to the decree directing the sale of the land, or cure any error therein. *Buchanan v. Clark*, 10 Gratt. 164.

III. Identity of Parties, Subject Matter and Defenses.

A. IN GENERAL.

Where the parties are the same, and separate suits have been brought in equity upon matters which might have been united in one suit, and the defense is the same in all, a consolidation rule ought to be granted. But where the suits are by different plaintiffs proceeding against different funds in the hands of different defendants to satisfy separate and distinct liens, a consolidation is improper. *Wyatt v. Thompson*, 10 W. Va. 645; *Beach v. Woodyard*, 5 W. Va. 231; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Fisher v.*

Charleston, 17 W. Va. 644; *McConnico v. Moseley*, 4 Call 360; *Moorman v. Crockett*, 90 Va. 185, 17 S. E. 875; *Devries v. Johnston*, 27 Gratt. 805; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; *Mosby v. Withers*, 80 Va. 82.

B. IDENTITY OF PARTIES.

Where the parties are the same, and separate suits have been brought upon matters which might have been united in one suit, a consolidation rule ought to be granted. *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 W. Va. 645; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Eagles v. Hook*, 22 Gratt. 510; *Mosby v. Withers*, 80 Va. 82.

But where the suits are by different plaintiffs proceeding against different funds in the hands of different defendants to satisfy separate and distinct liens, consolidation is improper. *Wyatt v. Thompson*, 10 W. Va. 645; *Beach v. Woodyard*, 5 W. Va. 231.

Trustee and Executor.—Two suits against the same person, one against him as trustee, the other as executor, for claims payable out of the same fund, involving the settlement of the same transaction, and distribution of the same estate, the complainants to be affected pro tanto by the result of a suit for dower out of the same estate; held, properly heard together. "The two suits were claims against the same person—one against him as trustee, the other against him as executor—the interest of each complainant demanded out of the same fund, and their rights and liabilities involved the settlement of the same transaction and the distribution of the same estate. And, moreover, they were pro tanto to be affected by whatever was to be the final end of the *Mary Crockett* suit for dower out of the same estate in which they claimed their rights. It was a proper case for the consideration of the two causes." *Moorman v. Crockett*, 90 Va. 185, 17 S. E. 875.

Different Plaintiffs.—Although the suits, against an estate to enforce a vendor's lien, and by devisees to sell the property covered by the lien, and after paying the debts to distribute the proceeds, sought to be consolidated, are brought by different plaintiffs, yet if they are substantially against the same defendants and to a certain extent have a common object; i. e., the administration of the testator's estate, it is competent for the court to consolidate the suits. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

Necessity of Consent Where Plaintiffs Different.—In *Devries v. Johnston*, 27 Gratt. 805, an order was approved which consolidated three suits, by the same plaintiffs, against the same defendants, to subject the same land to the payment of their debts. In a subsequent case, however (*Barger v. Buckland*, 28 Gratt. 850), where separate suits were brought by different plaintiffs, against the same defendant, to subject his lands to the payment of the debts due the plaintiffs, respectively, this court said it was doubtful whether the causes could have been properly consolidated without the plaintiffs' consent, the court distinguishing the case from *Stephenson v. Taverners*, 9 Gratt. 398, which was a creditor's suit for the administration of assets.

C. IDENTITY OF SUBJECT MATTER.

In General.—Consolidation is properly ordered where there is a plea in the cause that another suit is pending in the same court, between the same parties, concerning the same subject. *Mosby v. Withers*, 80 Va. 82.

Suits between different parties claiming the same property may be heard together, to avoid decrees that might clash with each other. *McConnico v. Moseley*, 4 Call 360.

A suit by the beneficiary against the trustee may properly be consolidated with another suit by a legatee against

the same defendant as executor, where the rights of each plaintiff involved the settlement and distribution of the same estate. *Moorman v. Crockett*, 90 Va. 185, 17 S. E. 875.

Suits to Subject Land to Payment of Debts.—In *Devries v. Johnston*, 27 Gratt. 805, three suits were brought by the same plaintiffs against the same defendants to enforce payment of debts by attachment and sale of the debtor's land, the court ordered these suits to be consolidated and heard together. See also, *Stephenson v. Taverners*, 9 Gratt. 398; *Preston v. Aston*, 85 Va. 104, 7 S. E. 344.

Attachment Suit and Suit to Subject Land to Payment of Liens.—An attachment creditor has his suit referred to a commissioner to ascertain the real estate of the attachment debtor, and the liens against the same, without first making the known lien creditors and the trustee holding the legal title parties thereto. On the coming in of the commissioner's report the court consolidates such attachment suit with another suit, therein pending for the purpose of subjecting the debtor's real estate to the payment of the liens thereon, in which there had been no reference, and then, over the objection of the parties plaintiff and defendant to the latter suit, proceeds to render a final decree on such commissioner's report as to both causes. This is manifest error. *Wilson v. Carrico*, 46 W. Va. 466, 33 S. E. 237.

Suit to Subject Land to Satisfy Deed of Trust.—Several suits by different plaintiffs in the same court against the same debtor to subject the same tract of land to sale to satisfy a deed of trust, may be amalgamated so far as to be heard together. *Buchanan v. Clark*, 10 Gratt. 164.

Three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt, will be consolidated and heard

together. *Barger v. Buckland*, 28 Gratt. 851.

Bill to Impeach Conveyances.—In *Claiborne v. Gross*, 7 Leigh 331, where two creditors filed separate bills in chancery impeaching a conveyance of land made by the debtor, as fraudulent, and the chancellor on motion consolidated the causes, it was held by two judges, that the order of consolidation was improper.

But this decision has been virtually overruled in subsequent cases. *Patterson v. Eakin*, 87 Va. 54, 12 S. E. 144; *Wyatt v. Thompson*, 10 W. Va. 645.

Proceeding to Enforce Judgment Liens.—But where the suits are by different plaintiffs, proceeding against different funds of the defendant, to satisfy separate and distinct liens; and where, the judgment lien of the plaintiffs in one of the suits against the defendants was created long subsequent to the institution of the other creditor's suit, and subsequent to the report of the master ascertaining the liens and their privileges, and a decree confirming the same adjudicating the merits of the cause and enforcing the liens of such other creditors against the property of defendant elected by them for that purpose, it was not improper to refuse consolidation. *Beach v. Woodyard*, 5 W. Va. 231. The court said: "I think the case is different from those cases where creditors proceed against the estate of a deceased person, and there is a deficiency of assets. It is also different where the property is proceeded against by numerous creditors in separate suits. In such cases the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in such suits, so that only one account of the estate may be necessary."

Administration of Estate.—Where several suits are brought by different creditors against the same estate, the court will order the proceedings in all

the suits but one to be stayed, and will require the several parties to come in under the decree in that suit, so that only one account of the estate may be necessary. And the same rule applies in all cases where several suits are brought for the administration of the same state, no matter by whom brought. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144, citing *Stephenson v. Taverners*, 9 Gratt. 398.

Where the object, or at least the main object, of two suits is to subject the realty of a decedent to sale to pay off and satisfy his indebtedness, the court may properly direct a consolidation to prevent the estate from being consumed in unnecessary costs. "It is true, the first suit prayed for the sale of so much thereof as would pay off the liens existing against the same, and, if the surplus left was susceptible of partition, that the same be partitioned among the heirs at law of said Patrick; but, if not susceptible of partition, that it be sold, and the proceeds divided among said heirs. The suit brought by Daniel McKittrick prayed that all proper accounts be taken, and that the real estate of said Patrick be subjected to sale for the payment of his just debts and liabilities, and especially the debts claimed against said estate by the plaintiff. This plaintiff might with propriety have come into the first suit by petition, and made himself a party, and presented his claims in that suit; and, in my opinion, the court committed no error in requiring the said causes to be consolidated and heard together." *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303.

Although a general bill may be pending to administer all the assets of an insolvent debtor, who has made an assignment of his effects, yet an individual creditor, holding a specific lien on part of the property of such debtor, may, before the maturity of the general bill to which he is made a party, but not yet served, file his separate bill

for the enforcement of his specific lien, and the latter bill may be treated as a petition in the general suit, or, which is more common in Virginia, the two causes may be heard together and the rights of all parties settled and adjudicated. *Bristow v. Home Building Co.*, 91 Va. 18, 20 S. E. 946, 947.

Vendor and Purchaser.—The plaintiff files his bill to have his title to certain real estate established and to obtain the legal title from the trustee. Also in the same court a bill is filed against the plaintiff, claiming as assignee of the vendor, the purchase money of the land, which is still unpaid. The causes were properly heard together. *Mayo v. Carrington*, 19 Gratt. 74.

D. IDENTITY OF DEFENSES.

Where separate suits have been brought in equity which might have been united in one suit, and the defense is the same in all, a consolidation would be proper. *Wyatt v. Thompson*, 10 W. Va. 645; *Beach v. Woodyard*, 5 W. Va. 231; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Fisher v. Charleston*, 17 W. Va. 644; *Eagles v. Hook*, 22 Gratt. 510.

But where the parties are different and different defenses might have been made, it is error to consolidate the causes. *Wyatt v. Thompson*, 10 W. Va. 645; *Fisher v. Charleston*, 17 W. Va. 628.

When separate suits are brought upon notes or contracts made at the same time, and which might have been united in one action, and when the defense is the same in all, a consolidation rule ought to be granted. "It would generally be an important fact affecting the propriety of consolidating suits, that the two notes sued on in the several suits were given at different times. As this would show, that originating in different transactions, the evidence, which would probably be brought in each case, would be entirely different, and it might lead to

serious embarrassment in the trial of the cases, even though the defense might be of the same character in each case. But if the foundation of the suit or proceeding were judgments, their being of different dates would be of far less importance as the foundation of neither judgment would be shown in evidence, and therefore there would be no probable embarrassment arising from consolidating them, if the defenses in each were the same." *Thompson v. Shepherd*, 9 Johnson (N. Y.) 262, approved in *Fisher v. Charleston*, 17 W. Va. 644; *McRae v. Boast*, 3 Rand. 481.

Payment.—Where the plaintiff brings two actions against the same debtor, who pleads payment to both actions, and the parties agree that both shall be tried together, such agreement is in effect a consolidation of the actions. *Eagles v. Hook*, 22 Gratt. 510. See *Fisher v. Charleston*, 17 W. Va. 628.

Mandamus to Enforce Payment of Judgment.—When several judgments have been obtained against a city by the same plaintiff, who at or about the same time institutes against it several mandamus proceedings to enforce the payment of such judgments, and upon a rule to show cause why they should not be consolidated, it appears that there is but one and the same defense in each of the cases, an order should be made to consolidate them, though the judgments were rendered at different times; and but one set of costs should be taxed, whether incurred before or after the order of consolidation, but if it appears that the plaintiff had reason to believe, and did believe, that there would be different defenses in the several cases, the court should direct that the order of consolidation should not affect costs previously incurred, otherwise it should not so direct. *Fisher v. Charleston*, 17 W. Va. 628.

Judgments of Different Dates.—Where several proceedings by man-

damus are instituted at or about the same time to enforce the payment of judgments, if one of the proceedings is to enforce a judgment of a different date from the rest, and the defense to it is entirely different, a motion for a rule that these causes be consolidated must be refused. But the fact that one of the judgments was rendered at a different time is immaterial, provided that there is but one and the same defense in each of the cases. *Fisher v. Charleston*, 17 W. Va. 628.

IV. How Consolidation Procured.

A. CONSOLIDATION ON COURT'S OWN MOTION.

The two actions being of the same nature, and between the same parties, it was a proper case for a consolidation of the actions, and the court might properly, *ex mero motu*, have ordered the cases to be consolidated and heard together. *Eagles v. Hook*, 22 Gratt. 511.

B. BY AGREEMENT OF PARTIES.

An agreement of the parties that the causes shall be heard together, is in effect a consolidation of the two actions. *Eagles v. Hook*, 22 Gratt. 511.

C. UPON SUGGESTION OF PARTIES.

Where the proper showing is made, the court, upon the suggestion of parties, will consolidate the causes and proceed in them as one cause. *Mosby v. Withers*, 80 Va. 82.

V. How Brought to Attention of Court.

A. PLEA.

The consolidation of actions is not a matter of strict right, nor the proper subject of a plea, either in bar or in abatement; but is addressed to the discretion of the court. *McRae v. Boast*, 3 Rand. 481. See the title ABATE-

MENT, REVIVAL AND SURVIVAL, vol. 1, p. 19.

Plea of Another Suit.—But in *Mosby v. Withers*, 80 Va. 82, it was brought to the attention of the court by a plea of another suit pending.

B. RULE TO SHOW CAUSE.

The proper mode of procuring a consolidation of causes is by motion for a rule to show cause why the causes should not be consolidated. *McRae v. Boast*, 3 Rand. 481; *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 W. Va. 645; *Fisher v. Charleston*, 17 W. Va. 628; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303.

VI. Stay of Proceedings.

See the title APPEAL AND ERROR, vol. 1, p. 418.

If several suits are pending by different creditors, the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in that suit, so that only one account of the estate may be necessary. *Stephenson v. Taverners*, 9 Gratt. 398; *Beach v. Woodyard*, 5 W. Va. 233; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

VII. Formal Order.

While it is the most regular course to enter a formal order of consolidation, the failure to make that entry is not such an error as can be taken advantage of in an appellate court. *Eagles v. Hook*, 22 Gratt. 511.

VIII. Service of Process.

See the title SERVICE OF PROCESS.

There are three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt, and the debtor, the trustee and trust creditor are made defendants in each of them. The process is properly served on all the parties

in two of the cases, and on the trustee and creditor in the third. The court made an order that the causes should be consolidated and heard together, and that is done; and the debtor appears and makes defense in all the causes without objecting that the process was not properly served in the third case. He thereby waived the objection on that ground, if he had any. *Barger v. Buckland*, 28 Gratt. 851.

IX. Taxation of Costs.

See the title **COSTS**.

In *Barger v. Buckland*, 28 Gratt. 850, where three suits by judgment creditors were brought to subject the land of their debtor which he had conveyed in trust to secure a debt, and the causes were ordered to be consolidated and heard together, each plaintiff was held entitled to his separate costs.

When several judgments have been obtained against a city by the same plaintiff, who at or about the same time institutes against it several mandamus proceedings to enforce the payments of such judgments, and upon a rule to show cause why they should not be consolidated, it appears that there is but one and the same defense in each of the cases, an order should be made to consolidate them, though

the judgments were rendered at different times; and but one set of costs should be taxed, whether incurred before or after the order of consolidation, but if it appears that the plaintiff had reason to believe, and did believe, that there would be different defenses in the several cases, the court should direct that the order of consolidation should not affect costs previously incurred, otherwise it should not so direct. *Fisher v. Charleston*, 17 W. Va. 628.

X. Error.

See the title **APPEAL AND ERROR**, vol. 1, p. 418.

A. REVERSIBLE ERROR.

Consolidation of causes is a matter of discretion with the court below, and will not be disturbed, unless it appears from the record that there was an abuse of discretion. *Hill v. Postley*, 90 Va. 200, 17 S. E. 946, citing *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; *McRae v. Boast*, 3 Rand. 481. See ante, "Discretion of Court," I.

B. OBJECTIONS IN APPELLATE COURT.

An objection can not be made for the first time in an appellate court to the consolidation of causes. *Eagles v. Hook*, 22 Gratt. 510.

Consolidation of Corporations.

See the title **CORPORATIONS** and references given.

Consolidation of Railroads.

See the title **RAILROADS**.

CONSPIRACY.

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As to boycotting, see the title BOYCOTT, ante, p. 612.

I. Definition.

A combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of confederates and giving effect to the purposes of the latter, whether of extortion or mischief. *Crump v. Com.*, 84 Va. 935, 6 S. E. 620. See post, "What Constitutes," II.

II. What Constitutes.

Guilty Knowledge — Necessary Element.—The guilty knowledge of the act done by conspirators is a necessary element of their guilt, without proof of which there can be no conviction. But it is not necessary to prove that this guilty knowledge was imparted to all of them at one and the same time, and by one and the same means. It is only necessary to show that each of the conspirators had this guilty knowledge, no matter how, when or where he acquired it. *Sands v. Com.*, 21 Gratt. 871.

Necessary to Show Meeting of Minds.—When two persons are indicted jointly for a conspiracy against another the jury can not find either party guilty of conspiracy as charged in the indictment, unless they believe

from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the indictment. *Jones v. Com.*, 31 Gratt. 836.

It was proved in *Crump v. Com.*, 84 Va. 946, 6 S. E. 620, that the conspirators who were members of a typographical union declared their set purpose and persistent effort to "crush" the plaintiffs, who were printers doing a large business in the city of Richmond, because they refused to make theirs a union office; that the minions of the boycott committee dogged the firm in all their transactions; followed their delivery wagons; secured the names of their patrons; and used every means, short of actual physical force, to compel them to cease dealing with plaintiffs, thereby causing them to lose one hundred and fifty to two hundred customers and ten thousand dollars of net profit. Here the crime of conspiracy was clearly established and the defendant properly convicted.

Number of Conspirators — Reversal of Judgment as to One.—To constitute a conspiracy it must be the act of at least two persons; so that, generally, if one of them be acquitted, such acquittal takes away the foundation of the guilt of the other, there may be

exceptions to this rule, however. In the case of *Jones v. Com.*, 31 Gratt. 836, two persons having been tried jointly for the crime of conspiracy and both found guilty, one of them applied for a new trial, which was overruled, and he obtained a writ of error. The other did not apply for a new trial, and there was a judgment against him. It was held, that judgment could be reversed as to the one who appealed, without reversing the judgment against the other.

The Unlawful Act.—There can be no conspiracy to do that which is lawful, although it be done maliciously and operates to injure another in person or property. *Porter v. Mack*, 50 W. Va. 584, 40 S. E. 459.

The unlawful act done which constitutes a conspiracy, may be some act of the confederation which it would be unlawful for them to attain, either singly, or which, if lawful singly, it would be dangerous to the public to be attained by the combination of individual means. *Crump v. Com.*, 84 Va. 927, 6 S. E. 620.

Every attempt by force, threat or intimidation, to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression; and any and every combination for such a purpose is an unlawful conspiracy. *Crump v. Com.*, 84 Va. 941, 6 S. E. 620.

A wanton, unprovoked interference by a combination of many with the business of another for the purpose of constraining that other to discharge faithful and long-tried servants, or to employ whom he does not wish or will to employ, will be restrained and punished by the criminal law, as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society. *Crump v. Com.*, 84 Va. 942, 6 S. E. 620.

At trial for criminal conspiracy an

instruction is proper that "if the jury believe from the evidence that defendant agreed with one or more to coerce B. to discharge, against B.'s will, certain of his employees, and to employ certain others whom B. did not wish to employ, that such agreement is unlawful; and that if in pursuance of such agreement defendant threatened any of B.'s customers, they (the defendant and others), would injure the business of such customers by intimidating their customers, and making them afraid to continue their patronage of the customers of B., then the jury must find the defendant guilty. *Crump v. Com.*, 84 Va. 927, 6 S. E. 620.

Overt Act.—Where parties have conspired to commit a crime, if they stop before its commission there is no felony. And if the alleged confederates were on the ground, full bent on executing the alleged conspiracy, yet, before an overt act was committed they were assaulted by the party designed against, they should not be held guilty of conspiracy, hence it is material who was the first aggressor, the conspirators or the injured party. *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885.

Presumption from Presence — Aiding and Abetting.—Four parties were jointly indicted in the circuit court of Cabell county under § 10, ch. 148, W. Va. Code, 1891, called the "Red Men's Act;" the indictment charging that they conspired together to inflict bodily injury on R. B. Yowell, and did, in pursuance of the conspiracy beat, wound, and greatly injure him. The plaintiff in this case was tried separately, convicted, and sentenced to the penitentiary for three years. He brought his case to the supreme court on appeal, where it was held, that a jury may find a combination and conspiracy from the fact that the parties were present, aiding and abetting in the commission of

the offense charged, if satisfied of such conspiracy beyond a reasonable doubt. The presumption there authorized is one of law, but not conclusive, and may be rebutted. *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885. See W. Va. Code, 1899, ch. 148, § 10.

False Pretences.—Under § 10, ch. 135, Acts, 1882, W. Va., known as the "Red Men's Act," providing that if any person in pursuance of a combination or conspiracy shall take and carry away any property not his own, he shall be guilty of a felony, an indictment for conspiracy, and the felonious taking and carrying away personal property is not sustained by proof that the property was obtained by false pretences, with the owner's consent, and without force or threats; the taking contemplated by statute is by physical force or against the owner's consent. *State v. Porter*, 25 W. Va. 685. In this case the facts were that parties, one of whom was the defendant, having seen a boy of eight years find two ten-dollar bills on the street, conspired to take it from him by false pretences, and succeeded in getting one bill from the boy on the street; and the other, with the consent of the child's father, after he had reached home, by claiming to have lost it and supporting this claim by testimony of coconspirators. See *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883. See also, *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885.

Constitutionality of Statute—Aiding and Abetting.—Under § 10, ch. 148, W. Va. Code, 1891, that provision of said section providing that if the alleged conspirators are present, aiding and abetting in the commission of the act, it shall be presumed that the act was done in pursuance of the conspiracy, is constitutional. *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885; W. Va. Code, 1899, ch. 148, § 10.

III. An Indictable Offense.

A conspiracy, or combination to injure a person in his trade or occupation, is indictable. *Crump v. Com.*, 84 Va. 934, 6 S. E. 620.

Conspiracy to Seduce.—At common law the offenses of adultery; fornication, and the like, could not be punished by our courts of law unless they were accompanied with other circumstances, which of themselves constitute a misdemeanor; such as the public commission of the act, or a conspiracy. Hence, a conspiracy to seduce and carry off a female over sixteen years of age is indictable, though the seduction and abduction be not indictable. *Anderson v. Com.*, 5 Rand. 627, 16 Am. Dec. 776. See generally, the title SEDUCTION.

IV. Indictment—Merger.

Merger.—Although the conspiracy is a complete offense by itself before it is carried into effect, yet if the act conspired to be done be a felony, and it is carried into effect, and the felony is committed, the conspiracy is merged in the felony, and the indictment should be for the felony, and not for the conspiracy. *Anthony v. Com.*, 88 Va. 850, 14 S. E. 834.

Unnecessary to Allege the Means Employed.—It is not necessary that the particular means employed to carry out the conspiracy be alleged in the declaration, for the means are matters of evidence to prove the charge and not the crime itself. *Crump v. Com.*, 84 Va. 927, 6 S. E. 620.

V. Parties.

A. INDICTMENT AS ACCESSORY.

A conspirator who is absent at the time the felony is committed, taking no part in the actual commission of the offense, is an accessory before the fact and can only be indicted and punished as such. *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

Where a person is indicted jointly with others as principal in the commission of a robbery, it is error to instruct the jury that in case they believe from the evidence beyond a reasonable doubt that the defendant on trial conspired with his codefendant or any one of them to commit the offense, they should find him guilty, although he may not have been present at the time the robbery was committed; the court said: "The instruction complained of is given upon the theory that the truth against the defendant is to sustain the charge against him as an accessory and not principal, and he not being indicted as an accessory but as principal, the instruction is wrong." *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

B. RIGHT TO SEPARATE TRIAL.

Where two persons have been indicted jointly for a misdemeanor, they can not claim any right to be tried separately. *Com. v. Lewis*, 25 Gratt. 938. In this case it was held, that the statute which, changing the common law, allowed persons in a joint indictment for felony at their election to have a joint or several trial, did not apply to misdemeanors. Va. Code, 1873, p. 1247, §§ 14, 15; Va. Code, 1887, § 4029.

In *Curran's Case*, 7 Gratt. 619, 627, it was held, that this statutory right of election in cases of felony is subject to the right of the commonwealth, to try the accused severally, notwithstanding they may elect to be tried jointly. See *Crump v. Com.*, 84 Va. 933, 6 S. E. 620.

When two persons are indicted jointly for a conspiracy to prosecute another for a larceny, neither of them is entitled to a separate trial. *Jones v. Com.*, 31 Gratt. 836.

C. NUMBER OF CONSPIRATORS.

See ante, "What Constitutes," II.

D. EACH CONSPIRATOR THE AGENT OF THE OTHER.

Each conspirator is the criminal

agent of every other, and when he accedes to the conspiracy he sanctions what may have been previously done or said by the others, or any of them, in furtherance of the common object. *Sands v. Com.*, 21 Gratt. 895; *Danville Bank v. Waddill*, 31 Gratt. 469; *Williamson v. Com.*, 4 Gratt. 547; *Brown's Case*, 86 Va. 935, 11 S. E. 799. See post, "Acts and Declarations of Conspirator," VI, A.

VI. Evidence.

A. ACTS AND DECLARATIONS OF CONSPIRATOR.

Upon an indictment against a person for a conspiracy to commit a felony, or for the felony so actually committed, the acts and declarations of another of the conspirators, though not in the presence of the prisoner or afterwards reported to him, are evidence against him; and this though the acts and declarations were done or made before the prisoner became a party to the conspiracy, if done or said in furtherance of the common object. *Sands v. Com.*, 21 Gratt. 871; *Martin v. Com.*, 2 Leigh 745; *Danville Bank v. Waddill*, 31 Gratt. 484. See also, *Claytor v. Anthony*, 6 Rand. 285; *Ellis v. Dempsey*, 4 W. Va. 126.

Such admissibility is not confined to a case in which the prosecution is for the conspiracy itself, but also extends to a case in which the prosecution is for the crime committed in pursuance of the conspiracy. And it does not matter whether the prosecution be jointly against all, or severally against each, or one of the perpetrators. *Sands v. Com.*, 21 Gratt. 895.

Of course a declaration of a conspiracy may be admissible against him though not admissible against his co-conspirators, as, for an instance, tending to show his guilty knowledge. *Sands v. Com.*, 21 Gratt. 899.

The prior acts, declarations, and threats of the accused, even though not a part of the *res gestæ*, are admis-

sible in evidence against him, when they legitimately tend to establish motive and intention to do the killing, and a common purpose and design on the part of himself and those jointly indicted with him to commit the act. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230. See generally, the titles CONFESSIONS, ante, p. 79; DECLARATIONS AND ADMISSIONS.

Cross-Examination.—When the declarations of coconspirators have been proven, by a witness not connected with the conspiracy, he may be cross-examined by defendant, as to defendant's statements during the transaction, as part of the *res gestæ*. *Carskadon v. Williams*, 7 W. Va. 2.

Conspiracy Must Be Prima Facie Established.—Before the declaration of a coconspirator made in the absence of the prisoner can be given in evidence against the accused, there must be proof sufficient in the opinion of the court to establish *prima facie*, the fact of conspiracy between the parties; the question of existence of such conspiracy being ultimately for the jury. *State v. Burnett*, 47 W. Va. 731, 35 S. E. 986; *State v. Cain*, 20 W. Va. 680; *Williamson v. Com.*, 4 Gratt. 547; *Brown's Case*, 86 Va. 935, 11 S. E. 799; *Danville Bank v. Waddill*, 31 Gratt. 469. See also, *Claytor v. Anthony*, 6 Rand. 285.

Declarations of one or more conspirators can not be proven to affect his or their fellow, until the fact of conspiracy between the parties has been first shown. *Carskadon v. Williams*, 7 W. Va. 2.

But if such evidence of the declaration of an alleged coconspirator be admitted without such foundation being laid, yet the judgment will not be reversed for this reason, if the facts proved, or evidence certified, show that *prima facie* the fact of conspiracy had been established. *State v. Cain*, 20 W. Va. 680. See also, *Hill's Case*, 2 Gratt. 595.

Although evidence of the acts and declarations of an alleged coconspirator be admitted without a foundation therefor having been laid, the judgment will not be reversed for that reason if the evidence show that *prima facie* the fact of conspiracy has been established. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230.

In considering the admissibility of the declarations of an alleged coconspirator made in absence of the prisoner, such declarations so made will not be regarded as evidence of the fact of conspiracy, unless they so accompany the execution of the common criminal intent, as to become a part of the *res gestæ*, or in themselves tend to further the execution of the common criminal intent. *State v. Cain*, 20 W. Va. 694. In this case the only evidence introduced to lay foundation for the declaration was, that the prisoner and the alleged coconspirator were seen together on the day of the homicide, in the town of Ripley and later riding rapidly down the street together. Of course these facts do not show *prima facie* a conspiracy, and it was error for the court to admit the testimony. If, however, there was proof to the jury that would convince the court, that a *prima facie* conspiracy had been formed between the parties, the evidence would have been admissible. See also, *Hill's Case*, 2 Gratt. 595; *Danville Bank v. Waddill*, 31 Gratt. 469.

It is said by the court in *Danville Bank v. Waddill*, 31 Gratt. 469, quoting from an English author: "When two or more persons conspire together to commit any offense or actionable wrong, everything said, done, or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done or written by every one, and is a relevant fact as against each of them; but relations of measures taken in the execution or furtherance of any such common purpose are not relevant as

such against any conspirators, except those who make them, or are present when they are made. Evidence of acts relevant under this article may not be given until the judge is satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy."

Proof of conspiracy or the existence of a common design on the part of two or more persons to commit a crime for which they are jointly indicted may be extracted from the circumstances connected with the transaction which forms the subject of the accusation; and, when they are such as fairly tend to prove such conspiracy or common design, they constitute a sufficient foundation for the admission of the acts and declarations of each of the parties as evidence against the others. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230. •

In Furtherance of the Object of the Conspiracy.—In order that such evidence may be admissible, it must be shown that the person whose acts or declarations are sought to be made evidence, was, at the time of making or doing them, himself a conspirator; and also that they were done or said in furtherance of the object of the conspiracy. *Sands v. Com.*, 21 Gratt. 871. See also, *State v. Burnett*, 47 W. Va. 731, 35 S. E. 983; *Cain's Case*, 20 W. Va. 694; *Brown's Case*, 86 Va. 935, 11 S. E. 799; *Martin's Case*, 2 Leigh 745.

Subsequent Statements of Coconspirator.—Though conspiracy has been proved, statements of a conspirator, made after the object of the conspiracy is accomplished, are inadmissible to criminate his coconspirator. *Oliver v. Com.*, 77 Va. 590; *Hunter's Case*, 7 Gratt. 641; *Jones' Case*, 31 Gratt. 836; *State v. Godwin*, 32 W. Va. 177, 9 S. E. 85.

Confessions or admissions of an accomplice in a felony, made after the commission and completion of the offense, are not competent evidence

against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved; *Field, J.*, in his opinion saying: "The confessions or declarations of an accomplice or confidant made when they were in the act of committing an offense, or when in its way of commission, can be received as evidence against all parties to the conspiracy. But after the commission of the act is complete and over, declarations subsequently made by an accomplice are good evidence against him only, unless made in the presence of his partners in the crime." *Hunter v. Com.*, 7 Gratt. 641.

In an action of *assumpsit* to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safekeeping in bank, the only plea in the case was *nonassumpsit*. There was no question as to the delivery of the gold to the defendant, but the defense was that he had been robbed of it, and the effort of the plaintiff was to prove a fraudulent appropriation of it by the defendant conspiring with another person. It was held, that after the conspiracy had been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators, not made in the presence of the others, are admissible as evidence against the latter. *Danville Bank v. Waddill*, 31 Gratt. 469.

When two persons are on trial for jointly conspiring to prosecute another for larceny, the confessions of one of them in the absence of the other, made after the conspiracy charged in the indictment was completed and ended, are properly admitted as evidence. And when all the evidence has been introduced, the court should then instruct the jury, that, in passing upon the guilt of the other party, they must discard from their consideration the said admissions, they having been made

after the conspiracy was completed and ended. *Jones v. Com.*, 31 Gratt. 836.

B. COMPETENCY OF WITNESS.

Accomplice as a Witness—Statute—Effect of Previous Sentence.—Ordinarily, an accomplice is a competent witness on the trial of his associate, provided he has not been previously sentenced and convicted of an infamous offense. And by statute in Virginia his incompetency by reason of interest has been removed, unless jointly tried with his associate. *Va. Code*, 1873, ch. 195, § 21; *Oliver v. Com.*, 77 Va. 592.

Though a witness on a trial for arson was charged as an accomplice in the indictment, and found guilty by the jury, he is competent to testify, where he has not yet been sentenced. *Brown v. Com.*, 86 Va. 935, 11 S. E. 799; *Oliver v. Com.*, 77 Va. 590.

C. SUFFICIENCY OF EVIDENCE.

It is said by the court in *Woods v. Com.*, 86 Va. 929, 11 S. E. 798, quoting from *Greenleaf on Evidence*: "The degree of credit, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason, but there is no such rule of law" forbidding a conviction upon the evidence of one accomplice. *Dove's Case*, 82 Va. 301; *Brown's Case*, 2 Leigh 769; *Oliver's Case*, 77 Va. 590; *Byrd's Case*, 2 Va. Cas. 490.

The evidence in the case of *Martin v. Com.*, 2 Leigh 745, showed that the defendant and prisoner, having engaged an illiterate young man, went from Richmond into Bedford county for the purpose of purchasing horses; the prisoner furnished the money for

all purposes, which was proved to be counterfeit, his accomplice handling and spending it, and making false statements concerning their purposes along with the prisoner, this was held sufficient to establish a conspiracy. See also, *Crump v. Com.*, 84 Va. 946, 6 S. E. 620.

VII. Civil Action.

The common-law action of conspiracy is obsolete, and in lieu thereof an action on the case in the nature of a conspiracy has been substituted. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

Against Whom an Action Will Lie—

Husband and Wife.—An action for conspiracy will not lie against a husband and wife only, since they are but one person in law; but it will lie against them and a third person. *Kirtley v. Deck*, 2 Munf. 10, 5 Am. Dec. 445.

Judgment against One Defendant.—

In an action on the case for conspiracy the grounds or gravamen thereof, whether one or more, must be set out with the same certainty as though it were an action against a single defendant. Conspiracy is only added thereto as matter of aggravation or jointure, and need not be proved, but judgment may be had against one defendant and the action discontinued as to the others. *Porter v. Mack*, 50 W. Va. 582, 40 S. E. 459.

Conspiracy to Slander Parties May

Be Joined.—An action of slander can not be maintained against two defendants, for each is severally liable for the words spoken by him. Yet where two or more persons conspire to ruin another by slanderous utterances, they may be joined in the same action. *Porter v. Mack*, 50 W. Va. 585, 40 S. E. 459. See the title LIBEL AND SLANDER.

Defendants May Be Charged with

Uttering Same Words.—In an action on the case in the nature of a conspiracy, the defendants may be charged with uttering the same words sepa-

rately for the common purpose of carrying out a conspiracy to destroy the plaintiff's reputation and business, and if the conspiracy is established they become equally liable for the resulting damages. *Porter v. Mack*, 50 W. Va. 586, 40 S. E. 459.

Declaration.—In an action to recover for conspiring to maliciously prosecute the plaintiff, an averment in the declaration that the prosecution was false and malicious is not sufficient; it must be alleged that it was without probable cause. *Kirtley v. Deck*, 2 Munf. 10, 5 Am. Dec. 445. See *Ellis v. Thilman*, 3 Call 3; *Young v. Gregorie*, 3 Call 446. See generally, the title **MALICIOUS PROSECUTION**.

A declaration charging a conspiracy to sacrifice and destroy plaintiff's property and business by the malicious use of judicial proceedings must allege that such proceedings were instigated, instituted and prosecuted to a finality

by the defendants without probable cause. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

In an action on the case for conspiracy the grounds or gravamen thereof, whether one or more, must be set out with the same certainty as though it were an action against a single defendant. Conspiracy is only added thereto as matter of aggravation or jointure and need not be proven, but judgment may be had against one defendant and the action discontinued as to the others. *Porter v. Mack*, 50 W. Va. 582, 40 S. E. 459.

Not Necessary to Charge Completion of the Act.—In conspiracy the combining is the act, and the evil intent being properly alleged to show that the combining to accomplish it is indictable, it is not necessary to charge the completion of the act, which is the object of the conspiracy. *Anthony v. Com.*, 88 Va. 849, 14 S. E. 834.

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CROSS REFERENCES.

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I. Definition of a Constitution.

"'A constitution,' says the celebrated Paine, 'is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it can not be produced in a visible form, there is none. A constitution is a thing antecedent to government, and a government is only the creature of a constitution. It is not the act of the government, but of the people constituting a government. It is the body of elements to which you can refer, and quote article by article, and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have,' etc. See Rights of Man, part 1, p. 30." *Kamper v. Hawkins*, 1 Va. Cas. 19, 75.

The constitution is a fundamental law of the state, in opposition to which any other law must be inoperative and void. *List v. Wheeling*, 7 W. Va. 501, 519; *Kamper v. Hawkins*, 1 Va. Cas. 19, 82. See post, "Supremacy as the Law," IV, A.

"It is to the governors, or rather to the departments of government, what a law is to individuals—nay, it is not only a rule of action to the branches of government, but it is that from which their existence flows, and by which the powers (or portions of the right to govern), which may have been committed to them, are prescribed. It is their commission—nay, it is their creator." *Kamper v. Hawkins*, 1 Va. Cas. 19, 24.

The constitution is the great contract of the people, every individual whereof having sworn allegiance to it. A system of fundamental principles, the violation of which must be considered as a crime of the highest magnitude. That this great and paramount law should be faithfully and rightfully executed, it is divided into three departments, to wit: The legislative, the executive, and judiciary, with an express restraint upon all, so

that neither shall encroach on the rights of the other. *Kamper v. Hawkins*, 1 Va. Cas. 19, 59.

And "The difference between a free and arbitrary government I take to be: That in the former, limits are assigned to those to whom the administration is committed, but the latter depends on the will of the departments or some of them. Hence the utility of a written constitution." *Kamper v. Hawkins*, 1 Va. Cas. 19, 23.

Schedule.—See post, "Temporary and Permanent Provisions," II, C.

The schedule is a part of the constitution, and limits its operation, and, in its own language, was adopted in order that no inconvenience might arise from changes in the constitution. *Sands v. Com.*, 20 Gratt. 800, 819.

"It was not intended, however, as a limitation on the power of the legislature to adopt a mode of criminal procedure in all cases of crimes and misdemeanors (whether committed before or after the adoption of the constitution), but was intended simply to provide that proceedings in the cases therein mentioned might be had according to the existing law, in the absence of such legislation." *Sands v. Com.*, 20 Gratt. 800, 819.

II. Adoption of Constitutions.

A. NATURE AND POWERS OF CONSTITUTIONAL CONVENTIONS.

Distinguished from Legislature.—Constitutions are not enacted by an ordinary legislature, but by a convention of delegates elected by the people. *Kamper v. Hawkins*, 1 Va. Cas. 20; *Loomis v. Jackson*, 6 W. Va. 613.

Powers Derived from People.—A constitutional convention lawfully convened does not derive its powers from the legislature but from the people. *Loomis v. Jackson*, 6 W. Va. 613, 708. See also, *Kamper v. Hawkins*, 1 Va. Cas. 20.

Sovereign and Independent of Legislature.—The legislature can neither

limit nor restrict them in the exercise of these powers, for they are in the nature of sovereign powers. *Loomis v. Jackson*, 6 W. Va. 613, 708.

And the people of the state in their sovereign capacity have the right, in adopting a constitution for their government, to do anything which they are not prohibited from doing by the federal constitution, which was made and ratified by the states themselves. *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583.

Convention of 1776.—As to the powers of the convention of 1776, this body seems to have been appointed, not only to see that the commonwealth sustained no injury, but also to consult in general for the public good, and in such a crisis as that at which our government was formed those who are delegated have authority more extensive than a legislature appointed under a government, one object of which is to restrain that as well as the other departments. *Kamper v. Hawkins*, 1 Va. Cas. 19, 27.

This convention was not chosen under the sanction of the former government; it was not limited in its powers by it, if indeed it existed, but may be considered as a spontaneous assemblage of the people of Virginia, under a recommendation of a former convention, to consult for the good of themselves and their posterity. They established a bill of rights, purporting to appertain to their posterity, and a constitution evidently designed to be permanent. *Kamper v. Hawkins*, 1 Va. Cas. 19, 37.

It had not the shadow of a legal, or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, and annul the constitution itself, namely, the people, in their sovereign, unlimited, and unlimited authority and capacity. *Kamper v. Hawkins*, 1 Va. Cas. 19, 74.

The declaration of independence, and the constitution, as the acts of the peo-

ple, must therefore stand, or fall, together. *Kamper v. Hawkins*, 1 Va. Cas. 19, 73.

B. HOW PUT IN FORCE AND OPERATION, AND TIME OF TAKING EFFECT.

Avoidance of Hiatus.—"The instant that the declaration of independence took effect, had the convention proceeded no farther, the government, as formerly exercised by the crown of Great Britain, being thereby totally dissolved, there would never have been an ordinary legislature nor any other organized body, or authority in Virginia. Every man would have been utterly absolved from every social tie, and remitted to a perfect state of nature. But a power to demolish the existing fabric of government, which no one will, I presume, at this day, deny to that convention, without authority to erect a new one, could never be presumed. A new organization of the fabric, and a new arrangement of the powers of government, must instantly take place, to prevent those evils which the absence of government must infallibly produce in any case; but more especially under circumstances so awful, and prospects so threatening, as those which surrounded the people of America, at that alarming period." *Kamper v. Hawkins*, 1 Va. Cas. 19, 72.

Promulgation.—"The constitution of 1902 was ordained and proclaimed by a convention duly called by direct vote of the people of the state to revise and amend the constitution of 1869." *Taylor v. Com.*, 101 Va. 829, 831, 44 S. E. 754.

In *Taylor v. Commonwealth*, 101 Va. 829, 44 S. E. 754, the court declined to express an opinion upon the contention raised there, that the constitutional convention of 1901-2 had not power to promulgate the constitution it had ordained, it not being necessary to the decision of the case.

This constitution went into effect July 10, 1902. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

And it was said in *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 420, that the constitution does not derive its force from the convention which framed it, but from the people who ratified it.

Acquiescence by People Validates.—The constitution of this state promulgated in July, 1902, by the convention which framed it, having been recognized, accepted, and acted on by the executive, legislative, and judicial branches of the government of the state, and by the people in their primary capacity, and being actually in force throughout the state, and there being no other government in existence in the state opposing or denying its existence, is the only rightful, valid, and existing constitution in the state, and to it the citizens of the state owe obedience and loyal allegiance. *Taylor v. Com.*, 101 Va. 829, 44 S. E. 754.

And where the people had received a constitution, the magistrates and officers down to a constable (for even the mode of his appointment is directed) have been appointed under it, the people had felt its operation and acquiesced, and the people alone could change it. *Kamper v. Hawkins*, 1 Va. Cas. 19, 28.

For it is confessedly the assent of the people which gives validity to a constitution. *Kamper v. Hawkins*, 1 Va. Cas. 19, 29; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 420.

As said in *Loomis v. Jackson*, 6 W. Va. 613, 708: "The legality of the election for officers held on the 22d day of August, 1872, after the ratification of the new constitution and schedule, is not to be called in question by any court created or continued by the provisions of that constitution. When it is proposed that this court shall determine that the sovereign power of this state can not lawfully commission a judge of its own creation, it is invited to commit judicial suicide. Courts sit to expound the laws made by their government, and not to de-

clare that government itself an usurpation."

West Virginia Constitution of 1872.—"The constitution became operative and in full force from and including the fourth Thursday of August, 1872, which was the twenty-second day of August, 1872. Schedule, § 6." *Speidel v. Schlosser*, 13 W. Va. 686, 691; *State v. Allen*, 8 W. Va. 680.

C. TEMPORARY AND PERMANENT PROVISIONS.

As to some acts of the same convention being temporary and others revocable by the legislature, the subject matter of them will evince which are intended to be of this nature, and if any were designed to be permanent, they must be so until changed by the people, unless indeed calling them ordinances and the other a constitution, sufficiently manifest the design that the latter should be of a higher authority than they. *Kamper v. Hawkins*, 1 Va. Cas. 19, 27.

Schedule Usually Temporary.—"In the *Richmond Mayoralty Case*, 19 Gratt. 712, 713, Judge Moncure, in delivering the unanimous opinion of the court, says: "The only office of a schedule is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition. The convention acts in this matter as an ordinary legislature, and only because there is necessity for such action before a legislature can or will be convened under the constitution. To be sure, if a convention in framing a schedule should plainly show an intention to place any of its provisions beyond the control of the legislature, such provision being the act of the representatives of the state without any constitutional restrictions, would be as effectual and binding as if they were embodied in the constitution itself. But unless such an intention plainly appears, the presumption is that the provisions of the schedule are subject

to future legislation.'” *State v. Strauder*, 8 W. Va. 686, 700. See *Sands v. Com.*, 20 Gratt. 800.

D. “RECONSTRUCTION” GOVERNMENT.

See post, “Prohibition of Payment of Debts Incurred in Aid of Confederacy,” V, E, 3.

The government established over Virginia by the reconstruction acts, did not come into existence by any color of authority from the laws of Virginia. And yet, it was a *de facto* government; its officers were *de facto* officers, whose acts were valid as to the public and third persons. That construction is demanded by the most imperious necessity, whatever may be thought of the constitutional power of congress to pass the reconstruction acts. *Griffin v. Cunningham*, 20 Gratt. 31, 123.

Saying: “The laws of congress known as the reconstruction acts, subjected this state to the military authority of the United States. The constitution under which we now live, and under which the legislative, executive and judicial departments of the government were organized, was inoperative, by the express terms of the reconstruction laws, until approved by the congress of the United States.” *Griffin v. Cunningham*, 20 Gratt. 31, 35.

E. SECESSION GOVERNMENTS.

See post, “Prohibition of Payment of Debts Incurred in Aid of Confederacy,” V, E, 3.

At no time were the seceding states out of the Union. Their rights under the constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remain the same. *Homestead Cases*, 22 Gratt. 266, 283. See *Hood v. Maxwell*, 1 W. Va. 219, where it is said that no state of the federal Union has a constitutional right to secede from it.

Again: “The compact upon which government rests, whether between

people or states (or both, as in our case) is very different in its nature from that on which partnerships between individuals, and cartels, protocols, treaties, and alliances between governments stand. And perhaps the most striking feature of the difference is, that one is perpetual, the other temporary, in its nature and object.” *Hood v. Maxwell*, 1 W. Va. 219, 242.

For government is a necessity of man's nature and not a mere caprice, however wisdom and experience may mould its structure or vary its application. Its perpetuity springs from its continued necessity, and is therefore an essential element of its nature. *Hood v. Maxwell*, 1 W. Va. 219, 242.

Question a Political One.—It has been held by the United States supreme court, that when there are two governments in a state, each claiming to be the lawful government, the question which of them is really the lawful one, is not a judicial question, but a political one, to be determined by the political authorities of the United States. *Com. v. Chalkley*, 20 Gratt. 404, 408.

“The present constitution of the state recognizes the restored as having been the lawful government, and denounces the authorities which carried on a government at Richmond during the war as ‘usurped and pretended authorities.’ This constitution was adopted by the people at the polls. Whether the people adopted it willingly and because they approved it, or only adopted it as the best alternative within their reach, is a matter of no consequence—the constitution is equally obligatory in either case.” *Com. v. Chalkley*, 20 Gratt. 404, 409.

The constitution of the state provides that “no appropriation shall ever be made for the payment of any debt or obligation created in the name of the state of Virginia, by the usurped and pretended authorities assembled at Richmond during the late war.” *Com. v. Chalkley*, 20 Gratt. 404, 410.

III. Construction and Interpretation of Constitutions.

A. TO BE CONSTRUED AS A WHOLE.

It is a rule of construction that the whole constitution is to be examined, with a view of arriving at the true intention of each part. This is because the instrument is adopted by the voters as a whole, and an article or section standing by itself, which might seem of doubtful import, may yet be made plain, by comparison with other clauses of the instrument. *List v. Wheeling*, 7 W. Va. 501, 519; *State v. Kyle*, 8 W. Va. 711.

B. ORDINARY MEANING OF WORDS TAKEN.

A constitution is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life. For this reason pre-eminently, every word in it should be expounded in its plain, obvious, common sense. *Farinholt v. Luckhard*, 90 Va. 937, 21 S. E. 817; *Virginia, etc., R. Co. v. Clowers*, 102 Va. 867, 872, 47 S. E. 1003; *Burks v. Hinton*, 77 Va. 1; *Slack v. Jacob*, 8 W. Va. 612.

"And in interpreting clauses of a constitution we must presume, that words have been employed in their natural and ordinary meaning. Says Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 188: 'The framers of the constitution and the people, who adopted it, must be understood to have employed words in their natural sense and to have understood what they meant.'" *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 419.

C. INTENT OF PEOPLE SHOULD PREVAIL.

The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. *List v. Wheeling*, 7 W. Va. 501, 519; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 418; *Virginia,*

etc., R. Co. v. Clowers, 102 Va. 867, 872, 47 S. E. 1003.

Meaning Fixed When Adopted.—"It is a well settled rule, that the meaning of the constitution is fixed, when it is adopted; and it is not different at any subsequent time, when a court has occasion to pass upon it." *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 418.

And: "It is to be presumed, that language has been employed with sufficient precision to convey that intent; and unless examination demonstrates, that the presumption does not hold good in the particular case, nothing will remain except to enforce it. No change of public sentiment after the adoption of the constitution should have the slightest weight with the court to influence them to give a construction to the instrument not warranted by the intention of its framers." *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 419.

Extension of Words of Exclusion beyond Original Intent.—That construction would be unfair, which would extend words of exclusion in the constitution, used for one purpose, to other objects not contemplated by the framers at the time. *Case of the County Levy*, 5 Call 139.

D. EFFECT GIVEN TO EVERY WORD IF POSSIBLE.

In construing constitutions, statutes and other written instruments, effect should be given to every word used, unless to do so would lead to a conclusion absurd in itself, or necessarily repugnant to the plain meaning of the instrument. *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378.

E. CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION.

In case of doubtful meaning in the words used, we may look to contemporaneous and practical construction. Contemporaneous construction may consist simply in the understanding, with which the people received it at

the time, or in the acts done in putting it in operation, and which necessarily assume that it is to be construed in a particular way. *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 420.

"Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. (Cooley's *Con. Lim.* 67.)" *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 420.

But even a uniform and unquestioned practice is not conclusive on the courts. *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962.

Acquiescence for any length of time, can not legalize the clear usurpation of power, for where the people have clearly expressed their will in the constitution, and appointed judicial tribunals to enforce it, to allow contemporary and practical construction to solve in its own favor doubts which arise on reading the constitution, is giving it its full legitimate force. *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 421.

In *Turpin v. Locket*, 6 Call 185, it is said: "Written constitutions are, like other instruments, subject to construction; and, when expounded, the exposition, after long acquiescence, becomes as it were part of the instrument; and, can no more be departed from than that. *Com. v. Caton*, 4 Call 5, and the case of the *County Levy*, 5 Call 139."

F. LEGISLATIVE CONSTRUCTION AND ITS WEIGHT.

The construction placed on the constitution of the state by the legislature thereof is entitled to consideration and, in case of doubt, should be influential in its construction, but can not be permitted to overturn plain language. *Day v. Roberts*, 101 Va. 248, 43 S. E. 362. See *Chahoon v. Com.*, 21 Gratt. 822, 828.

And the construction given to an article of the constitution by the legislature, acting thereunder shortly after its adoption, is entitled to weight in determining its meaning. *Burks v. Hinton*, 77 Va. 1.

G. PUBLIC CONVENIENCE AND ADMINISTRATION OF JUSTICE.

"Whilst public convenience and the administration of public justice can not avail against an express provision or necessary implication of the provisions of the constitution, yet such considerations, where there are no such express provisions or necessary implications, will always prevail in the construction of statutes." *Smith v. Com.*, 75 Va. 904, 908.

H. RULE OF CONSTRUCTION WITH REFERENCE TO COMMON LAW.

"The proper rule for the exposition of a constitution is thus stated by Judge Cooley in his work on *Constitutional Limitations*: 'It is also a very reasonable rule that a state constitution shall be understood and construed in the light, and by the assistance, of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning, in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes. It is a maxim with the courts, that statutes in derogation of the common law shall be construed strictly, a maxim which we fear is sometimes prevented to the

overthrow of the legislative intent; but there can seldom be either propriety or safety in applying this maxim to constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive; and the real question is, what the people meant, and not how meaningless their words can be made by the application of arbitrary rules.' Cooley on Const. Lim. 7th Ed., p. 94." Virginia, etc., *R. Co. v. Clowers*, 102 Va. 867, 872, 47 S. E. 1003.

Thus the rule has no application to remedial provisions of a constitution ordained for the purpose of relaxing the stringency of existing precedents in the interest of employees engaged in the dangerous occupation of constructing, maintaining, and operating railroads. Effect is to be given to the policy established by the constitution, and to that end a fair interpretation is to be given to the language used, construing words in their common and ordinary acceptation, unless it clearly appears that they were intended to be used in some other sense. Virginia, etc., *R. Co. v. Clowers*, 102 Va. 867, 47 S. E. 1003.

General Provision Adopting Common Law.—A constitutional provision declaring in general terms the adoption of the common law should be deemed to adopt it, only so far as it accords with existing institutions, and as its principles are applicable to the state of the country and the condition of society. Such a provision will not be construed to oblige the courts to uphold the English doctrine of ancient lights, as this doctrine is not in harmony with our institutions. *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

The thirty-sixth section of article eight of the West Virginia constitution of 1872 declares: "Such parts of the common law, and of the laws of this state, as are in force when this constitution goes into operation, and are not repugnant thereto, shall be, and continue, the law of the state, until altered or repealed by the legislature," etc. *State v. Allen*, 8 W. Va. 680, 682.

I. ADOPTION OF CONSTRUCTION OF PROVISIONS FROM ANOTHER STATE CONSTITUTION.

Where a constitutional provision or statute of one state, which has been construed by its highest court, is adopted by another state, the construction so given is adopted also. Norfolk, etc., *R. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489; *Winans v. Winans*, 22 W. Va. 678, 684.

J. RESORT TO EXTRINSIC EVIDENCE.

See the title PAROL EVIDENCE.

1. Where Text Is Plain, Extrinsic Aid Inadmissible.

When the text of a constitutional provision is plain and unambiguous, the courts in giving construction thereto are not at liberty to search for its meaning beyond the instrument itself. Chesapeake, etc., *R. Co. v. Miller*, 19 W. Va. 408; *Lovings v. Norfolk*, etc., *R. Co.*, 47 W. Va. 582, 35 S. E. 962, 965. See *State v. Ellison*, 49 W. Va. 70, 38 S. E. 574.

2. In Case of Ambiguity or Obscurity.

"But if the clause to be construed is ambiguous or obscure and leaves room for doubt as to what was really intended by it, then we may resort to other and extrinsic lights to aid us in giving it a correct interpretation; then and only then are we warranted in seeking elsewhere for aid." Chesapeake, etc., *R. Co. v. Miller*, 19 W. Va. 408, 420.

3. Recourse to Proceedings of Convention.

One mode of construing a section is

to take the constitution as we find it, without reference to the manner in which its different parts were proposed and adopted, and another is to look at the proceedings of the convention and endeavor thereby to discover the probable intention of the framers of the constitution as we now find it. In either case we must look into the natural state of things which existed when the constitution was framed and adopted. *Burks v. Hinton*, 77 Va. 1, 13.

Where the text is obscure or ambiguous we may look to the proceedings of the constitutional convention which framed the instrument. *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 420.

It was said in *Burks v. Hinton*, 77 Va. 1: "In construing this constitution on this point we will consider the plain meaning of the language used first, and if it is necessary in order to discover the intention we will look to the proceedings of the convention which framed it and seek there to discover distinctly the intention of the framers of the instrument."

Proof That a Certain Provision Was Stricken Out.—The deliberate striking out of a provision in a reported section of a constitution in process of formation, by the convention, should have weight in determining the construction of such section, in a doubtful case. And the striking out of such provisions, as shown by the journal of the convention, will create a presumption that the convention intended to change such section from what it would have been had such provision remained. *Burks v. Hinton*, 77 Va. 1; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431; *Robertson v. Clopton*, unreported (Law Journal, 1881), but cited in principal case at p. 14.

4. Views of Members of Convention.

The meaning of constitutional provisions and legislative enactments is to be ascertained from the language used and not from the views of individual members of the body which proclaimed

or enacted them. *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378. See *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 301, 26 S. E. 943.

5. Contemporaneous History.

But the history of the times may be consulted in order to ascertain the reason, as well as the meaning, of the constitutional provision under consideration. *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378. See *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 301, 26 S. E. 943.

K. CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY OF LAW.

See post, "Powers of Legislature," V, E.

The constitution is to be liberally construed so as to uphold the law, if practicable. *Com. v. Brown*, 91 Va. 762, 21 S. E. 257; *Lacey v. Palmer*, 93 Va. 165, 24 S. E. 930; *Bosang v. Building, etc., Ass'n*, 96 Va. 123, 30 S. E. 440.

Provisions Not Touching Substance Liberally Construed.

—"A liberal construction ought to be given to constitutional provisions which do not touch the substance of the law, or the authority of the legislature to pass it. *Iverson Brown's Case*, 91 Va. 762, 21 S. E. 357." *Morgan v. Com.*, 98 Va. 812, 816, 35 S. E. 448.

Liberal Construction of Schedule.

See ante, "Temporary and Permanent Provisions," II, C.

"The schedule is not to be subjected to a strict and literal construction, when that will tend to mischievous consequences; it should be construed liberally, to 'suppress the mischief and advance the remedy.'" *Griffin v. Cunningham*, 20 Gratt. 31, 115.

The schedule appended to the constitution of the restored civil government, in its own language, was adopted "in order that no inconvenience may arise." *Griffin v. Cunningham*, 20 Gratt. 31, 39.

L. DISTINCTION AS TO STATE AND FEDERAL CONSTITUTIONS.

There is an important distinction to be observed between the construction of state and federal constitutions. The constitution of the United States is a source and grant of power to the congress of the United States. It is an enabling, and not a restraining, instrument, and congress can do nothing except what the constitution, either directly or by reasonable construction, authorizes it to do. On the other hand, the constitutions of the states are restraining instruments, and the legislatures of the states possess all legislative power not prohibited to them by the constitution. *Brown v. Epps*, 91 Va. 726, 21 S. E. 119; *Miller v. Com.*, 88 Va. 618, 14 S. E. 161. This distinction is well illustrated by the different constructions placed upon grants of power to congress by the federal constitution, and grants of power to state legislatures by the state constitutions. In the first case the grant is construed strictly, as this is the sole source of congressional power. In the second case the grant is merely declaratory of the power already existing in the legislature and is construed liberally. *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770; *Bridges v. Shallcross*, 6 W. Va. 562; *Ex parte Hunter*, 2 W. Va. 122, 161. See post, "Supremacy as the Law," IV, A. See also, the title STATES.

"All power before the adoption of the constitutions, state and federal, resided in the people of the states, and it is and can be restrained, only so far as the people have restrained themselves in the constitution, which they have adopted. When the people of the colonies separated from Great Britain, they retained all the powers of the British parliament, which Mr. Justice Blackstone says are omnipotent; and in the state constitutions, which they adopted, they gave up such powers only as they deemed for the public

good, and for the security of life, liberty, and property; and when the federal constitution was framed, some of their powers were granted to the government of the United States; but by that grant, no powers passed except such as were delegated to the United States in the constitution; all other powers, not prohibited to the states, are therein expressly reserved to the states respectively, or to the people thereof—of course, the people of the states respectively, who had then entered or should thereafter enter into the compact." *Peerce v. Kitzmiller*, 19 W. Va. 564, 572.

M. JURISDICTION OF CONSTITUTIONAL QUESTIONS.

Authority of State and Federal Courts Compared.

State Court Construes State Law in Absence of Federal Question.—The decision of the highest court of a state in the construction of its statutes, and as to the validity or invalidity of contracts dependent only on such statutes, is the controlling rule of decision in federal courts, where there is no federal question. *Clarksburg Electric Light Co. v. City of Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

State Court May Declare Law in Conflict with Federal Constitution.—A state court has jurisdiction to decide that a provision of the state constitution is in conflict with the constitution of the United States. *Homestead Cases*, 22 Gratt. 266.

Federal Supreme Court Construction of United States Constitution Rules.

"In cases involving the construction of the constitution and laws of the United States, it seems now to be generally conceded that the decisions of the supreme court are binding upon the state courts. And practically they are conclusive of the rights of the parties, whether approved by the state courts or not. But I hold that this court is also supreme in its sphere, and is not bound to follow with blind submission

any court on earth." *Antoni v. Wright*, 22 Gratt. 833, 885. (On rehearing.)

But see *Hunter v. Martin*, 4 Munf. 1, where it is said: "The court of appeals of Virginia will consider whether a mandate issued by the supreme court of the United States, directing this court to enter a judgment reversing one which it heretofore pronounced to be authorized by the constitution, or not; and, being of opinion that such mandate is not so authorized, will disobey it."

And: "It is the opinion of this court that so much of the 25th section of the act of congress, passed September 24th, 1789, entitled 'an act to establish the judicial courts of the United States,' as extends the appellate jurisdiction of the supreme court of the United States, to judgments pronounced by a supreme court of a state, is not warranted by the constitution." *Hunter v. Martin*, 4 Munf. 1.

Federal Judicial Power Not Exercisable by State Courts.—By the constitution, the judicial power of the United States is vested in the supreme court, and the inferior courts to be ordained and established by congress; the state courts have, therefore, no right to exercise that judicial power, and an act of congress which purports to give the state courts jurisdiction of such an action, is unconstitutional. *Jackson v. Rose*, 2 Va. Cas. 34. And see *Com. v. Feely*, 1 Va. Cas. 321.

For the judiciary of one separate and distinct sovereignty can not of itself assume, nor can another separate and distinct sovereignty either authorize or coerce it, to exercise the judicial powers of such other separate and distinct sovereignty. *Jackson v. Rose*, 2 Va. Cas. 34, 35.

But a state court has jurisdiction to punish an act made an offense by the laws of the state, though the same act is an offense against a law of congress. *Jett v. Com.*, 18 Gratt. 933; *Hendrick's Case*, 5 Leigh 708.

IV. Operation and Effect of Constitutions.

A. SUPREMACY AS THE LAW.

The constitution of the United States was adopted by the whole people of the United States and is a grant of powers acquiesced in by the states themselves; hence, the constitution, and the laws passed by congress in pursuance thereof, are the supreme law of the land. Next in order of supremacy come the state constitutions, the provisions of which are absolutely binding upon all of the departments of the state government. The legislature has no power to pass laws in conflict with either state or federal constitutions. As has been said "the constitution is law to the lawmakers." *Kamper v. Hawkins*, 1 Va. Cas. 20; *Blair v. Marye*, 80 Va. 485; *Shell v. Cousins*, 77 Va. 328; *Cases of the Judges*, 4 Call 135; *List v. Wheeling*, 7 W. Va. 501, 519; *Eckhart v. State*, 5 W. Va. 515; *Lemons v. State*, 4 W. Va. 755. See post, "Powers of State and Federal Governments Compared," V, D; "Subordinate to the Constitution," V, E, 1, b; "Powers and Duty of Judiciary," V, F; "Responsibility and Powers of Executive," V, G.

In our complex form of government, the courts are bound to have respect to, and take cognizance of, the federal as well as the state constitution. In fact, to regard the former as the supreme law, which invalidates—renders null and void—any law of the state violating it. *Clarke v. Tyler*, 30 Gratt. 134, 164.

Constitution of Virginia of 1869.—

"In no sense can the constitution of this state be regarded as a law of congress. It is true that, under the act of March, 1867, the approval of the constitution by congress was required before the state should be entitled to representation. The effect of withholding its approval would have been to continue the military government to which the state was then subjected. But

when the constitution was approved, and senators and representatives elected under it admitted, it then became the organic law of this state, binding upon all the citizens of the state and all departments of the state government organized under it, except so far as any of its provisions may be in conflict with the constitution of the United States. If it is to be considered a mere creature and law of congress, then congress may repeal it, and declare it void. It can no more do this than it can declare the constitution of New York a nullity." *Homestead Cases*, 22 Gratt. 266, 285.

Bill of Rights.—The bill of rights of Virginia is a part of the constitution, and has been repeatedly referred to as the rule of judicial decision. *Goodin v. Crump*, 8 Leigh 120, 151; *Custis v. Lane*, 3 Munf. 590; *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315.

Provisions of Federal Constitution Inapplicable to States and State Proceedings.—Section 3, art. 3, and amendment 6 of the constitution of the United States apply to offenses against the United States and proceedings in its courts, and not to offenses against a state or proceedings therefor in the state courts. *Ex parte McNeely*, 36 W. Va. 84, 14 S. E. 436.

First Ten Amendments to Federal Constitution.—The first ten amendments to the United States constitution have reference solely to the powers exercised by the United States government, and do not apply to the powers exercised by the state governments. *Southern Exp. Co. v. Com.*, 92 Va. 59, 2 S. E. 809; *Baker v. Wise*, 16 Gratt. 139; *Com. v. Byrne*, 20 Gratt. 165.

B. PRESUMPTIVELY PROSPECTIVE IN OPERATION.

Constitutions, as well as statutes, are construed to act prospectively only, unless, on the face of the instrument or enactment, a contrary intention is manifest beyond reasonable question. If

the language admits of a substantial doubt on this point, courts will not construe the provision retrospectively. A constitutional provision can not be given a retrospective operation unless that is the unmistakable intention of the words used, or the obvious design of the authors. *Arey v. Lindsey*, 103 Va. 250, 48 S. E. 889; *List v. Wheeling*, 7 W. Va. 501, 519.

C. EFFECT ON PRE-EXISTING LAWS.

Implied Repeal of Inconsistent Laws.

—All acts of the legislature in force at the time the constitution took effect, which are plainly in conflict with the constitution, or any of its parts, when rightly construed, are modified or repealed, to the extent of such conflict. All acts authorized to be done by laws in force prior to, and at the time of the adoption of the constitution, which are clearly forbidden to be done by the constitution, must be considered as prohibited, provided the obligation of a contract will not thereby be impaired, but other existing laws are unaffected. *List v. Wheeling*, 7 W. Va. 501, 520.

For the constitution is the fundamental law of the state, in opposition to which any other law must be inoperative and void. If, therefore, such other law seems to be applicable to the facts, but, on comparison with the fundamental law, it is found to be in conflict, the court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby, in effect, annul it, the administration of public justice being referred to it. *List v. Wheeling*, 7 W. Va. 501, 520.

Where Provision Is Not Self-Executing.—See post, "What Clauses Are Self-Executing," IV, E.

Where legislation is necessary to give effect to a constitutional provision, laws in existence when a new constitution is adopted, remain the law until legislation is had to enforce the provisions of the constitution which

conflict with the old law. *Supervisors v. Stout*, 9 W. Va. 703; *Chahoon v. Com.*, 20 Gratt. 733; *Sands v. Com.*, 20 Gratt. 800; *Douglass v. Town of Harisville*, 9 W. Va. 162.

"The courts can not make the change by seeking to conform the writ to a provision of the constitution, which is inoperative without legislative action; for that would be for the courts to assume legislative functions, and perform a legislative act." *Sands v. Com.*, 20 Gratt. 800, 820.

Provisions Directed to Subsequent Legislatures.—It will be found, on an examination of the constitution, that many of its sections are expressly directed to the legislature. Such sections, under the weight of judicial decisions upon that subject, do not apply to or affect laws passed, and in force at the adoption of the constitution, in so far as they are directed to the legislature, as the legislature therein named is held to mean the legislature created by that constitution. *List v. Wheeling*, 7 W. Va. 501, 521.

Repeal of Statute by General Terms.

—A constitution scarcely ever repeals a former statute by express reference thereto—it is generally done, when intended, by the use of general terms upon the subject had in view. *List v. Wheeling*, 7 W. Va. 501, 524.

D. EFFECT OF ADOPTION UPON STATE OFFICERS.

In every organic change of government, whenever one government succeeds another, the incumbents in office, in the absence of constitutional or legislative provision, must, *ex necessitate rei*, continue to hold and discharge the duties of their respective offices until their successors are installed. And until they are removed, their official acts are as binding and valid as those of their successors. *Griffin v. Cunningham*, 20 Gratt. 31, 41. See *Com. v. Chalkley*, 20 Gratt. 404.

But the incumbents of office at the time of an organic change of government, continuing to hold over after

such change (in the absence of a provision of the new constitution, or of an act of the legislature of the new government giving them such authority), hold by sufferance only and upon a principle of public necessity or convenience, not in virtue of any individual or private right. They can not set up any claim against the legislature, which has ample power to put an end to their official authority at any time, and appoint others to take their places, subject only to any constitutional restrictions which may plainly appear to exist. *Richmond Mayoralty Case*, 19 Gratt. 673; *Griffin v. Cunningham*, 20 Gratt. 31, 41.

Provisions Applicable to Officers Chosen under It.—The clause of the Virginia constitution which provides among other things, that a mayor shall be chosen by the electors of every city, applies only to a mayor to be chosen under the constitution, at and after the time therein prescribed for the purpose; and not to one appointed to perform the duties of mayor before one could be chosen to enter upon the duties of the office under the constitution. *Richmond Mayoralty Case*, 19 Gratt. 673.

And a provision in a state constitution that no person shall be eligible as a juror who is not entitled to vote and hold office, applies only to disabilities imposed by the instrument making it, and not to those imposed by the fourteenth amendment to the United States constitution. *Sands v. State*, 21 Gratt. 871

E. WHAT CLAUSES ARE SELF-EXECUTING.

See ante, "Effect on Pre-Existing Laws," IV, C.

A section of a constitution may operate *ex proprio vigore*, although it was, in express terms, made the duty of the legislature to provide by general law for giving full force and effect to the section by "due process of law," where the mandate of the provision is

explicit, and can have full force in itself. *Peerce v. Kitzmiller*, 19 W. Va. 564, 581; *White v. Crump*, 19 W. Va. 583. See *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147; *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218; *Chahoon v. Com.*, 20 Gratt. 733; *Prison Ass'n v. Ashby*, 93 Va. 667, 25 S. E. 893.

Thus, where the constitution contains an express prohibition, intended to protect private property, it may be effectual, *ex proprio vigore*, without further legislation, even though no statute gives a remedy for the invasion of the right of property thus secured. The common law will furnish an appropriate remedy. *Johnson v. Parkersburg*, 16 W. Va. 402.

Applying this rule, it will be seen that the constitutional provision that private property shall not be taken for public use without just compensation is self-executing. *Johnson v. Parkersburg*, 16 W. Va. 402.

And the provision of the West Virginia constitution that "no citizen of West Virginia, who participated in the war between the government of the United States and a part of the people thereof on either side, shall be held liable civilly or criminally; nor shall his property be seized or sold under final process issued on judgments heretofore recovered, or otherwise, because of an act done according to the usages of civilized warfare, in the prosecution of said war by either of the parties thereto," operates *ex proprio vigore*. *White v. Crump*, 19 W. Va. 583.

It was said in *Speidel v. Schlosser*, 13 W. Va. 686, 695, that where a constitutional provision conferred a right (in this case of a homestead exemption), but declared that it should be "subject to such regulations as shall be prescribed by law," the intention was manifested that it should not operate *per se*, but should be inoperative until put into effect by the legislature. See also, *Holt v. Williams*, 13 W. Va. 704.

And the third section of the third article of the constitution, in relation to

the qualification of jurors, did not operate *proprio vigore*, and without any legislation on the subject, to repeal all existing laws in conflict therewith; but until such legislation was had the existing law continued in force. *Sands v. Com.*, 20 Gratt. 800; *Chahoon v. Com.*, 20 Gratt. 733; *Wade v. City of Richmond*, 18 Gratt. 583.

But, under the second and fourth section of the schedule of the constitution, the act in force at the time of the adoption of the constitution regulating juries in criminal cases, not having been since altered, the *venire facias* for the trial of a prisoner for felony should be conformed to that act. *Sands v. Com.*, 20 Gratt. 800.

Provision Addressed to Legislature.

—A constitutional provision addressed to the legislature, giving it power to enact certain laws, is prospective in its operation, until the legislature acts thereunder. *Douglass v. Town of Harrisville*, 9 W. Va. 162; *List v. Wheeling*, 7 W. Va. 501, 521.

Provision Conferring Original Jurisdiction on Supreme Court.

—And the constitutional provision conferring original jurisdiction upon the supreme court in certain specified cases is not self-executing, but the court exercises this jurisdiction, within the constitutional limitation, by virtue of statutory enactments made in pursuance of this provision. *Cook v. Daugherty*, 99 Va. 590, 39 S. E. 223; *Price v. Smith*, 93 Va. 14, 24 S. E. 474; *Prison Ass'n v. Ashby*, 93 Va. 667, 25 S. E. 893; *Gresham v. Ewell*, 84 Va. 784, 6 S. E. 134; *Page v. Clifton*, 30 Gratt. 417. See the title COURTS.

Provision Conferring Appellate Jurisdiction.

—The provision of § 88 of the Virginia constitution (1902), allowing an appeal in certain cases involving not less than \$300, is not self-executing, and until the legislature saw fit to confer it, this court could not exercise such jurisdiction. *Flanary v. Kane*, 102 Va. 547, 46 S. E. 681.

F. APPLICATION OF BILL OF RIGHTS TO CONVICTS.

The bill of rights, though made a part of the present constitution, has the same force and authority, and no more, than it always had. And the principles which it declares have reference to freemen, and not to convicts in the state penitentiary. *Ruffin v. Com.*, 21 Gratt. 790. See post, "Class Legislation in General," VIII, A.

G. CLAUSE REQUIRING COURT TO DECIDE ALL POINTS ON RECORD.

The clause in the constitution of West Virginia requiring the supreme court of appeals to "decide every point arising upon the record, and give its reason therefor in writing," is directory, and does not affect the common-law rule of *res judicata*. *Hall v. Bank of Virginia*, 15 W. Va. 323; *Henry v. Davis*, 13 W. Va. 230.

V. Governmental Powers and Functions.

A. SEPARATION OF DEPARTMENTS.

The legislative, executive, and judiciary departments, our constitution declares, shall be forever separate and distinct. To be so, they must be independent one of another, and each protected in its legitimate sphere, so that neither can control, or annihilate the other. *Kamper v. Hawkins*, 1 Va. Cas. 19, 84; *State v. Buchanan*, 24 W. Va. 362. See *Price v. Moundsville*, 43 W. Va. 523, 27 S. E. 218.

"The legislative department can no more exercise judicial power than the judicial department can exercise legislative power. Each is supreme in the exercise of its own proper functions, when acting within the limits of its authority. The boundary line between these powers is plainly defined in every well-ordered government; and in this country it is now a well-established principle of public law, that the three

great powers of government—the legislative, the executive, and the judicial—should be preserved as distinct from, and independent of, each other, as the nature of society and the imperfection of human institutions will permit. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty." *Griffin v. Cunningham*, 20 Gratt. 31, 50. See *Slack v. Jacob*, 8 W. Va. 661; *State v. Buchanan*, 24 W. Va. 362, 379; *Hall v. Webb*, 21 W. Va. 318; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42, 69.

"In this state there are limitations upon the powers of the legislature, in addition to those contained in positive restrictive clauses of the constitution. These limitations result from the division of powers among the several departments—legislative, executive and judicial. It was never intended that either should perform an act within the constitutional province of the other. As the judiciary can not legislate, so neither can the legislative department do any act of a judicial nature. Such an act is as clearly a violation of the spirit of the constitution as though that instrument had declared, in express terms, that the legislature shall not, in any case, exercise judicial powers." *Griffin v. Cunningham*, 20 Gratt. 31, 85.

"The relations of the executive, legislative and judicial departments of the government of this state bear, so far as we are advised, generally similar relations to each other as the same departments of the government of the United States bear toward each other. The constitution of the state, as we have seen, expressly declares that these departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace may be elected to

the legislature." *Slack v. Jacob*, 8 W. Va. 612, 659.

Comity between Departments.—There is no such comity between the separate departments of the state government as would require submission as to the alleged acts of each other in violation or defiance of the express requirements of the constitution. No unconstitutional enactment in this state can interfere with the rights of private citizens unless it is sanctioned by all three of the departments of the state government. The constitution, as the expression of the will of the people, is the supreme law, and it is the duty of each department of the state government created by it to see that it is preserved inviolate. *Price v. Moundsville*, 43 W. Va. 523, 27 S. E. 218.

Power of Review.—See post, "Powers and Duty of Judiciary," V, F.

The legislative department has certain powers, the exercise of which can in no respect be reviewed by either of the other departments. And the same is true of the executive and judicial departments. In other matters the supreme court of appeals is made the final arbiter. *State v. Buchanan*, 24 W. Va. 362, 379; *Thomas v. McCahan*, 1 Va. Dec. 231, 236.

"Legislative action can not be made to retract on past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form; since the legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the court." *Griffin v. Cunningham*, 20 Gratt. 31, 53.

Independence to Be Preserved.—The propriety and necessity of the independence of the judges is evident in reason, and the nature of their office, since they are to decide between government and people, as well as between contending citizens; and if they be

dependent on either, corrupt influence may be apprehended. *Kamper v. Hawkins*, 1 Va. Cas. 19, 95.

This applies more forcibly to exclude a dependence on the legislature, a branch of which, in cases of impeachment, is itself a party. *Kamper v. Hawkins*, 1 Va. Cas. 19, 96.

Power to Punish Contempt Inherent and Necessary.—See the title CONTEMPT.

In the courts created by the constitution, there is an inherent power of self defense and self preservation; this power may be regulated but it can not be destroyed, or so far diminished as to be rendered ineffectual by legislative enactment; it is a power necessarily resident in, and to be exercised by, the court itself, and the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it can not destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred. *Carter v. Com.*, 96 Va. 816, 32 S. E. 780.

In *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407, it was held, that a statute which merely regulated the manner in which contempts should be punished in the circuit courts of the state, was constitutional and valid. This statute had previously been held, in *State v. Frew*, 24 W. Va. 476, not to be intended to apply to contempts committed against the supreme court of appeals, and that that court had the power to punish summarily both direct and constructive contempts, such summary power being a necessity there, but not in the circuit courts.

B. LEGISLATIVE AND JUDICIAL POWERS COMPARED.

Not Defined by Constitution.—See post, "Exercise of Judicial or Executive Functions," V, E, 1, c.

"The constitution does not define what are legislative or what are judicial powers; but what properly belongs to the one and what to the other of these departments of the government is to be determined by reference to the established law as it existed at the time the constitution was framed." *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635, 636.

But it is the province of courts to decide what the law is, and determine its application to particular facts in the decision of causes; the province of the legislature is to declare what the law shall be in the future. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *Griffin v. Cunningham*, 20 Gratt. 31, 106.

"In public apprehension the legislature is deemed in a peculiar sense the agent and representative of the people. It is true it constitutes the most numerous branch of the government, and the brief terms for which its members are elected and the fact that they are directly voted for by the people, give color to and encourage this opinion, but a moment's reflection should serve to dispel it. In our system of government all power and authority are derived from the people. They have seen fit by organic law to distribute the powers of government among three great co-ordinate departments—the executive, the legislative and the judicial. * * * Whoever, therefore, belongs to either one of these great departments is an agent and servant of the common master, and each and all represent a part of the sovereignty of the state so long as they move within the appropriate spheres prescribed to them, by the organic law." *Carter's Case*, 96 Va. 812, 32 S. E. 780.

"The action of the legislature can never correspond with the action of the courts. The latter act in modes unknown to the former; and it would be highly improper, if not a usurpation, for the legislature to attempt to do what 'the courts do in individual

cases.'" *Taylor v. Stearns*, 18 Gratt. 244, 292. See *Trustees of Brooke Academy v. George*, 14 W. Va. 411, 420.

Question of Exercise of Eminent Domain Power Legislative.—See the title EMINENT DOMAIN.

C. PRELIMINARY DECISION OF CONSTITUTIONAL QUESTIONS.

See post, "Taking Care That the Laws Are Faithfully Executed," V, G, 4.

Each department of the government may decide what the law is upon any subject within its jurisdiction, and that must be regarded as the law until it is finally decided to be unconstitutional by the court of last resort, to which the constitution, equally binding upon all of the departments, has committed the final decision. *State v. Buchanan*, 24 W. Va. 362. In *re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398.

"When the legislature passes an act, it must of necessity decide upon its constitutionality. When the chief executive is called upon to execute a law, he must necessarily decide whether or not it is constitutional; that is, whether or not it is law; for as Judge Cooley says, in his *Constitutional Limitations*, p. 3: 'The term unconstitutional law as employed in American jurisprudence is a misnomer and implies a contradiction; that enactment, which is opposed to the constitution, being in fact no law at all.'" *State v. Buchanan*, 24 W. Va. 362, 379.

D. POWERS OF STATE AND FEDERAL GOVERNMENTS COMPARED.

"In considering the powers of the federal and state governments, it must not be forgotten that they are of very different natures—the one delegated, the other original; the one possessing no power not delegated, the other having all power not prohibited by the constitution." *Ex parte Hunter*, 2 W. Va. 122, 161. See ante, "Distinction as to State and Federal Constitutions,"

III, L; "Supremacy as the Law," IV, A.

"To the federal government are confided certain powers, specially enumerated, and principally affecting our foreign relations, and the general interests of the nation. These powers are limited, not only by their special enumeration, but by the positive declaration that all powers not enumerated, or not prohibited to the states, are reserved to the states or the people. This demarcation of power is not vain and ineffectual. The free exercise, by the states, of the powers reserved to them, is as much sanctioned and guarded by the constitution of the United States, as is the free exercise, by the federal government, of the powers delegated to that government." *Hunter v. Martin*, 4 Munf. 1, 7.

Limitation on Powers of Congress.—

"The government of the United States, although it by no means possesses the entire sovereignty of this vast empire (the great residuum thereof still remaining with the states respectively), is nevertheless, as to all purposes for which it was created, and as to all the powers vested therein, unless where it is otherwise provided by the constitution, completely sovereign. And its sovereignty is as entirely separate and distinct from the sovereignty of the respective states, as the sovereignty of one of those states is separate and distinct from the other." *Jackson v. Rose*, 2 Va. Cas. 34, 37.

"Were the state courts obliged to execute every law which congress might pass, without inquiring whether it was, or was not, made in pursuance of the constitution, it is most manifest that the justly dreaded work of consolidation would not only be begun, but that in principle it would be completed; and that state sovereignty and state independence would soon cease to exist." *Jackson v. Rose*, 2 Va. Cas. 34, 38.

Congress has no power to declare by law what shall or shall not be evi-

dence in a state court. *Crews v. Farmers' Bank*, 31 Gratt. 348; *Hale v. Wilkinson*, 21 Gratt. 75. See contra, *Woodson v. Randolph*, 1 Va. Cas. 128.

Quære, if it be within the constitutional power of congress to declare domestic contracts (here an unstamped note), entered into between citizens of the state, under state laws, and which have no bearing upon matters exclusively cognizable by the federal authorities, to be invalid and of no effect in the state courts. *Crews v. Farmers' Bank*, 31 Gratt. 348, 356. See *Woodson v. Randolph*, 1 Va. Cas. 128, holding that congress could do this.

The congress of the United States can not give jurisdiction to, or require services of, any officer of the state governments as such, but congress may authorize any citizen of the United States, to perform any act which the constitution of the United States does not require to be performed in a different manner. *Ex parte Pool*, 2 Va. Cas. 276, 280.

War Powers of Confederate Congress.—See the titles CONFEDERATE STATES, ante, p. 53; WAR.

E. POWERS OF LEGISLATURE.

1. In General.

a. Plenary unless Restrained.

See post, "The Police Power," XIII.

The legislature of the state is possessed of plenary legislative powers, except where restrained by the federal and state constitutions. *Prison Ass'n v. Ashby*, 93 Va. 667, 25 S. E. 893; *Danville v. Hatcher*, 101 Va. 523, 529, 44 S. E. 723; *Farmville v. Walker*, 101 Va. 323, 331, 43 S. E. 558; *Supervisors v. Randolph*, 89 Va. 614, 619, 16 S. E. 722; *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, overruled in *Brown v. Epps*, 91 Va. 726, 21 S. E. 119; *Com. v. Drewry*, 15 Gratt. 1, 5; *Price v. Moundsville*, 43 W. Va. 523, 27 S. E. 218; *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635, 639; *State v. Dent*, 25 W. Va. 1, 7; *Speidel v. Schlosser*, 13 W.

Va. 686, 699; *State v. Allen*, 8 W. Va. 680, 683; *Ex parte Stratton*, 1 W. Va. 304.

"The legislature may enact any law that is not forbidden by the fundamental law of the land. If the federal or state constitution does not in express terms, or by necessary implication, forbid the exercise of such power, the enactment must be adjudged valid and enforceable as a law." *Slack v. Jacob*, 8 W. Va. 612, 637.

The legislature is endowed by the constitution with the legislative power of this commonwealth. It does not possess only granted, but supreme powers in the exercise of the legislative powers, limited and restrained only by the express terms of the constitutions, state and federal, or the necessary implications therefrom. *Louthan v. Com.*, 79 Va. 196, 199; *State Female Normal School v. Auditors*, 79 Va. 233, 237; *Com. v. Weller*, 82 Va. 721, 1 S. E. 102; *McGahey v. Com.*, 85 Va. 519, 524, 8 S. E. 244; *Laube v. Com.*, 85 Va. 530, 8 S. E. 246; *Virginia, etc., Coal Co. v. McClelland*, 98 Va. 424, 36 S. E. 479; *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005; *Town of Danville v. Pace*, 25 Gratt. 1, 9; *Antoni v. Wright*, 22 Gratt. 833, 879 (on rehearing); *Crenshaw v. Slate River Co.*, 6 Rand. 273; *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770; *Ex parte Hunter*, 2 W. Va. 122, 161; *State v. Strauder*, 8 W. Va. 686, 696; *Bridges v. Shallcross*, 6 W. Va. 562.

For in creating a legislative department and conferring on it legislative power the people of Virginia must be understood to have conferred full and complete legislative power, to the extent that such power may be exercised by the governing power of any country. *Trustees of Brooke Academy v. George*, 14 W. Va. 411, 419; *State v. Strauder*, 8 W. Va. 686, 696.

The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is entrusted with the general au-

thority to make laws at discretion. *State v. Strauder*, 8 W. Va. 686, 696.

Express Authority Unnecessary.—

And the fact that the constitution specifically authorizes the legislature to establish offices, etc., without an express authority to prescribe qualifications, does not exclude such power, the state legislative power being supreme except where restrained by the constitution, as distinguished from that of the federal government, to which the federal constitution is strictly a grant of powers instead of a limitation or restraint. *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770.

Legislative Discretion and Motives.

—See post, "Legislative Motives and Discretion Unimpeachable," V, F, 3.

b. Subordinate to the Constitution.

See ante, "Supremacy as the Law," IV, A.

"The legislature, it is true, to a large extent represents the commonwealth, but it does so in subordination to the constitution of the state. It can do nothing which that instrument prohibits, and, in what is confided to it, must conform in its mode of action to the requirements of the constitution. If it transcends its power, or if it acts in contravention of the constitution, its acts are void; they confer no rights and bind no man, and all the world is charged with notice of the limitations which the constitution imposes." *Ellinger v. Com.*, 102 Va. 105, 45 S. E. 807. See *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 43 S. E. 194; *Miller v. Com.*, 88 Va. 618, 14 S. E. 161; *Thomas v. McCahan*, 1 Va. Dec. 231, 236; *Fidelity Ins. Co. v. S. V. R. Co.*, 86 Va. 1, 5, 9 S. E. 759; *Bridges v. Shallcross*, 6 W. Va. 562.

Any act whose necessary operation impairs, or tends to impair, the supremacy of the constitution, is void, regardless of the intention of the legislature in enacting it. *Isaacs v. Richmond*, 90 Va. 30, 17 S. E. 760.

"The legislature is called into existence by the constitution, and its pow-

ers are restrained and limited by the constitution." *Louthan v. Com.*, 79 Va. 196, 199.

Acquiescence in Other Like Acts Immaterial.—See post, "Acquiescence by State in Unconstitutional Law," V, E, 1, d.

The legislature can not impugn the constitution under which they claim, and to which, by their acts, they themselves have acknowledged an obligation, nor can any argument against this position be drawn from an acquiescence in some acts which may be unconstitutional. *Kamper v. Hawkins*, 1 Va. Cas. 19, 29.

Saying: "No legislative act, contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than the principal; that the servant is above his master; that the representatives of the people are superior to the people themselves." *Kamper v. Hawkins*, 1 Va. Cas. 19, 82.

c. Presumption That Legislation Is Constitutional and Construction.

"Every law enacted by the legislature is presumed to be in conformity with the constitution, until the contrary is shown, and it devolves on him who alleges its invalidity to show it. It is a grave responsibility for a court or judge to pronounce a solemn and deliberate act of the sovereign law-making power unconstitutional and void. It should never be done in a doubtful case, and especially where no great principle of liberty or the security of the property 'enshrined in the constitution of the United States and repeated in that of the state' is involved, but only some rule of legislative action. When it is done, the conflict between the constitution and the law must be clear and palpable. To doubt is to affirm the validity of the law." *Com. v. Brown*, 91 Va. 762, 781, 21 S. E. 257. See *Day v. Roberts*, 101 Va. 248, 253, 43 S. E. 362; *Young v. Com.*, 101 Va. 853, 854, 45 S. E. 327; *Trehy v. Marye*,

100 Va. 40, 42, 40 S. E. 126; *Smoot v. Building, etc., Ass'n*, 95 Va. 693, 29 S. E. 746; *Brown v. Epps*, 91 Va. 726, 738, 21 S. E. 119; *Miller v. Com.*, 88 Va. 618, 14 S. E. 161; *Fidelity Ins., etc., Co. v. S. V. R. Co.*, 86 Va. 1, 5, 9 S. E. 759; *Louthan v. Com.*, 79 Va. 196; *Bolling v. Lersner*, 26 Gratt. 36, 47; *Com. v. Moore*, 25 Gratt. 951; *Antoni v. Wright*, 22 Gratt. 833, 882; *Homestead Cases*, 22 Gratt. 266, 280; *Griffin v. Cunningham*, 20 Gratt. 31, 34; *Taylor v. Stearns*, 18 Gratt. 244, 268; *Eyre v. Jacob*, 14 Gratt. 426; *Sharpe v. Robertson*, 5 Gratt. 518; *State v. Ellison*, 49 W. Va. 70, 38 S. E. 574; *South Morgantown v. Morgantown*, 49 W. Va. 729, 40 S. E. 15; *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962, 965; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278; *Armstrong v. Taylor County Court*, 41 W. Va. 602, 24 S. E. 993 (rehearing denied June 24, 1896); *Charleston, etc., Bridge Co. v. Kanawha Co. Court*, 41 W. Va. 658, 24 S. E. 1002, 1006; *State v. Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9; *Chesapeake, etc., Co. v. Miller*, 19 W. Va. 408; *Lewis v. Rosler*, 19 W. Va. 61, 64; *Speidel v. Schlosser*, 13 W. Va. 686, 693; *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 648, 655; *Slack v. Jacob*, 8 W. Va. 612; *Shields v. Bennett*, 8 W. Va. 74; *Bridges v. Shallcross*, 6 W. Va. 562; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Gutman v. Va. Iron Co.*, 5 W. Va. 22; *Ex parte Hunter*, 2 W. Va. 122, 161.

In *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, 421, the rule is laid down as follows: "When doubts arise in the minds of the court as to the interpretation to be put upon the provision of a constitution, if, after a careful examination of the provision, and after all the lights, to which it is proper to resort, have been made use of for the purpose of ascertaining its true meaning, the court construing the provision still has doubts whether the legislation complained of is an infraction of the

instrument, the court, upon such doubts alone, is bound to pronounce in favor of the validity of the act. The court does not, in such case, sustain the validity of the act, because other persons or courts have doubted its constitutionality, but because the court itself, after using all the aids that it has a right to use, in its own mind acting for itself and upon its own responsibility, is not able to say beyond a reasonable doubt that the act is unconstitutional. The presumption is in favor of the constitutionality of the act, and in a doubtful case that presumption is sufficient to sustain the act."

"No enactment of the legislature will be declared unconstitutional, unless such enactment is prohibited by the constitution in express terms or by necessary implication." *Smith v. Com.*, 75 Va. 904, 907; *Virginia, etc., Coal Co. v. McClelland*, 98 Va. 424, 36 S. E. 479.

A court must be slow and cautious to overthrow legislative action. In none but a case of very plain infraction of the constitution, where there is no escape, will or ought a court to do so. To doubt only is to affirm the validity of its action. *Ex parte McNeeley*, 36 W. Va. 84, 95, 14 S. E. 436; *Bridges v. Shallcross*, 6 W. Va. 562; *State v. Strauder*, 8 W. Va. 686, 703.

The constitutionality of a law is to be presumed because the legislature, which was first required to pass upon the question, and the executive, who approved the act after its passage by the legislature, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid, by the constitution, upon their action, have adjudged that it is so. They are co-ordinate departments of the government with the judiciary; and the legislature passes bills, and the executive approves them, under the solemnity of an official oath, which it is not to be supposed they will disregard. *State v. Strauder*, 8 W. Va. 686, 703.

Prima Facie Valid and Enforceable.—

Any legislative act which does not encroach upon the powers apportioned to other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them. *State v. Dent*, 25 W. Va. 19; *State v. Swann*, 46 W. Va. 128, 33 S. E. 89; *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770; *Virginia, etc., Coal Co. v. McClelland*, 98 Va. 424, 36 S. E. 479.

Statutes Construed Favorably to Constitutionality.—And wherever an act of the legislature can be so construed and applied as to avoid a conflict with the constitution, where the meaning of the latter is clear, and give it the force of law, such construction will be adopted by the courts. *Charleston, etc., Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 24 S. E. 1002, 1007; *Slack v. Jacob*, 8 W. Va. 612; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9; *Osburn v. Staley*, 5 W. Va. 85.

Even though, at first view, it would seem not the most obvious and natural one. *Speidel v. Schlosser*, 13 W. Va. 686, 693; *State v. Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000; *Slack v. Jacob*, 8 W. Va. 612.

Thus, where a statute is susceptible of two constructions, one of which is plainly within, and the other without, the legislative power, the courts must adopt the former construction. *Martin v. South Salem Land Co.*, 97 Va. 349, 33 S. E. 600; *S. C.*, 94 Va. 28, 37, 26 S. E. 591; *Harrison v. Thomas*, 103 Va. 333, 336, 49 S. E. 485; *Brown v. Epps*, 91 Va. 726, 738, 21 S. E. 119.

For it is always to be presumed that the legislature designed the statute to take effect, and not be a nullity. *Slack v. Jacob*, 8 W. Va. 612; *State v. Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000; *Charleston, etc., Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 24 S. E. 1002.

Presumption of Essential Facts.—If a legislative act may or may not be constitutional, according to the existence or nonexistence of certain facts, courts are bound to presume the existence of those facts *prima facie* to give validity to the act. *Roby v. Shepard*, 42 W. Va. 286, 26 S. E. 279. See also, *Moundsville v. Fountain*, 27 W. Va. 182, 202.

Construed According to Natural and Reasonable Effect.—"In whatever language a statute may be framed, its constitutional validity must be determined by its natural and reasonable effect." *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 13 S. E. 340, 342.

Saying: "There may be no purpose, it has been held, upon the part of a legislature, to violate the constitution, and yet a statute, enacted under the forms of law, may, by its necessary operation, injuriously affect rights secured by the constitution, in which case the statute, to that extent, must be declared void." *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 13 S. E. 340, 342.

Question for Court.—Constitutionality of a statute is a question for the court. *Muscoe v. Com.*, 86 Va. 443, 450, 10 S. E. 534.

Constitution Liberally Construed.—"The constitution is to be liberally construed so as to uphold the law if practicable. *Iverson Brown's Case*, 91 Va. 762, 21 S. E. 257." *Trehy v. Marye*, 100 Va. 40, 43, 40 S. E. 126. See ante, "Construction in Favor of Constitutionality of Law," III, K.

d. Acquiescence by State in Unconstitutional Law.

An unconstitutional act of assembly is void, and confers no rights which can, by acquiescence on the part of the state, bind it. *Ellinger v. Com.*, 102 Va. 100, 45 S. E. 807. See *Kamper v. Hawkins*, 1 Va. Cas. 20, 29; *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428; *Railway Co. v. Miller*, 19 W. Va. 421.

Acquiescence and Acceptance by Courts.—"Where it appears that courts of all grades in the state, from justices

of the peace to this court, have gone on uninterruptedly for many years to exercise jurisdiction under a statute, and that during all that time there has been no doubt entertained nor question raised as to the constitutionality of the law—when all this has been done in the presence of an able and inquisitive bar—a strong presumption is raised that the attack has not been made upon the constitutionality of the law, because, in the judgment of the courts of the profession, no such ground of objection existed." *Brown v. Epps*, 91 Va. 726, 729, 21 S. E. 119.

e. Exercise of Judicial or Executive Functions.

(1) In General.

The apportionment of authority to the legislature does not sanction the exercise of executive or judicial power, except in those cases, warranted by parliamentary usage, when they are incidental, necessary or proper to the exercise of legislative authority, or where the constitution, in specified cases, may expressly permit it. *State v. Strauder*, 8 W. Va. 686; *Hall v. Webb*, 21 W. Va. 318, 326. See ante, "Separation of Departments," V, A; "Legislative and Judicial Powers Compared," V, B. As to invasion of pardoning power, see the title PARDON.

"Yet, while this is the basic principle underlying the separation of the government into its departments, it has been found to be wholly impractical to make such separation perfect. On the contrary, it has been found necessary, for its own existence and the proper discharge of its functions, for the legislature to exercise both judicial and executive or administrative functions, such as are entirely distinct from a legislative or law-making function, strictly speaking. In the enactment of every law, the legislature is called upon to exercise judicial functions, and especially is this true, in granting a charter to a city, town, or village, for there must be an inquiry, judicial in its nature, as to whether the facts jus-

tify the enactment of the law." In re Town of Union Mines, 39 W. Va. 179, 19 S. E. 398.

(2) Encroachment upon Judiciary.

In General.—The legislature must not usurp the functions of the judiciary. Thus, a statute directing the assessor and county clerk in making out the land books to disregard all changes made by the county court in the value of any tract of land, is unconstitutional and void. *Ex parte Low*, 24 W. Va. 620; *Seibert v. Linton*, 5 W. Va. 57. And an act of legislature purporting to legalize an order of the board of supervisors opening a road is void, because it attempts to determine a question essentially judicial. *Seibert v. Linton*, 5 W. Va. 57. See *Ice v. Marion County Court*, 40 W. Va. 118, 20 S. E. 809. And see the title **STREETS AND HIGHWAYS**.

But a statute allowing an appeal from a decision of a board of public works to the circuit court is not in violation of the constitutional provision requiring legislative, executive and judicial functions to be kept separate. *Wheeling Bridge, etc., R. Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551.

And statutes affecting limitation of actions, statutes relating to frauds and perjuries, to the admission of parol and written evidence, statutes relating to the registration of deeds, legalizing judicial proceedings, validating defective marriages, and a multitude of others, apply to the transactions and agreements of parties rules of decision wholly different from those which prevailed when the transactions occurred or the agreement was made. And yet these statutes have been fully sustained as clearly within the constitutional competency of the law-making department, as not infringing on judicial functions. *Town of Danville v. Pace*, 25 Gratt. 1, 24.

Act Authorizing Courts to Act in Ended Causes.—Under a constitution which divides a government into three distinct departments; viz., the legis-

lative, the executive and the judicial, without special authority in the constitution for so doing, it is beyond the power of the legislative department to authorize the courts to set aside judgments and grant new trials in cases, after the term at which the judgments were rendered, had passed, no matter how erroneous the judgment, for such action would be judicial. *Peerce v. Kitzmiller*, 19 W. Va. 564; *Griffin v. Cunningham*, 20 Gratt. 31, 52; *White v. Crump*, 19 W. Va. 583; *Arnold v. Kelley*, 5 W. Va. 446; *Marshall v. Cheatham*, 88 Va. 31, 13 S. E. 308; *Marpole v. Cather*, 78 Va. 239; *Ratcliffe v. Anderson*, 31 Gratt. 105. See post, "Laws Affecting Vested Rights," V, E, 2, d.

After the remedy under the general law has expired, a statute authorizing the opening of judgments rendered since an anterior date impairs vested rights and infringes on the judicial department. *Ratcliffe v. Anderson*, 31 Gratt. 105; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591; *Marpole v. Cather*, 78 Va. 239; *Teel v. Yancey*, 23 Gratt. 691; *Griffin v. Cunningham*, 20 Gratt. 31, 52; *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583.

To render a judgment or decree is a judicial act. It is one which the legislature can not perform. *Griffin v. Cunningham*, 20 Gratt. 31, 106.

Setting Aside Judgment.—For the legislature to set aside the judgment of a court by its act, is judicial legislation and void. *Ex parte Low*, 24 W. Va. 620, 624; *Arnold v. Kelley*, 5 W. Va. 446.

Acts in Aid of Judicial Proceedings.—The legislature may undoubtedly pass acts in aid of judicial proceeding, but never in destruction of them. Where the act in question falls within the latter class, it is unconstitutional and void. *Marpole v. Cather*, 78 Va. 239, 241.

"The legislature does or may prescribe the rules under which the ju-

dicial power is exercised by the courts, and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and for the same reason it would be incompetent for it, by retrospective legislation, to make valid proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties." *Griffin v. Cunningham*, 20 Gratt. 31, 108.

Acts in Exercise of Political Power.

—An act of the legislature forming a delegate district, or apportioning delegates for the house of delegates, may be declared unconstitutional and void by the courts, as an exercise of judicial power, although the act is in the exercise of political power. *Harmison v. Ballot Comm'rs*, 45 W. Va. 179, 31 S. E. 394. See the title ELECTIONS.

Statutes Authorizing Review of the Decisions of Military Court.—The legislature had no authority to confer upon the new constitutional court of appeals the power to set aside, annul or affirm "as to the court may seem proper" the decisions of a court established by the military authorities under the reconstruction laws of congress, even though the exercise of such power be limited to the first term of the newly-constituted court. *Griffin v. Cunningham*, 20 Gratt. 3155; *Teel v. Yancey*, 23 Gratt. 691.

Forfeiture without Trial.—The legislature has constitutional power to pass laws for the forfeiture of any vessel employed in violating the laws of the state, without regard to the guilt or innocence of the owner of such vessel,

but he must have notice and opportunity to contest. *Boggs v. Com.*, 76 Va. 989. See the title FORFEITURES.

No Power to Nullify Judgment by Pardon.—In *Com. v. Caton*, 4 Call. 5, the supreme court held void a resolution adopted by the state senate, but not concurred in by the lower house, whereby a pardon was sought to be granted to certain parties convicted of treason.

Constitutionality of Special Court of Appeals.—The act of March 31, 1848, Sess. Acts, p. 51, establishing a special court of appeals, constituted of judges of the circuit courts, is constitutional, and not an encroachment upon the judiciary. *Sharpe v. Robertson*, 5 Gratt. 518; *Bolling v. Lersner*, 26 Gratt. 54; *Winans v. Winans*, 22 W. Va. 685.

The legislative department has authority to terminate legislation when it pleases, but can not protract it beyond the supreme court of appeals. *Sharpe v. Robertson*, 5 Gratt. 518, 604.

Fixing Valuation of Land for Taxation.—So much of § 8, ch. 12, acts of 1881, as directs the assessor and county clerk, in making out the land books for the year 1881, to disregard all changes made by the county court in the value of any tract of land made after the first day of July, 1876, is judicial legislation and, therefore, unconstitutional and void. *Ex parte Low*, 24 W. Va. 620.

A statute declaring a particular sale a valid one is an assumption of judicial power by the legislature, and therefore void. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592, 623.

f. Power to Recall Bill after Passage.

But, after the passage of a bill in the legal and constitutional form, by both houses of the legislature, and the transmission of it to the governor in the manner provided in the constitution, the legislature has exhausted its power over it, and it can not recall the bill by resolution and revest themselves

with power to further act upon it. *Wolfe v. McCaull*, 76 Va. 876. See the title STATUTES.

g. May Regulate but Not Impair Constitutional Right.

"Where a constitution establishes a right but has not particularly designated the manner of its exercise, it is within the constitutional limits of the legislative power to adopt all necessary regulations in regard to the time and mode of exercising it, which are reasonable and uniform and designed to secure and facilitate the exercise of such right. Such a construction would afford no warrant for such an exercise of the legislative power, as under pretense of regulating should subvert or destroy the right itself." *Donaldson v. Voltz*, 19 W. Va. 156, 158.

Thus § 6, ch. 193, acts of 1872-73, so far as it excepts from the benefit of the exemption from execution debts due for rent, is in violation of § 48, art. 6, of the constitution, giving the right, and is therefore null and void. *Donaldson v. Voltz*, 19 W. Va. 156.

h. Can Not Restrict Rights of Succeeding Legislature.

See post, "Impairment of Obligation of Contract Prohibited," XI.

"The fact that a former legislature passed general laws relating to the same matters can not take away the right of a subsequent legislature to pass any act, public or private, special or general, not prohibited by the constitution; it matters not what effect it may have on former legislation. One legislature can not restrict the rights of its successors." *State v. County Court of Wirt*, 37 W. Va. 808, 17 S. E. 379.

"According to the theory and practice of our government, the whole subject of taxation, the raising and collecting public revenue, and its appropriation, are under the exclusive control of the representatives of the people. These are sovereign powers,

which no legislature is competent to surrender; nor can it, by any contract or enactment, deprive any future legislature of the right to adopt any laws, to impose any burdens, and apply the public revenue in any manner the public interest may require, not prohibited by the constitution." Dissenting opinion of Staples, J. *Antoni v. Wright*, 22 Gratt. 833, 866, subsequently approved in *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114.

See majority opinion, where it is said: "It is unquestionably true, that one legislature can not, by an act of ordinary legislation, bind or control, in any manner, subsequent legislatures. Such acts of legislation are, and of right should be, always subject to amendment or repeal. But it is equally true, that by special legislation amounting to a contract, a subsequent legislature may be bound. It is bound irrevocably by a legislative grant, forever parting with the real or personal property of the state, which is held to be a contract not to be impaired by legislation; by a temporary or perpetual exemption of specific property or interests from taxation; by a bond or certificate of debt issued by the state for money loaned, or other good and sufficient consideration; by charters of incorporation, unless the right to modify or repeal them is reserved by law; and by all legitimate legislative contracts. The exercise of such power in special cases, although necessarily controlling, to a certain extent, subsequent legislatures, has been always held to be salutary, and one of the 'essential elements of sovereignty.'" *Antoni v. Wright*, 22 Gratt. 833, 848.

And: "If the judicial authority could interpose to annul a law enacted by the legislature, upon the ground that it incapacitated it in future to discharge its important constitutional duties, it could only be in an extreme case, and where it was palpable on the face of the law, that such was intrinsically its nature, and that such must

be its effect and operation." *Antoni v. Wright*, 22 Gratt. 833, 882.

Irrevocable grants of franchises to corporations, which impair the supreme authority of the state to make laws for the right government of the state, must be regarded as mere licenses and not as contracts, which bind future legislatures; for no legislature can give away or sell the discretion of subsequent legislatures in respect to matters, the government of which from the very nature of things must vary in varying circumstances. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

i. Special and General Legislation.

"A general law is that which relates to a whole class of persons, places, relations, or things grouped according to some specified class characteristic, binding all within the jurisdiction of the law-making power, limited as that power may be by its territorial operation or by constitutional restraint. And it is none the less general though at the date of its passage there may be but one, or in fact not one, individual of the class thus created, provided it be reasonable, and not illusory, in its generalization; and provided that the circle or ring of classification be such as to remain open to receive the potentials which may arise bearing the peculiar mark of the class." *Groves v. County Court of Grant*, 42 W. Va. 587, 26 S. E. 460, 463.

"Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are laws special as to place." *Groves v. County Court of Grant*, 42 W. Va. 587, 26 S. E. 460, 463.

To take from the past a specified period of time, and a single transaction as having occurred within that period, but by circumlocution described as a class, and then take as the characteristic of the class the peculiarity of having occurred within such past period of time, to mark and distinguish the

class thus apparently created and set apart as the subject matter to be dealt with, such law, though general in appearance, is special in effect. *Groves v. County Court of Grant*, 42 W. Va. 587, 26 S. E. 460.

So much of chapter 31 of the acts of 1895 as provides for the relocation of county seats by a majority vote in cases where the county seat of any county in this state has, since January 1, 1872, been relocated by a special act of the legislature, is a special law, and as such is prohibited by § 39, art. 6, of the constitution, and is therefore unconstitutional and void. *Groves v. County Court of Grant*, 42 W. Va. 587, 26 S. E. 460.

Repealing Municipal Charter.—But the constitution, in art. 6, § 39, does not prohibit the legislature from passing a special law repealing the charter of a municipal corporation, or uniting the territory of several municipal corporations in one municipal corporation, and thus repealing their former charters. *South Morgantown v. Morgantown*, 49 W. Va. 729, 40 S. E. 15.

Question of Law for Court.—This constitutional provision against the passage of local or special acts is mandatory, and compliance with it necessary to the validity of the law in question; and whether, in any given case, the legislature has transcended its power and passed a law in conflict with the constitutional limitation in respect to local and special laws, is essentially a question of law, and must necessarily be decided by the courts. *Groves v. County Court of Grant*, 42 W. Va. 587, 26 S. E. 460, 462.

j. Delegation of Power.

(1) To the Judiciary.

See post, "Powers and Duty of Judiciary," V, F.

The legislature can not delegate its power to the judiciary, as such a delegation is impliedly prohibited by the separation of powers in the constitution. Applying this rule, a statute at-

tempting to confer upon the circuit courts the power to "supersede, revoke or annul" an ordinance of a city upon the petition of ten taxpayers residing in said city, is unconstitutional for the reason that such power is legislative, and therefore forbidden to be exercised by the courts. *Shephard v. City of Wheeling*, 30 W. Va. 479, 4 S. E. 635.

But a statute conferring on courts functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, is constitutional and valid. In *re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398; *Elder v. Central City*, 40 W. Va. 222, 21 S. E. 738.

And the legislature may authorize the appointment of additional justices of the peace by the county court if the court shall be of the opinion that others are needed. *Ex parte Bassitt*, 90 Va. 679, 19 S. E. 453.

So an act authorizing the courts to appoint commissioners in chancery is constitutional. *Lewis v. Rosler*, 19 W. Va. 61. And the circuit court may be authorized to appoint jury commissioners, they being officers of the court and not public officers. *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

Act Creating Special Court of Appeals.—The act of February 28, 1872, creating a special court of appeals, is not unconstitutional, as conferring legislative power, because it authorizes the court of appeals to designate the judges therefor. *Bolling v. Lersner*, 26 Gratt. 36, 48.

(2) To Local Authorities.

Local Option.—The legislature has the power to delegate to the voters of a particular district or county the power to adopt a statute. Thus, the question of authorizing the sale of liquor within a given locality may be left to the determination of its voters. *Savage v. Com.*, 84 Va. 619, 5 S. E. 565. See the title INTOXICATING LIQUORS.

Conditional Legislation.—And an act providing for the establishment of a system of free schools in a county may be made conditional upon its approval by the people of the county. *Bull v. Read*, 13 Gratt. 78. See also, *Kuhn v. Board of Ed.*, 4 W. Va. 499; *Neale v. County Court*, 43 W. Va. 96, 27 S. E. 373; *Savage v. Com.*, 84 Va. 621, 5 S. E. 565; *Ex parte Bassitt*, 90 Va. 682, 19 S. E. 453; *Langhorne v. Robinson*, 20 Gratt. 665; *Gilkeson v. Frederick Justices*, 13 Gratt. 584; *Goddin v. Crump*, 8 Leigh 120; *City of Richmond v. Richmond, etc., R. Co.*, 21 Gratt. 604; *Rutter v. Sullivan*, 25 W. Va. 427.

If the legislature should undertake to authorize the people, or a convention from the people, to enact a statute on a certain subject, then it might be well said, that it had delegated its power, and such act so enacted would have no constitutional warrant; but it is very different where the legislature submits to the people for their approval a statute which it has already passed. *Rutter v. Sullivan*, 25 W. Va. 427, 433; *Bull v. Read*, 13 Gratt. 78.

The legislature has the exclusive power to create independent school districts, without the assent of the citizens residing therein, and to authorize by law the election of a board of education for such district, by the qualified voters resident therein, and to give such board power to make the annual levies for buildings and the support of schools therein. *Kuhn v. Board of Ed.*, 4 W. Va. 499; *Pumphrey v. Brown*, 77 Va. 569.

k. Tonnage Duty Prohibition.

See the title TAXATION.

The seventh section of the act of March 3, 1866, entitled an act imposing a duty on oysters, imposes a tonnage duty, and is, therefore, in violation of the constitution of the United States, art. 1, § 10. *Johnson v. Drummond*, 20 Gratt. 419.

A duty of tonnage, in the most obvious sense of the word, imports a tax or duty proportioned to the tonnage

or size of the vessel. This description of tax has usually been imposed in that form, both in England and in this country, and from the form, it doubtless received its appellation. But, in the case cited from 6 Wallace 31, the supreme court held, that "it was not only a pro rata tax that was prohibited, but any duty on the ship, whether a fixed sum upon the whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." *Johnson v. Drummond*, 20 Gratt. 419, 423.

2. To Pass Retrospective Laws.

a. In General.

Retrospective Laws Valid unless Prohibited.—The legislature may give a statute retrospective operation unless it violates that provision of the federal constitution relating to ex post facto laws and the obligation of contracts, or unless it is repugnant to some express provision of the state constitution, or unless it interferes with vested rights of property, so as not to come within the limits of the law-making power. Independently of these exceptions, retroactive laws are within the scope of the legislative authority and will not be interfered with by the judiciary. *Town of Danville v. Pace*, 25 Gratt. 1; *Bell v. Farmville, etc., R. Co.*, 91 Va. 99, 20 S. E. 942; *Redd v. Supervisors*, 31 Gratt. 695; *Merchants' Bank v. Ballou*, 98 Va. 117, 32 S. E. 481; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239; *Keller v. McHuffman*, 15 W. Va. 64; *Huffman v. Alderson*, 9 W. Va. 616; *Ex parte Hunter*, 2 W. Va. 122, 159. See post, "Impairment of Obligation of Contract Prohibited," XI.

Rules of Appellate Procedure.—The act of February 7, 1890, amending Va. Code, 1887, § 3484, requires the appellate court to look first to the proceedings and the whole evidence on the first trial; and if there be error in setting aside the verdict on that trial, to set aside and annul all proceedings subsequent to said verdict, and to enter

judgment thereon. The rule of this act, which operates retrospectively, applies to all cases which, though decided by the court below before, yet come before this court on error since the passage of said act. *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538.

And it is equally clear that it was within the constitutional power of the legislature to give it that effect. *Mears v. Dexter*, 86 Va. 828, 833, 11 S. E. 538; *Southwest Va. Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365.

It was held, in *Wyatt v. Morris*, 2 W. Va. 575, that an act of the legislature of West Virginia extending the time of application for a writ of error or supersedeas to a judgment of a Virginia court, though enacted after the expiration of the former period of limitation, was not unconstitutional. See *Ex parte Quarrier*, 4 W. Va. 210, 224.

Statutes Construed Prospectively.—A statute will not be construed to have a retroactive effect unless there is something on the face of the act showing beyond a doubt that this was the purpose of the legislature. *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481; *Myers v. Com.*, 90 Va. 785, 20 S. E. 152; *Bell v. Farmville, etc., R. Co.*, 91 Va. 99, 20 S. E. 942, 944; *Jones v. Com.*, 86 Va. 662, 10 S. E. 1005; *Town of Danville v. Pace*, 25 Gratt. 1, 4; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476.

Applying this rule, a provision in the constitution that "the legislature may authorize municipalities to lay taxes" is not to be construed as retrospective. *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

Imposing Qualification for Office Holders.—No one has a natural or inalienable right to an office; all who seek it must accept the office with all the restrictions imposed by law. Therefore a law providing that certain officers shall take a test oath of loyalty to the state is not retroactive and is constitutional. *Ex parte Stratton*, 1 W.

Va. 305; *Randolph v. Good*, 3 W. Va. 551.

b. Ex Post Facto Laws.

What Laws Are Ex Post Facto within the Meaning of the Constitution.—The states are expressly inhibited by the federal constitution from passing ex post facto laws. Laws fall within the meaning of this inhibition when they impose a punishment for previous acts which were not punishable at all when committed, or not punishable to the extent or in the manner prescribed, or when they change the rules of evidence so that less or different testimony is required to convict. *Danville v. Pace*, 25 Gratt. 1; *Ex parte Quarrier*, 4 W. Va. 210; *Turner v. Turner*, 4 Call 234. See *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448; *Com. v. Adcock*, 8 Gratt. 682.

Ex post facto laws are prohibited, and while, in a general and literal sense, an ex post facto law is one passed in regard to an act after the act is done, in its most comprehensive definition it includes all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or of a criminal nature. *Jones v. Com.*, 86 Va. 661, 663, 10 S. E. 1005.

"Justice Chase, in an early case (*Calder v. Bull*, 3 Dall. 390, August term, 1798), defines an 'ex post facto law,' within the meaning of the United States constitution, to be (1) one which makes an action done before the passing of the law, which was innocent when done, criminal; (2) or makes a crime greater than it was when committed; (3) or inflicts a greater punishment than the law annexed to the crime when committed; (4) or alters the legal rule of evidence, and receives less or different testimony than the law required at the commission of the offense, in order to convict the offender. They strictly extend to criminal cases and not to civil cases, and are restricted to the creation, and perhaps enhancement, of crimes and pains and penalties." *Jones v. Com.*, 86 Va.

661, 663, 10 S. E. 1005; *Ex parte Hunter*, 2 W. Va. 122, 172.

It is further stated in the same decision, that the prohibition (against passing ex post facto laws) is an additional bulwark in favor of the personal security of the subject—to protect his person from punishment by legislative acts having a retrospective operation, and not to secure the citizen in his rights of either property or contracts. *Ex parte Hunter*, 2 W. Va. 122, 172.

"And Mr. Justice Field, in the later case of the Missouri test oaths (*Cummings v. Missouri*, 4 Wall. 277), defines it thus: 'An ex post facto law is one which imposes a punishment for an act which was not punishable at the time when it was committed, or imposes additional punishment to that then prescribed.'" *Jones v. Com.*, 86 Va. 661, 663, 10 S. E. 1005.

Inflicting Existing Punishment Which Accused Would Otherwise Escape.—

It forbids the passage of any law which makes an action criminal, which was lawful when it was performed. And not only laws which come directly within this definition, but such as inflict an existing punishment which the accused would otherwise escape, are forbidden. *Perry v. Com.*, 3 Gratt. 632, 636.

Always Relate to Crimes and Punishment.—

Ex post facto laws always relate to penal and criminal proceedings, and never to civil proceedings. Hence, a law requiring a person who has already qualified as an attorney at law to take an oath before he can continue to practice at law, is not an ex post facto law. *Ex parte Hunter*, 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210; *Perry v. Com.*, 3 Gratt. 632.

For where an act recites conduct which other laws make criminal, but it does not; which other laws punish, but it does not, at least in the proper sense of that term, and if at all, it is only an incidental result, consequent

on the exercise of a lawful power, and in the execution of a lawful object; neither does it change the evidence by which crime is established, nor does it contemplate the proof of any crime by the evidence it appeals to; it is not *ex post facto*. *Ex parte Hunter*, 2 W. Va. 122, 157.

Not every law which operates prejudicially to an individual, can be said to be criminal, or punitive, and if retrospective, therefore "*ex post facto*." For then every tax law would be punitive, for they would, in that sense, punish the taxpayer by the amount extorted. *Ex parte Hunter*, 2 W. Va. 122, 155.

It was upon this distinction between a retrospective civil and criminal law, that the case of *Morris v. Wyatt*, 2 W. Va. 575, turned, and in which this court sustained the validity of the act, because, though retrospective, it was not *ex post facto*. *Ex parte Quarrier*, 4 W. Va. 210, 224.

In *Turner v. Turner*, 4 Call 234, a legislative interpretation changing title founded on existing statutes is likened to an *ex post facto* law since it deprives vested rights. See post, "Laws Affecting Vested Rights," V, E, 2, d.

Test Oath of Office.—It was held in *Ex parte Stratton*, 1 W. Va. 304, that a statute prescribing a test oath of loyalty for public officers was not a retrospective law, and therefore not *ex post facto* in its nature, as no one has a natural right to office, and all who seek it must accept it with the restrictions and conditions imposed by law.

The act of the legislature of West Virginia, 1866, was also held not unconstitutional in prescribing a test oath of loyalty for all attorneys at law, as being an *ex post facto* law. *Ex parte Hunter*, 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210.

Voter's Test Oath.—And in *Randolph v. Good*, 3 W. Va. 551, the act of the legislature of West Virginia of 1865, in relation to challenging voters

and requiring them to take the test oath therein prescribed, was held not to be unconstitutional, as an *ex post facto* law, or one impairing vested rights.

Imposition of Increased Punishment for Second Offence.—A statute imposing a greater punishment for a second offense, than for the first offense of the same character, is not unconstitutional as being an *ex post facto* law. *Rand v. Com.*, 9 Gratt. 738.

The constitution withholds from the legislature the power to convert into a crime, by statute, an act, which, at the time it was done, offended against no law; or to visit a criminal act even with penalties more severe than those which were attached to it by law, when it was committed. No constitutional or other obstacle however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offenses committed after the passage of the act, may, if shown to have committed like offenses before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. *Rand v. Com.*, 9 Gratt. 738, 743; *King v. Lynn*, 90 Va. 345, 18 S. E. 439.

The act does not apply to the case of a conviction for an offense committed after commission of that for which the prisoner is on trial. *Rand v. Com.*, 9 Gratt. 738.

But it applies to the case of a prisoner on trial who had been convicted and sentenced previous to the passage of this act. *Rand v. Com.*, 9 Gratt. 738.

Remedial Law Not Ex Post Facto.—Remedial laws in force at time indictment found, must prevail, though when the offense was committed different modes of procedure were required. *Wilson v. Com.*, 86 Va. 666, 10 S. E. 1007.

Thus, by the law in force before May 1, 1888, accused, when indicted, was required to be sent before a jus-

tice for examination. By § 4003, Va. Code, 1887, that requirement is omitted, and accused, indicted since then, need not have such preliminary examination, though the offense was committed before then. *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005.

Laws Mitigating Punishments.—Where there is a statutory provision, that the repeal of a law, or its expiration, shall not affect any offense committed before such repeal or expiration, or the punishment thereof, except that if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby be applied to any judgment pronounced after it has taken effect, the consent of the accused to the infliction of such mitigated punishment is essential, and it must be given in court and entered of record, before the verdict received and recorded by the court. Otherwise the law in force at the time of the offense is applicable. *State v. Abbott*, 8 W. Va. 741. See the title STATUTES.

Rules of Practice May Be Changed.—And it is always competent for the legislature to change the rules of practice without violating this inhibition. Hence, a statute changing the mode of summoning and making up juries in trials for felony, applies to all cases tried after the act, though the offense was committed, and the examining court had passed upon the case, before the passage of the act. *Perry v. Com.*, 3 Gratt. 632.

For the constitutional provision, forbidding ex post facto laws, relates to crimes and punishments; and not to criminal proceedings. *Perry v. Com.*, 3 Gratt. 632.

And though an offense committed before the Code of 1849 went into operation, must, so far as the question of guilt, degree of crime, quantum of punishment and rules of evidence are concerned, be governed by the law in force at the time the offense was committed, yet upon the question of the

prisoner's right to be discharged from the failure to try him, arising after the Code went into operation, it must be governed by the Code of Virginia. *Com. v. Adcock*, 8 Gratt. 661. See post, "Speedy Trial," VI, B.

Law Not Made Ex Post Facto by Charges in Indictment.—The fact that an indictment charges the commission of an offense both before and after the statute making it an offense was passed is not sufficient to make the law ex post facto, but the part of the indictment charging the offense before the passage of the law making it an offense, will be disregarded. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

May Operate as Discharge.—The passage of an act which prescribes a new punishment for old offenses, and repeals all laws coming within the purview of it, without providing that offenses committed before the operation of the new law shall be punished under the old, operates as a discharge of all who have committed such offenses, and have not been tried previous to the new law going into effect. *Attoo v. Com.*, 2 Va. Cas. 382.

c. Bills of Attainder.

The states are also forbidden by the federal constitution to pass bills of attainder. A statute requiring a party to take a certain oath therein prescribed as prerequisite to a rehearing in the matter of a judgment suffered by default, in attachment, called the "suitor's test oath," and in effect to purge himself from all complicity with the "rebellion," is in the nature of a bill of pains and penalties, and unconstitutional, as a bill of attainder and ex post facto law. *Kyle v. Jenkins*, 6 W. Va. 371; *Peerce v. Carskadon*, 6 W. Va. 383; *Ross v. Jenkins*, 7 W. Va. 284. See *Peerce v. Carskadon*, 83 U. S. 276; *Lynch v. Hoffman*, 7 W. Va. 578; *Lynch v. Hoffman*, 7 W. Va. 553, 557. See *Beirne v. Brown*, 4 W. Va. 72; *Peerce v. Carskadon*, 4 W. Va. 234, overruled.

And an act of congress providing for the forfeiture of land for the nonpayment of taxes, as a penalty upon persons who were engaged in the rebellion against the United States, is a legislative conviction and punishment without trial and is a bill of attainder and void. *Martin v. Snowden*, 18 Gratt. 100.

d. Laws Affecting Vested Rights.

See post, "What Amounts to Impairment," XI, D.

Legislation can not divest or impair rights of property already vested, nor the right of alienation, nor any of the essential incidents to the estate in such property. *Johnson v. Sanger*, 49 W. Va. 405, 38 S. E. 645. And a legislative interpretation changing title founded on existing statutes is subject to every objection which lies to an ex post facto law, since it would destroy vested rights. *Turner v. Turner*, 4 Call 234; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481; *Town of Danville v. Pace*, 25 Gratt. 1.

But while retrospective laws which impair and take away other vested rights, may be oppressive, and are sometimes unjust, they may, nevertheless, be strictly constitutional. Ex parte *Hunter*, 2 W. Va. 122, 173. *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481; *Town of Danville v. Pace*, 25 Gratt. 1.

Statutes which go to confirm existing rights and in furtherance of the remedy, by curing the defects and adding to the means of enforcing existing obligations, have been held clearly valid, when just and reasonable, and conducive to the general welfare, even though they might in some degree infringe upon vested rights. *Town of Danville v. Pace*, 25 Gratt. 1, 11.

Vested Right to Curtesy or Dower.

—But a husband's right to curtesy initiate, and his right to reduce into possession his wife's choses in action, are not vested rights, and they may be

impaired or taken away by legislation. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335; *Thornburg v. Thornburg*, 18 W. Va. 522. But see *Wyatt v. Smith*, 25 W. Va. 813. And so with a wife's right to dower. *Thornburg v. Thornburg*, 18 W. Va. 522. See the titles CURTESY; DOWER.

No Vested Right in Statutes.—And an act authorizing state bondholders to invest bonds in tax-receivable coupons does not create in the bondholder any vested right, so as to prevent the repeal of the statute, before the acceptance by them of its benefits. *Paulsen v. Rogers*, 32 Gratt. 654; *Wise v. Rogers*, 24 Gratt. 169.

Affecting the Remedy.—See post, "Laws Affecting Remedies," XI, D, 7.

Vested Right in Statute of Limitations.—See post, "Changing Statute of Limitations," XI, D, 7, d.

Vested Rights in Office.—See the title PUBLIC OFFICERS.

Vested Right in Office of Attorney.

—A party having qualified as an attorney before the passage of the attorneys' test oath act, of February 14, 1866, did not acquire such a vested right in the office of attorney as released him from being required to take the oath prescribed in that act. Ex parte *Quarrier*, 4 W. Va. 210.

Vested Right in Judgment.—"There can be no doubt that a judgment is such a vested right of property that the legislature can not, by a retroactive law, either destroy or diminish its value. *Roberts v. Cocke*, 28 Gratt. 207, 222; *Ratcliffe v. Anderson*, 31 Gratt. 105." *Merchants' Bank v. Ballou*, 98 Va. 112, 117, 32 S. E. 481; *Day v. Pickett*, 4 Munf. 104. See *Town of Danville v. Pace*, 25 Gratt. 1; *Arnold v. Kelley*, 5 W. Va. 446. See post, "Judgments," XI, C, 3.

Effect of Fourteenth Amendment.

See post, "Due Process of Law," X.

Before the ratification of the fourteenth amendment to the constitution of the United States, the legislature might, if authorized by the state con-

stitution, divest rights of property, where such rights were not vested by contract. *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583.

Since the ratification of said amendment such vested rights of property by a state can only be divested by "due process of law." *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583.

Vested Rights of Mill Owners.—See the title MILLS AND MILLDAMS.

Vested Rights of School Trustees.—See the title SCHOOLS.

Vested Rights in Lottery Privilege.—See the title LOTTERIES.

Vested Right in Tax Exemption.—See the title TAXATION.

e. Curative Laws.

Statutes Validating Contracts Void for Usury.—Legislative acts validating invalid contracts will be sustained, when these acts go no further than to bind the party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law. Thus, the defense of usury, being in the nature of a penalty or forfeiture, may at any time be taken away by the legislature in respect of previous as well as subsequent contracts, without trenching upon any vested rights. *Town of Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Ewell v. Daggs*, 108 U. S. 143; *Bosang v. Iron Belt*, etc., Ass'n, 96 Va. 119, 30 S. E. 440; *Smoot v. People's*, etc., Ass'n, 95 Va. 686, 29 S. E. 746. See the title USURY.

Legitimizing Children.—And where the legislature passed a law, declaring that the issue of a marriage deemed null in law should nevertheless be legitimate, it was held, to legitimate children born before the act, so as to entitle them to share the estate, and as next of kin to entitle them to administration, where the father had died after

the act took effect. *Stones v. Keeling*, 3 Hen. & M. 228, and note; *Rice v. Eford*, 3 Hen. & M. 225. See the title BASTARDY, vol. 2, p. 334.

Curing Defective Acknowledgment.

—But a statute which attempts to validate deeds, made for the benefit of a corporation, which have been acknowledged before a notary public or other officer who was a stockholder in such corporation, is unconstitutional and void so far as it affects the lien of a judgment recovered and docketed against the grantors in such deeds prior to the approval of the act. *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481. See the title ACKNOWLEDGMENTS, vol. 1, p. 104.

Void Judgment Can Not Be Validated.—So, also where persons without authority to act as judges hear and decide causes, their judgment is of no effect, and it can not be validated by a subsequent statute, as this would be taking one man's property from him and giving it to another. *Griffin v. Cunningham*, 20 Gratt. 31. See the title JUDGMENTS AND DECREES.

Curing Failure to Exercise Conditions Precedent.—Where the legislature has given a county or municipality authority to subscribe to stock of a corporation, and, through mistake or otherwise, the conditions precedent to purchase are not complied with by the county or municipality, the legislature can cure this defect by subsequent legislation. *Redd v. Supervisors*, 31 Gratt. 695; *Bell v. Farmville*, etc., R. Co., 91 Va. 99, 20 S. E. 942; *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722. See the title CONDITIONS, ante, p. 53.

3. Prohibition of Payment of Debts Incurred in Aid of Confederacy.

See ante, "Secession Governments," II, E. See the title CONFEDERATE STATES, ante, p. 53.

The state government of Virginia, which existed at Richmond during the war, and the Confederate government of which it formed a part, were at least governments de facto, and contracts

arising thereunder are valid, and will be enforced unless prohibited by the constitution of the state. *Pulaski Co. v. Stuart*, 28 Gratt. 872; *Miller v. Cook*, 77 Va. 818; *Pilson v. Bushong*, 29 Gratt. 236; *Dinwiddie Co. v. Stuart*, 28 Gratt. 526; *Ruckman v. Lightner*, 24 Gratt. 19; *Bier v. Dozier*, 24 Gratt. 10; *Newton v. Bushong*, 22 Gratt. 628; *Walker v. Pierce*, 21 Gratt. 722; *Walker v. Christian*, 21 Gratt. 291, 302.

Acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person or estate, for the preservation of life and health, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government. *Dinwiddie Co. v. Stuart*, 28 Gratt. 526, 539.

Thus, a contract made under the act of May 9, 1862, to furnish salt to a county, does not come within the prohibition of the constitution, state or federal, prohibiting the levy of any tax to pay any liability incurred in aid of the Confederacy, and must be enforced. *Pulaski Co. v. Stuart*, 28 Gratt. 872; *Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999; *Dinwiddie Co. v. Stuart*, 28 Gratt. 526.

Under the statute passed by the legislature of Virginia, at Richmond, of May 9, 1862, authorizing counties to purchase salt for distribution to their people, the county court of Greenbrier, which was under the control of that government in 1862, made a contract with S. for the purchase of a certain quantity of salt, which was then delivered by S. This contract is binding on the county of Greenbrier as at present organized, and its payment is not prohibited by the constitution of

the United States or of this state. *Stuart v. Greenbrier*, 16 W. Va. 95.

But the obligations created in the name of the state of Virginia, by the general assembly which sat in Richmond, at its session of 1861-62, are embraced by art. 10, § 10, of the constitution of Virginia, which forbids that any provision shall be made for their payment. *Meredith v. Rogers*, 24 Gratt. 172.

And so with notes issued as currency by the city of Richmond under an act of the legislature of the seceded state of Virginia. *Isaacs v. Richmond*, 90 Va. 30, 17 S. E. 760.

"Said clause of the constitution was designed to invalidate every obligation on the part of the state for the payment of money created by act of the legislature during the war. *Meredith v. Rogers*, 24 Gratt. 172, 174.

In *Com. v. Chalkley*, 20 Gratt. 404, the storekeeper of the penitentiary, elected prior to 1861, for two years, had purchased during his term leather and findings to be manufactured by the convicts, both he and the seller recognizing the authority of the Richmond government in power at the time. The claim never having been paid by the Richmond authorities, suit was instituted after the war to recover same from the re-established Virginia government. It was held, that there was no claim, either in law or equity, upon such government, for its payment. Any express contract therefor was avoided by the provision of the constitution, and so with an implied contract to pay for such goods, they not being absolute necessities for the support of the convicts.

4. Act of Oblivion as to Civil War.

The act of February 27, 1866, prohibiting suits being prosecuted for acts done in obedience to orders, or by authority, of any civil or military officer of this state or the United States, in aid of the purposes and policy of said authorities, in retarding, checking or

suppressing the "late rebellion," is not unconstitutional. *Hess v. Johnson*, 3 W. Va. 645. See post, "In Setting Aside War Trespass Judgments," X, E; "Judgments," XI, C, 3.

5. Control and Disposition of Public Funds and Property.

Prohibition of Payment of Unauthorized Claim.—Scope.—That part of § 38, art. 6, of the constitution, which is in these words: "Nor shall any legislature authorize the payment of any claim or part thereof hereafter created against the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements shall be null and void," does not apply to claims predicated upon simple justice and right, and does not prevent the legislature from voluntarily doing justice and right, when the claim is not predicated on a contract made without express authority of law. *Slack v. Jacob*, 8 W. Va. 612.

Full Power to Change Custody and Investment.—Where not forbidden by the terms of the gift, funds dedicated to public uses are entirely within the scope of the legislative powers of the general assembly, and acts of legislation changing the custody of such funds, and directing payment thereof to the new custodian, and the execution of a release to the debtor are valid, and binding on all affected thereby. *Prince William School Board v. Stuart*, 80 Va. 64; *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 5 S. E. 25.

Such acts come within the scope of the act of the restored government passed February 28, 1866, validating "certain acts, contracts, and proceedings during the late war." *Prince William School Board v. Stuart*, 80 Va. 64.

Where the legislature changed the custodian of a public fund, appointing one public officer to substitute another in the discharge of a public duty, and authorized the payment of the debt,

and its application in accordance with the terms of the instrument by which it was created, this was the exercise by the state of such paternal or tutorial power over rights and interests of the beneficiaries as appears to be clearly within the power of the sovereign, to be exercised by general laws, and under the peculiar circumstances of this case, by a special act of the legislature. *Prince William School Board v. Stuart*, 80 Va. 64, 72.

And the fact that the legislature in 1863 authorized the payment of such fund, which had been securely loaned upon real estate, into the literary fund, releasing the security, by which the fund was subsequently lost, being paid in Confederate currency, did not affect the validity of such release or the payment and discharge of the debt in this manner. *Prince William School Board v. Stewart*, 80 Va. 64, distinguishing *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457. *Lewis, J.*, dissenting, in which *Hinton, J.*, concurred, construed this act of the legislature as unconstitutional, as impairing the obligation of a contract, in that it authorized the payment of a debt in Confederate currency, or in legal currency, which was contracted to be paid in gold or its equivalent, it being thus paid off and discharged in Confederate money, worth perhaps one-fifteenth of the real value of the debt.

Act Donating Public Property Not Legislative.—If a legislature passes an act, which is not properly a statute, because not legislative in its character, such an act must be declared void by courts, because the constitution has conferred on the legislature only legislative power. *Trustees of Brooke Academy v. George*, 14 W. Va. 411, 420.

So an act of the legislature donating the property of the state to an individual, or a private corporation, in disregard of the public interest, is not legislative in its character, and should therefore be declared void by the

courts. *Trustees of Brooke Academy v. George*, 14 W. Va. 411, 420.

Peter Curran by the seventeenth clause of his will bequeathed all the residue of his estate, after the payment of certain bequests, to the Virginia literary fund; and he died in 1861. The legislature of the restored government of Virginia, on December 20, 1862, passed an act, by which they appropriated this residuary fund to the Brooke Academy, which was essentially a private educational institution, though incorporated by an act of the legislature of Virginia, passed January 10, 1799. It was held, that the act of December 20, 1862, so far as it attempts to make this appropriation of this residuary fund, is unconstitutional, null and void. *Trustees of Brooke Academy v. George*, 14 W. Va. 411.

Appropriation for Normal School.—The act approved March 7, 1884, entitled "An act for the establishment of a state female normal school," was within the legislative powers of the general assembly. And the latter had the power to appropriate out of the treasury the annual sum of ten thousand dollars for the support of that school, but not to appropriate it out of the fund set apart by the constitution for the maintenance of the public free schools of the state. *State Female Normal School v. Auditors*, 79 Va. 233. See the title SCHOOLS.

Act Transferring Property from Virginia to West Virginia.—An act of the general assembly of the reorganized government of Virginia, transferring to the proposed state of West Virginia, when the same shall become one of the United States, all this state's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments, in counties embraced within the boundaries of the proposed state aforesaid, was not void, because the state of West Virginia was not in existence as one of the United States at the time of its passage. *Calwell v. Prindle*, 19 W. Va. 604.

Said act did take effect and become operative for the purposes of its enactment on the said 20th day of June, 1863. And although the legislature of the state of West Virginia did not by an act in express terms "accept the said Virginia act," yet the legislature did, by clear implication, derived by acts touching the subjects of said Virginia act, accept the said Virginia act (if any acceptance were necessary to make the said act effective for its purpose). *Calwell v. Prindle*, 19 W. Va. 604.

The common-law principle applying to deeds—that there can be no valid deed without a grantee as well as a grantor—can not be held to apply to an act of the legislature like this or perhaps acts similar in character. The common law may be modified or repealed by the legislature in its applicability to a particular subject or matter or act, or generally. It is true that the act never could have been operative, if the state of West Virginia had not become one of the states of the Union; and it was manifestly intended by the legislature, that it should not be operative for any purpose, until that event happened. At the time of the passage of the act, as we have seen, the new state was in contemplation, and in fact had advanced far towards becoming a state of the Union; and the legislature of Virginia, at Wheeling, evidently considered that the new state would soon become an accomplished fact. *Calwell v. Prindle*, 19 W. Va. 604, 648.

6. Powers Over Municipal Corporations.

See the title MUNICIPAL CORPORATIONS.

7. Control Over Public Officers and Their Salaries.

See the title PUBLIC OFFICERS.

8. Power Over Qualification of Voters.

See the title ELECTIONS.

9. Regulations of Commerce.

See the title INTERSTATE COMMERCE.

10. Statutes Creating a Presumption as to Conspiracy.

See the title CONSPIRACY, ante, p. 132.

11. Statutes Giving Supply Liens.

See the titles LIENS; RAILROADS.

12. Escheat.

See the title ESCHEAT.

13. Regulating Sale of Intoxicating Liquors.

See the title INTOXICATING LIQUORS.

F. POWERS AND DUTY OF JUDICIARY.**1. In General.**

The judiciary alone has power to determine whether or not a statute is in harmony with the constitution, and to declare that statutes which conflict with the constitution shall be void. *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42, 69; *Kamper v. Hawkins*, 1 Va. Cas. 19, 82; *Jackson v. Rose*, 2 Va. Cas. 34, 35; *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394; *State v. Buchanan*, 24 W. Va. 362. See ante, "To the Judiciary," V, E, 1, j, (1).

A resort to the courts must be had to test the validity or assert the supremacy of laws; and the interests of persons affected by them furnish an active motive and an imperious necessity for such a resort. *Taylor v. Stearns*, 18 Gratt. 244, 268.

The question whether a state court can resist an unconstitutional law, has long been settled in Virginia, so far as respects the state laws, and has been acquiesced in by the general assembly, and the argument is much stronger as respects the laws of congress, the legislature of a separate and distinct sovereignty, whose laws are not valid and binding unless made in pursuance of the federal constitution. *Jackson v. Rose*, 2 Va. Cas. 34.

And while it is the duty of the judicial department generally to give ef-

fect to the acts of its coequal and coordinate department, the legislative, and always in a doubtful case to solve the doubt in favor of the validity of the law; on the other hand, it is one of its highest duties and most solemn prerogatives to declare what the law is. And where the legislative will, or the popular will declared in the solemn form of a constitution, is in contravention of the supreme law of the land, the judicial department must uphold that law, and unflinchingly guard it as inviolable. *Homestead Cases*, 22 Gratt. 266, 280; *Griffin v. Cunningham*, 20 Gratt. 31, 34; *Taylor v. Stearns*, 18 Gratt. 244, 268; *Com. v. Caton*, 4 Call 5; *Price v. Moundsville*, 43 W. Va. 523, 27 S. E. 218; *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348; *Slack v. Jacob*, 8 W. Va. 612, 627; *List v. Wheeling*, 7 W. Va. 501, 519.

And it is in duty bound to inquire into the constitutionality of an act of the legislature, when the question is properly presented for its consideration. *Price v. City of Moundsville*, 43 W. Va. 523, 27 S. E. 218; *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962; *Arkle v. Board of Commissioners*, 41 W. Va. 471, 23 S. E. 804; *Bridges v. Shallcross*, 6 W. Va. 562.

And a uniform and unquestioned practice, it is conceded, would not conclude this court in regard to a statute which was a plain and positive violation of the constitution. *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962, 965.

It is the province of the judiciary to expound the laws, and to adjudge cases which may be brought before them. The judiciary may clearly say that a subsequent statute has not changed a former for want of sufficient words, though it was perhaps intended it should do so. It may say, too, that an act of assembly has not changed the constitution, though its words are expressly to that effect, because a legislature must have both the power and the will (as evidenced by words) to

change the law. *Kamper v. Hawkins*, 1 Va. Cas. 19, 38.

Duty One of Extreme Delicacy.—The duty of inquiring into, and deciding upon the validity of an act of the legislature, has always been regarded as one of the most delicate a court can be called upon to discharge. *Sharpe v. Robertson*, 5 Gratt. 518, 575; *Com. v. Brown*, 91 Va. 762, 781, 21 S. E. 357; *Danville v. Pace*, 25 Gratt. 1. See ante, "Presumption That Legislation Is Constitutional, and Construction," V, E, 1, c.

Particularly where the act is in furtherance of a provision of the organic law of the state, incorporated in the solemn form of a constitution. *Homestead Cases*, 22 Gratt. 266, 280; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42, 69.

And it is to be exercised with extreme caution, and even with reluctance. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 288; *Louthan v. Com.*, 79 Va. 196, 199; *Helfrick's Case*, 29 Gratt. 847; *Com. v. Byrne*, 20 Gratt. 175; *Eyre v. Jacob*, 14 Gratt. 422; *South Morgantown v. Morgantown*, 49 W. Va. 729, 40 S. E. 15; *Roby v. Shepard*, 42 W. Va. 286, 26 S. E. 278; *Slack v. Jacob*, 8 W. Va. 627; *Bridges v. Shallcross*, 6 W. Va. 570; *Ex parte Hunter*, 2 W. Va. 122, 162.

Impeachment.—And if a court should be corrupt or arbitrary in the exercise of its powers thus committed to it, the same constitution has provided an effectual remedy by resort to the high court of impeachment. *State v. Buchanan*, 24 W. Va. 362.

Express Repugnancy Unnecessary.—See post, "Legislative Motives and Discretion Unimpeachable," V, F, 3.

It is not always necessary, in order to declare an act unconstitutional, to point out the precise provision which it violates, if it be repugnant to the spirit of the constitution, or of the institutions which the constitution creates. *Farmville v. Walker*, 101 Va. 323, 333,

43 S. E. 558; *Bridges v. Shallcross*, 6 W. Va. 562.

For the judiciary may and ought, not only to refuse to execute a law expressly repugnant to the constitution, but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof. *Kamper v. Hawkins*, 1 Va. Cas. 19, 35.

By fundamental principles are meant those great principles growing out of the constitution, by the aid of which, in dubious cases, the constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the constitution. *Kamper v. Hawkins*, 1 Va. Cas. 19, 40.

But it was said in *Osburn v. Staley*, 5 W. Va. 85, that while the legislature is governed by the spirit of the constitution, a court, in construing its acts, must be guided by the express words of the constitution, and not by its supposed spirit.

Extends to Acts in Exercise of Political Power.—An unconstitutional act forming a delegate district or apportioning delegates for the house of delegates may be declared void by the courts, although the act is the exercise of political power, since in such case the question is judicial. *Harmison v. Ballot Comm'rs*, 45 W. Va. 179, 31 S. E. 394.

Jurisdiction of Supreme Court of Appeals.—See the title APPEAL AND ERROR, vol. 1, pp. 493-4.

"By § 88 of the constitution of the state, which prescribes the jurisdiction of this court, it is provided that 'in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained.'" *Postal Tel. Co. v. Umstadter*, 103 Va. 743, 748, 50 S. E. 259.

Court of Appeals of Virginia—How Many Must Concur—Rehearing.—The assent of at least three judges of this court is required, by § 88 of the constitution (1902), only when it is necessary to determine that a law is or is not repugnant to the constitution of this state, or of the United States. In other cases, not involving the constitutionality of a law, § 3485 of the Code applies which requires this court to affirm "where the voices on both sides are equal." No rehearing is required. *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378.

Application of Rule of Stare Decisis.—See the title STARE DECISIS. See ante, "Acquiescence by State in Unconstitutional Law," V, E, 1, d.

Power of Federal and State Courts Compared.—See ante, "Jurisdiction of Constitutional Questions," III, N.

2. Co-Ordinate with Legislative Power.

See ante, "Separation of Departments," V, A.

The legislative and judicial are co-ordinate departments of the government, and of equal dignity. Each is alike supreme in the exercise of its proper functions, and can not, directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other. The courts may, in a proper case, and must, when the question is free from doubt, declare the legislative enactments unconstitutional and void. *Griffin v. Cunningham*, 20 Gratt. 31, 34; *Arkle v. Board of Commissioners*, 41 W. Va. 471, 23 S. E. 804.

The power of the people is superior to both, and where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former. *Kamper v. Hawkins*, 1 Va. Cas. 19, 83; *Griffin v. Cunningham*, 20 Gratt. 31, 34.

The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judi-

cial power is superior in degree and dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as a paramount law, whenever a legislative enactment comes in conflict with it. But the court sits not to review or revise the legislative action, but to enforce the legislative will; and it is only when they find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action. *Carter's Case*, 96 Va. 815, 32 S. E. 780; *Thomas v. M'Cahan*, 1 Va. Dec. 231, 236.

When they decide between an act of the people, and an act of the legislature, they are within the line of their duty, declaring what the law is, and not making a new law. *Kamper v. Hawkins*, 1 Va. Cas. 19, 96.

Formal Opinion Unnecessary.—In the case of *Shepard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635, it was held that: "Courts determine what the rights of parties are in suits or controversies inter partes which come before them in the ordinary and proper course of judicial procedure. In determining the rights of parties to the suit, they incidentally determine the law; but the judicial function is as effectually performed by the court which expresses no formal opinion as by the court which, in an opinion, announces the reasons for its decision." In re *Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398. See the title COURTS.

No Power to Enjoin Legislature.—"None pretend that the courts can either enjoin the legislature by injunction from passing any act in its legislative capacity, which is forbidden by the constitution, nor compel them to enact any law which is required by the constitution to be enacted." *Slack v. Jacob*, 8 W. Va. 612, 660.

Thus the congress is the legislative department of the government; the president is the executive department. Neither can be restrained in its action

by the judicial department; though the acts of both, when performed, are in proper cases, subject to its cognizance. *Slack v. Jacob*, 8 W. Va. 611, 659.

An act of the legislature which is valid is binding upon the courts as well as the officers and citizens. And it is clear that the courts have no power, jurisdiction or authority, to prevent the execution of a valid law. *Slack v. Jacob*, 8 W. Va. 612, 625.

Power to Enforce Laws.—The power of a state to enact laws, carries with it the judicial power to enforce them. A law without a sanction is no law, and an act of legislation without power to enforce it, is not a law. The judicial, unless otherwise stipulated in the compact, is coextensive with the legislative jurisdiction. *Hendricks v. Com.*, 75 Va. 934, 940.

3. Legislative Motives and Discretion Unimpeachable.

In General.—A court can not declare a statute unconstitutional and void solely on the grounds of its unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen not guaranteed by the constitution itself. Nor can they declare an act unconstitutional and void, because it appears to the minds of the judges to violate the fundamental principles of a republican government, not forbidden by the constitution itself to be violated. For a court can not legitimately substitute its own judgment for that of the legislature in any case properly within its power under the constitution. *Trustees of Brooke Academy v. George*, 14 W. Va. 411, 419; *Speidel v. Schlosser*, 13 W. Va. 686, 692.

It was at one time supposed that the judiciary could resort to the principles of natural justice or common right, and pronounce a legislative act void because in conflict with such supposed principles. This view, however, may be regarded as finally abandoned. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1002; *Lovings v. Norfolk*,

etc., R. Co., 47 W. Va. 582, 35 S. E. 962.

And the judiciary can not inquire into the motives and necessities which may have superinduced the passage of an act. *Slack v. Jacob*, 8 W. Va. 612, 614.

For example the legislature may remove the seat of the state government when they think that the state will be pecuniarily benefitted by the removal, and the statute authorizing the removal is not void even if it showed on its face that the legislature was induced to act by reason of pecuniary considerations, and not by their wisdom and discretion. *Slack v. Jacob*, 8 W. Va. 612, 631, 635.

The courts have no right to arrest, set aside or nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural right, absolute justice, or sound morality. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1002; *Prince William School Board of Stuart*, 80 Va. 64, 72; *Kamper v. Hawkins*, 1 Va. Cas. 19; *Speidel v. Schlosser*, 13 W. Va. 686, 692; *Slack v. Jacob*, 8 W. Va. 612, 614.

Wisdom and Expediency Not Considered.—The courts have nothing to do with the question whether or not the legislation contained in its provisions is wise and proper. The only question they have to deal with is one of power. The legislature of the state has plenary power, except where it is restricted by the constitution of the state or of the United States. If the statute, the validity of which is attacked, is not in conflict with the state or federal constitution, the courts have no power to declare it invalid, however well satisfied they may be that it is unwise or vicious legislation. *Prison Ass'n v. Ashby*, 93 Va. 670, 25 S. E. 894; *Danville v. Hatcher*, 101 Va. 523, 529, 44 S. E. 723; *Farmville v. Walker*, 101 Va. 323, 43 S. E. 558; *Smoot v. Peoples' Loan*, etc., Ass'n, 95 Va. 693, 29 S. E. 746; *Vir-*

ginia Development Co. *v.* Crozer Iron Co., 90 Va. 126, 17 S. E. 806; *Town of Danville v. Pace*, 25 Gratt. 1, 8; *Kamper v. Hawkins*, 1 Va. Cas. 47; *Charleston, etc., Bridge Co. v. Kanawha Co. Court*, 41 W. Va. 658, 24 S. E. 1002, 1006; *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1004, 17 L. R. A. 385; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600; *State v. Dent*, 25 W. Va. 1, 17; *Speidel v. Schlosser*, 13 W. Va. 686, 692; *Slack v. Jacob*, 8 W. Va. 612; *Osborn v. Staley*, 5 W. Va. 85.

"Courts are not at liberty to inquire into the proper exercise of the power by the legislature in a case where the latter have been acting within their constitutional limits. They are bound to presume that the legislators have exercised the proper discretion. Such an exercise of power within its constitutional limits, it has been held, is so conclusive that, though the legislature should, from any cause, do injustice to an individual, there is no court or other power in the government that can apply a remedy or administer relief. And it is not in the power of any court to say that a legislative act is void because it has not proven in after time to be judicious." *Prince William School Board v. Stuart*, 80 Va. 64, 72. See *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42, 69.

Resort to Extrinsic Evidence.—It would not be meet or seemly in the judicial tribunals to go into extrinsic evidence of fact as to the operation of an act of the legislature, to show that the act was unconstitutional. And when they enter upon such an inquiry they enter a field which is foreign to their jurisdiction. They invade the territory of another department of the government. *Antoni v. Wright*, 22 Gratt. 833, 882. (On rehearing.) But see *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114.

Courts are not authorized to look into the preamble or recitals of an act for alleged or supposed fraud, mis-

takes, or errors of judgment in the legislature, upon which to declare the enactment void. *Slack v. Jacob*, 8 W. Va. 612.

Presumption against Fraud and Corruption.—Courts will not presume fraudulent intent and corrupt purpose on the part of the legislature, but will presume the contrary. *Slack v. Jacob*, 8 W. Va. 612.

4. Power of Annulling Statutes.

a. When Constitutionality Will Be Considered.

Law Must Be Directly Brought in Question.—A court will not pass upon the constitutionality of a statute, unless a decision upon that very point is necessary to the determination of the case. *Edgell v. Conaway*, 24 W. Va. 747; *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *Griffin v. Cunningham*, 20 Gratt. 31; *Rutter v. Sullivan*, 25 W. Va. 427.

But they may determine whether such is the case or not, and if so, where they consider the statute unconstitutional, will not give it any effect. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635.

And it is well settled that the courts will never pronounce a statute unconstitutional because it may perhaps impair the rights of others not complaining. It is assumed to be valid until someone complains whose rights it invades. *Antoni v. Wright*, 22 Gratt. 833, 857; *Speer v. Com.*, 23 Gratt. 938; *Shepherd v. Wheeling*, 30 W. Va. 485, 40 S. E. 637.

The courts acquiesce in all acts of the legislature, whatever may be their repugnance to the constitution, until the question comes up in a case or proceeding in the court for trial or hearing. It is no part of the duty of courts to examine the acts as they come from the hands of the legislature, and decide which are and which are not in harmony with the constitution, and the people do not make it their business to inquire into the mat-

ter except through the legally constituted channel, the courts, and when the question fairly comes up in the courts it becomes their duty to honestly investigate, and if it is clear that not only the spirit, but the letter, of the constitution is violated by the act in question, whatever the time that has elapsed since the enactment, the plain duty of the court is to so declare it. *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962; *Arkle v. Board of Commissioners*, 41 W. Va. 471, 23 S. E. 804. See also, *Price v. Moundsville*, 43 W. Va. 523, 27 S. E. 218.

Wherever the question of constitutionality arises in the administration of rights, the courts have power to pass on it. *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394.

But whether an act of assembly authorizing the establishment of public roads, which allows appeals to this court on questions of law only, is constitutional, does not arise on an appeal from a decree dissolving an injunction to proceedings under the act, as it is not an appeal from any judgment pronounced in condemnation proceedings under the act. *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989.

Power to Consider Abstract Question of Constitutionality.—The courts of this state can not be empowered by the legislature to pass upon the constitutionality or validity of a legislative act or city ordinance as a general and abstract question; the question must be whether the act or ordinance furnishes the rule to govern the particular case before the court. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *In re Union Mines*, 39 W. Va. 179, 19 S. E. 398.

The power to revoke or annul a statute or ordinance is equivalent to the power to repeal it; and in either case the power is legislative, and not judicial, in its character. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635.

Chapter 72 of the acts of West Virginia, 1875, so far as it attempts to

confer upon the circuit courts the power to "supersede, revoke, or annul" an ordinance of a city upon the petition of ten taxpayers residing in said city, is unconstitutional, for the reason that such power is legislative, and therefore forbidden to be exercised by courts in this state. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635.

On Demurrer.—"The constitutionality of a law has been repeatedly passed upon on a general demurrer to the pleading in the lower court, and even where the question was raised for the first time in the petition to this court for the writ of error. *Speer v. Com.*, 23 Gratt. 935; *McCready v. Com.*, 27 Gratt. 985; *Iverson Brown's Case*, 91 Va. 762, 21 S. E. 357; *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809." *Adkins v. Richmond*, 98 Va. 91, 34 S. E. 967.

Need Not Be Specially Pledged.—The unconstitutionality of a law or an ordinance of a municipal corporation need not be specially pleaded. The question may be raised by a general demurrer in the trial court, and the error assigned for the first time in the supreme court. *Adkins v. Richmond*, 98 Va. 91, 34 S. E. 967.

On Appeal.—When the constitution of the state requires an indictment to conclude in certain forms and words, an indictment is not good unless it concludes in the exact language of the constitution. And a prisoner, by failing to object at the trial, does not thereby waive the objection, but, the right being a constitutional one, objection may be made by the prisoner for the first time on appeal. *Lemons v. State*, 4 W. Va. 755.

And one who has restrained an oyster inspector from collecting fees under a statute, on the ground that the statute is unconstitutional, can not dispute the jurisdiction of the supreme court of appeals, to which an appeal may be taken in all cases involving the constitutionality of a statute. *Thomas v. Rowe*, 2 Va. Dec. 113.

b. Who May Raise Question.

Party Interested.—The question must be raised, in all cases, by a party who is affected by the law in question. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635.

Joint Suit to Test Constitutionality.

—One of a number of parties affected by a law may file a bill in behalf of himself and all the other parties similarly situated, to test the constitutionality of the law and the propriety of proceedings under it. *Bull v. Read*, 13 Gratt. 78; *McClung v. Livesay*, 7 W. Va. 333; *Corrothers v. Board of Education*, 16 W. Va. 540; *Christie v. Malden*, 23 W. Va. 670; *Williams v. County Court*, 26 W. Va. 500; *Richmond v. Crenshaw*, 76 Va. 940; *Roper v. McWhorter*, 77 Va. 216; *Blanton v. Southern, etc., Co.*, 77 Va. 339; *Shen. Valley R. Co. v. Supervisors*, 78 Va. 276; *Bufalo v. Town of Pocahontas*, 85 Va. 225, 7 S. E. 238; *Lynchburg, etc., R. Co. v. Dameron*, 95 Va. 546, 28 S. E. 951; *Redd v. Supervisors of Henry County*, 31 Gratt. 698; *Eyre v. Jacob*, 14 Gratt. 424; *Johnson v. Drummond*, 20 Gratt. 428; *Douglass v. Harrisville*, 9 W. Va. 166; *Kuhn v. Board of Education*, 4 W. Va. 511; *Osburn v. Staley*, 5 W. Va. 85; *Doonan v. Board of Education*, 9 W. Va. 246; *C. & O. Ry. Co. v. Miller*, 19 W. Va. 408; *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. 64; *Coffman v. Sangston*, 21 Gratt. 263.

Estoppel to Dispute.—Whether an act be constitutional or not, a party, who has taken the benefit thereof and claimed under it in his bill, is estopped from contesting its validity. *Purcell v. Conrad*, 84 Va. 557, 5 S. E. 545.

And no one can deny the validity of a statute under which he has chosen to proceed. *Roanoke v. Berkowitz*, 80 Va. 616.

c. Effect of Unconstitutionality.**(1) Entire Unconstitutionality.**

Renders Statute Void.—Where a law is totally in conflict with the constitution the law is void in entirety, and it

is the duty of the court to so declare it. *Robertson v. Preston*, 97 Va. 296, 33 S. E. 618; *Black v. Trower*, 79 Va. 123; *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786; *Isaacs v. Richmond*, 90 Va. 30, 17 S. E. 760; *Kamper v. Hawkins*, 1 Va. Cas. 20; *Turpin v. Lockett*, 6 Call. 113, 178.

Unconstitutionality as Ground for Injunction.—An allegation in a bill for an injunction that the act complained of is being committed under an unconstitutional statute, will not, of itself, confer jurisdiction on a court of equity to grant the relief, where the other allegations do not make a case for such relief. *Thomas v. Rowe*, 2 Va. Dec. 113. See the title INJUNCTIONS.

(2) Partial Unconstitutionality.

Where a part of an act is unconstitutional, that fact does not authorize the courts to declare the other provisions of the act void, unless they are so connected in subject matter, depending on each other, operating for the same purposes, or otherwise so connected in meaning, that it can not be presumed that the legislature would have enacted the one without the other. If the act attempts to accomplish two or more objects, and is unconstitutional as to one, it may still be complete in all respects and valid as to the other; but if the purpose of the act is to accomplish a single object only and some of its provisions are void, the whole must fail, unless the remainder of the act is sufficient to effect the object, without the aid of that which is invalid. *Robertson v. Preston*, 97 Va. 296, 33 S. E. 618; *Black v. Trower*, 79 Va. 123; *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786; *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483; *Eckhart v. State*, 5 W. Va. 515.

"That a statute may be constitutional in part and unconstitutional as to some of its provisions is well settled. See *Homestead Cases*, 22 Gratt. 266; *Wise v. Rogers*, 24 Gratt. 169; *Black v. Trower*, 79 Va. at page 127, where it

is said: 'It is true that a statute in some of its provisions may be unconstitutional and void, and in others valid and enforceable. But when the valid part is so connected with and dependent on that which is void as that the parts are not distinctly separable, so that each can stand as the will of the legislature, the whole must fall.' Trimble's Case, 96 Va. 821, 32 S. E. 786; Com. v. McCullough, 90 Va. 597, 19 S. E. 114.

A statute may be valid in one part and void in another, but if the two parts are not interdependent, and are easily severed, the courts will give effect to that which is valid. Danville v. Hatcher, 101 Va. 523, 524, 44 S. E. 723; Trimble v. Com., 96 Va. 818, 32 S. E. 786; Pearson v. Supervisors of Brunswick Co., 91 Va. 322, 21 S. E. 483.

5. Power to Enjoin Executive.

A judge of a circuit court in vacation, or a court of equity, has not power or authority to enjoin the governor, as a citizen, or as governor of the state, or other officer or officers, person or persons acting under his authority as governor of the state, or by his direction, in the execution of an act of the legislature, from removing from one city to another the papers and movable property in said act mentioned, transferring the seat of government, until the constitutionality and validity of the said act was judicially determined, although the bill praying the injunction alleged the unconstitutionality of the act; the powers and duties springing from said act and the constitution being executive and of such nature that enjoining the governor from executing said act was an invasion by the judiciary of executive powers and duties devolved upon the governor as chief executive of the state. Slack v. Jacob, 8 W. Va. 612, 614.

Saying: "It is true that in the instance before us the interposition of the court is not sought to enforce ac-

tion by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles, which forbid judicial interference with the exercise of executive discretion." Slack v. Jacob, 8 W. Va. 611, 658.

And a bill praying an injunction against the execution of an act of congress by the incumbent of the presidential office could not be received whether it described him as president or as a citizen of a state. Slack v. Jacob, 8 W. Va. 612, 661.

"If the legislature enact any law that is expressly prohibited by the constitution, in violation of such prohibition, it is made the duty of the courts by the twenty-first section of the eighth article of the constitution, upon a proper case presented before them, to declare such act null and void. This section makes but little, if any, difference in what was the duty of the courts before it was inserted in the constitution, in the character of cases to which it applies, and was not intended to enlarge the jurisdiction of the courts so as to authorize them to invade and absolutely control and subject the chief executive in the exercise of his most important executive duties to its jurisdiction and control, especially in such a case as that now before us." Slack v. Jacob, 8 W. Va. 612, 660.

The judiciary pretends to no direct control over the action of the legislature or of the supreme executive, but it may decide upon the validity of the acts of either, affecting private rights, and by the writ of mandamus it may coerce a ministerial officer, though of the executive department, to the performance of a legal duty for the effectuation of a legal right. It must decide all questions essential to a determination of the rights of the parties in a judicial proceeding coming properly before it. Arkle v. Board of Commissioners, 41 W. Va. 471, 23 S. E. 804.

G. RESPONSIBILITY AND POWERS OF EXECUTIVE.

See the title GOVERNOR.

1. In General.

The executive department and all of its officers are as much bound by the constitution and laws as the legislative, and have no power to violate the rights of individuals secured by the laws. *Arkle v. Board of Commissioners*, 41 W. Va. 471, 23 S. E. 805.

But the executive and judicial branches are close akin. Their respective functions shade into each other imperceptibly. The administrative branch of the executive power can not wait to pursue judicial methods. Public convenience does not admit of such delay. He must therefore, in some essential parts, follow another method in ascertaining the facts and applying the law. We may for distinction, founded on partial resemblance, term this act of his quasi judicial. *Arkle v. Board of Commissioners*, 41 W. Va. 471, 23 S. E. 804, 807.

An act done in the exercise of judicial power—an act performed by a court touching the rights of parties or property brought before it by voluntary appearance or by prior action of ministerial officers—is a judicial act. *Arkle v. Board of Commissioners*, 41 W. Va. 471, 33 S. E. 804.

Commitment as Judicial Act.—The constitution directs that all the regular and permanent duties, which properly belong to a court, in the ordinary and popular signification of that term, shall be performed by the courts described in the constitution, the judges of which courts shall hold their offices during good behavior, etc. There is, therefore, nothing in the constitution which prevents a ministerial officer or other person, by law directed, to do and perform any act, which may be necessary to bring an accused party before a court possessing the judicial power of determining on his guilt or innocence,

such as committing a person for trial. *Ex parte Pool*, 2 Va. Cas. 276, 280. See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, ante, p. 1.

2. Power to Reprieve or Pardon.

The power to reprieve is vested in the governor by the constitution, in all cases of felony where the necessity therefor exists. He is the sole judge of such necessity, and his conclusions are not reviewable by the courts, but are binding on the other departments of the government. *State v. Hawk*, 47 W. Va. 434, 34 S. E. 918. And the pardoning power is vested solely in the executive. The legislature has no power to grant a pardon to a person convicted of crime. *Com. v. Caton*, 4 Call 5. See the title PARDON.

3. Approval of Legislative Acts.

Article 5 of the constitution of West Virginia provides that "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time." It follows from this section that the governor has no legislative function, and his approval of an act, which is to take effect not at its passage but after the expiration of ninety days, relates back to the date of its passage. *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407. See the title STATUTES.

4. Taking Care That the Laws Are Faithfully Executed.

The constitutional provision that the governor shall take care that the laws are faithfully executed, grants no power other than that implied in the imposition of the duty, and this provision does not generally, if ever, make it the duty of the governor to execute the laws. But, as the language implies, it makes it his duty to observe the manner in which the different officers of the government exercise their proper functions and execute the laws com-

mitted to their charge, or their failure to perform such duties. *Shields v. Bennett*, 8 W. Va. 74.

And when they fail to act, or act improperly, if he has the power to remove them from office, he may do so; or, if he has not, may bring the subject to the cognizance of that department of the government which has the power to remove or punish them. *Shields v. Bennett*, 8 W. Va. 74, 89.

The constitution vests the chief executive power in the government and requires that he shall take care that the laws be faithfully executed. Under this positive requirement of the constitution the governor must, under the oath he has taken, be vigilant, and with all the power at his command require the execution of the valid laws, which the legislature has passed, because in its wisdom the legislature passes such laws as the good of the state requires, and none other; and if the chief executive does not see to their faithful execution, he neglects to discharge his duty, and the object of the legislative department, to the extent the laws have not been executed, has failed. *State v. Buchanan*, 24 W. Va. 362.

Decision of Constitutionality.—See ante, "Preliminary Decision of Constitutional Questions," V, C.

And before the governor executes a law, he must of necessity decide, whether the act of the legislature, which he is thus called upon to execute, is constitutional and valid or unconstitutional and void. *State v. Buchanan*, 24 W. Va. 362; *Slack v. Jacob*, 8 W. Va. 659.

Thus the governor, having jurisdiction of the subject, decided that the effect of the decision of the supreme court of appeals in *Chesapeake*, etc., R. Co. v. *Miller*, 19 W. Va. 436, was to declare unconstitutional and void so much of § 43, ch. 12, acts of 1881, as exempted from taxation certain property therein specified, and that said chapter 12 was a complete tax law without said portion of said section, and re-

quested the auditor, who has the oversight of the assessors in the various counties and districts in the state, to instruct the said assessors in their assessments to disregard said portion of said section and assess the property therein attempted to be exempted, and the auditor gave said instructions. The law so construed by the chief executive and given by the auditor in his instructions to the assessors was binding on them. *State v. Buchanan*, 24 W. Va. 362.

The constitutionality of said § 43 can be tested by the taxpayer, when the law, as so declared by the governor, is made to operate on him. It is then his right, as a citizen, to resort to the court by the proper proceedings and have it decided, whether the property claimed by him to be exempt under said § 43, ch. 12, acts of 1881, is liable to be assessed; and if the court should decide against him, he could then appeal to the supreme court of appeals, which would either sustain said § 43 or declare it unconstitutional so far as it attempted to exempt said property. *State v. Buchanan*, 24 W. Va. 362.

But it is not the right of a subordinate executive or ministerial officer to arrest the execution of the law as construed by the chief executive, and he cannot justify his insubordination on the ground that the governor had decided wrong; his duty is obedience to the law as thus construed. *State v. Buchanan*, 24 W. Va. 362.

5. Powers of Legislature to Prescribe Duties.

"The legislature may require the governor to perform other duties than those specified in the constitution, not incompatible with his dignity and constitutional functions. But whether, in any case, when the legislature provides that a public act shall be done, yet fails in any manner to indicate the officer by whom it shall be performed, the provision that the governor shall take care that the laws be faithfully executed,

requires the governor himself to do the act, and if so, in what cases, are questions of interest and importance which we do not decide. Certainly, however, it will not be presumed, in the construction of a doubtful statute, that, because of this constitutional provision, a legislature, purposely or otherwise, fails to indicate an officer to do what it requires to be done. On the contrary, whenever the language of legislation can be understood to indicate such an officer, it will be construed to do so." *Shields v. Bennett*, 8 W. Va. 74, 90.

It was contemplated in the formation and adoption of the respective constitutions of Virginia and West Virginia, and, it is supposed, those of other states, that where the instrument did not constitute the law and indicate those who should enforce it, the legislature should not only enact laws for the regulation of the government and society, but should provide or specify the officers who should execute them. It was not intended that the legislature should merely declare the laws, and leave the governor to enforce them. *Shields v. Bennett*, 8 W. Va. 74, 89.

The performance of many duties, which the legislature may provide for by law, they may refer either to the chief executive of the state, or at their option to any other executive or ministerial officer. *Slack v. Jacob*, 8 W. Va. 612.

6. No Power to Remove Justice of Peace.

The executive has no power to remove a justice of the peace from office; but he may be removed by the judgment of a superior court at law. *Edmiston v. Campbell*, 1 Va. Cas. 16.

Neither can the power be conferred on the county court in West Virginia, as it requires the exercise of judicial functions and conflicts with the constitution, art. 8, § 24. See the title **JUSTICES OF THE PEACE**.

VI. Protection to Persons Accused of Crime.

A. AS TO PLACE OF TRIAL.

The provision of our constitution which confers on a person accused of crime, with reference to the place where he is to be tried, the privileges which the common law conferred on him, makes these common-law privileges of the accused constitutional rights, which the legislature can not take from him without his consent. *State v. Lowe*, 21 W. Va. 782, 786. See the title **VENUE**.

B. SPEEDY TRIAL.

1. Constitutional and Statutory Provisions.

In all criminal prosecutions a man hath a right to "a speedy trial by an impartial jury of his vicinage." Va. Const. (1902), art. 1, § 8.

"What is meant by the 'speedy trial' guaranteed by the constitution of Virginia, and what is the delay in the trial of one charged with felony that shall forever discharge him from prosecution, has been construed and interpreted by the legislature in the enactment of a statute, that 'every person against whom an indictment is found charging a felony, and held in any court for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of the circuit, or four of the county, corporation or hustings court, in which the case is pending, after he is so held without a trial,' unless the failure to try was due to certain causes mentioned in the statute. Section 4047, Code of Virginia, as amended by acts 1893-4, p. 464. This, or a similar provision, has long been a part of the statute law of the state (Rev. Code of 1819, vol. 1, ch. 169, § 28; Code of 1849, ch. 208, § 36)." *Benton v. Com.*, 91 Va. 782, 786, 21 S. E. 495. See *Com. v. Cawood*, 2 Va. Cas. 527.

The causes mentioned are "his insanity, or by the witnesses for the commonwealth being enticed or kept away, or prevented from attending by

sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail or failing to appear according to his recognizance; or of the inability of the jury to agree in their verdict." Va. Code (1887), § 4047.

See this section as re-enacted by acts of 1902-3-4, p. 883, from which the county court is omitted, having been abolished, and adding to the excuses for a failure to try, the following: "Or where there be no court held at the regular term, or where there is court held and for any reason it would be injudicious in the opinion of the court to have jurors and witnesses summoned for that term, which reason shall be specially spread upon the records of the court; but the time during the pendency of any appeal in any appellate court shall not be included as applying to the provisions of this act."

"And this legislative interpretation of the constitution has more than once received the sanction of this court. See *Adcock's Case*, 8 Gratt. 661; *Brown v. Epps*, ante, p. 726; *Nichols v. Com.*, ante, p. 741." *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

The 28th section of the act concerning criminal proceedings (1 Rev. Va. Code, 607), declared, that "every person charged with treason or felony, who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of witnesses against him appears to have been prevented by himself, shall be discharged from his imprisonment; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless the failure proceed from a continuance granted on the prisoner's motion, or from the inability of the jury to agree on a verdict." *Com. v. Cawood*, 2 Va. Cas. 527, 545.

Act Requiring Criminal Cases to Be Set for Trial, etc., Directory.—The act

of assembly, approved February 24, 1890, which makes it the duty of the judge of each county and corporation court, at least ten days before the commencement of every term, to set for trial, on a certain day of the term, each criminal case then pending; and provides that the clerk shall arrange the docket and issue subpoenas for the witnesses accordingly (Acts, 1889-90, p. 79), is directory merely, it being not otherwise intended for the benefit of the accused than as a means of insuring a speedy trial. *Hall v. Com.*, 89 Va. 171, 173, 15 S. E. 517. See *Wash's Case*, 16 Gratt. 530; *Benton v. Com.*, 90 Va. 328, 332, 18 S. E. 282.

Speedy Does Not Mean Immediate.—"Speedy," as used in the constitution, is not "immediate," but "without undue delay." *Brown v. Epps*, 91 Va. 726, 21 S. E. 119; *Callan v. Wilson*, 127 U. S. 540, explained and distinguished. *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, criticised as leaning the other way.

Object and Purpose of Provisions.—"The sole object and purpose of all the laws from first to last, was to ensure a speedy trial to the accused, and to guard against a protracted imprisonment or harassment by a criminal prosecution, an object but little if any less interesting to the public than to him, and the means, sanctions or penalties it employed for stimulating prosecutors and officers of the law to diligence in the prosecution, was by declaring that the consequence of a failure to indict or try in three terms should operate a discharge from the crime, or acquittal, unless it appear that the failure proceeded from no default or delinquency on the part of the commonwealth." *Com. v. Adcock*, 8 Gratt. 661, 680.

Commonwealth Must Be in Fault.—Whilst the court has an eye to the solemn duty of protecting the public against the wrongs of those who are regardless of their obligations to society, and to the delays which the commonwealth may unavoidably encounter in prosecuting breaches of these obli-

gations, it is studious to shield the accused from the consequences of the laches of those to whom the duty of conducting the prosecution may have been assigned. The public has rights as well as the accused, and one of the first of these is, that of redressing, or punishing their wrongs. It would not seem reasonable that this right, so necessary to the preservation of society, should be forfeited without its default. *Ex parte Santee*, 2 Va. Cas. 363, 365.

Duty of Court to Speed Trial.—In *Craft v. Com.*, 24 Gratt. 602, it was said that the "speedy trial" provision of the constitution not only authorized the court to proceed with the trial of a criminal at the same term at which he had been granted a new trial, if justified by the state of the docket, but made it his duty so to do, though against the prisoner's objection. See *Benton v. Com.*, 90 Va. 328, 332, 18 S. E. 282; *Page v. Com.*, 27 Gratt. 954, 960. See also, the title CONTINUANCES.

2. Law in Force at Time of Application Governs.

Though an offense committed before the Virginia Code of 1849 went into operation, must, so far as the question of guilt, degree of crime, quantum of punishment and rules of evidence are concerned, be governed by the law in force at the time the offense was committed, yet upon the question of the prisoner's right to be discharged from the failure to try him, arising after the Code went into operation, it must be governed by the law in the Code. *Com. v. Adcock*, 8 Gratt. 662, cited in *State v. Strauder*, 8 W. Va. 693.

3. "Held for Trial" Construed.

"While in the custody of the officer, under the capias, he was held by that officer, to be brought into court to answer the indictment, and could not be said to be held in court for trial, until actually delivered into its custody. So that, no matter when he was ar-

rested by the officer, he was held in court for trial for the first time on the day he was brought into court in charge of the officer who executed the capias." *Sands v. Com.*, 20 Gratt. 800, 816.

4. Meaning of "Term" and Construction as to Number.

Term Means Actual Session.—The word "term," in the act, (1 Rev. Code of 1819, ch. 169, § 28), ought to be construed to mean, not the stated time when a court should be held, but the actual session of the court. This construction must be given to the word in all three of the clauses of that section. Therefore, where a prisoner was remanded for trial by the examining court in July, 1822; at the October term the court did not sit; at the May term, 1823, the cause was continued for the commonwealth; at the third term in October, 1823, there was no court, he was not entitled, under the act, to be forever discharged of the crime. *Ex parte Santee*, 2 Va. Cas. 363, approved in *Brown v. Hume*, 16 Gratt. 456; *Com. v. Cawood*, 2 Va. Cas. 527, 546.

Special Session of Superior Court.—A special session of a superior court of law held for the trial of offenses, is not the third term within the meaning of the act (1 Rev. Code of 1819, ch. 169, § 28), but is a substitute for it, and therefore, where there was a failure to hold two regular terms, and then a special session was held, at which the prisoner was not tried, but being indicated at the regular term succeeding the special session, he ought not to be discharged from the crime, but may be tried. *Com. v. Lovett*, 2 Va. Cas. 74.

Terms Must Be Entire Ones.—"Before a prisoner is entitled to his discharge, under this section, there must be three (now four) regular terms—that is, plainly, whole terms; not parts or fractions of three (four) terms, but three (four) entire terms, of such court, after he is so held, without a trial; or, in other words, there must be three (four) periods of a session of such courts, having a beginning and ending

after that term when he is first held for trial. If the term has commenced (no matter how soon after its commencement the prisoner has been delivered into the custody of the court), that term can not be counted as one of the three (four) regular terms, after he is held for trial, because a part of that term has already expired and there is but a part of it left." *Sands v. Com.*, 20 Gratt. 800, 817.

The three terms spoken of in the Virginia act, ch. 208, § 34, Sess. Acts, 1866-67, are three terms after that at which the prisoner is first held for trial. And though a prisoner has been arrested and committed to jail, or gives bail to appear and does appear, or is brought into court, on the first day of a term of the court, that term is not to be counted as one of the three terms aforesaid. *Sands v. Com.*, 20 Gratt. 800.

And the term at which a prisoner is indicted for a felony is not to be counted as one of the terms contemplated by § 4047 of the Code, as amended. The terms to be counted are those after the prisoner has been indicted and held for trial. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858, citing *Davis v. Com.*, 89 Va. 133, 15 S. E. 388. See also, as to term for indictment, *Glover v. Com.*, 86 Va. 382, 10 S. E. 420, overruling *Hall v. Com.*, 78 Va. 678; *Jones v. Com.*, 19 Gratt. 478.

In *Bell v. Com.*, 8 Gratt. 600, where a prisoner was held not to be entitled to his discharge from imprisonment on account of two terms of court having elapsed without his being indicted, the circuit term to which he was sent on not being counted, having partly elapsed, the judgment was that he should be held in custody to answer a sufficient indictment, unless he should be discharged by the circuit court or otherwise, by reason of there having been three regular terms of the court since his examination without a trial. See same case sub nom. *Bell's Case*, 7 Gratt. 646.

Trial at Fourth Term Timely.—Va. Code, 1887, § 4047, providing that accused shall be tried within four terms of the county court after indictment, is satisfied by trial at the fourth term after he was indicted. *Davis v. Com.*, 89 Va. 132, 15 S. E. 388.

Quære, Whether Terms Must Be Consecutive.—Quære, whether there must be three successive failures to try or defaults at three consecutive terms, on the part of the commonwealth, to entitle a prisoner to his discharge; or whether any three occurring dispersedly or sparsedly in a series of alternate continuances or defaults, as well on the part of the prisoner as the commonwealth, will suffice. *Com. v. Adcock*, 8 Gratt. 661, 685.

"The judgment of this court in *Green's Case*, 1 Rob. 731, would seem to favor the construction which holds three consecutive terms or failures to be necessary, because in that case five terms had passed without trial. It was continued at the first term for the commonwealth, at the 2d for the prisoner, and at the 3d, 4th and 5th for the commonwealth; and the court said: 'His right (the prisoner's) to his discharge upon the adjournment of the circuit court, at its last term (which was the 5th), became complete and was consummated.'" *Com. v. Adcock*, 8 Gratt. 661, 685.

Failure to Hold Term—Continuance.—The statute guarantees a speedy trial to a person indicted for a felony by providing for his discharge from prosecution if four terms of the county court in which he is held for trial elapse without a trial, unless the record shows that the case was continued for some one of the enumerated reasons therein set forth, but the fact that one term has passed without an order in the case is not a denial of a speedy trial. If the record fails to disclose that a term was held on the day appointed for it, none may have been held and the case would stand continued until the next

term. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364.

Continuance against Prisoner's Protest.—"The 'speedy trial,' and the policy of the law to expedite the trial of criminal cases, forbid that the person accused of crime shall be detained in prison beyond any term of the court at which he may be lawfully tried unless good cause be shown for a continuance; and the acts, 1889-90, p. 79, require the judges of the county courts to set the criminal cases for trial ten days before the first day of the terms of their courts; the object of which requirement is, as interpreted by this court in *Hall's Case*, 89 Va. 171, 15 S. E. 517, to insure a speedy trial, for the benefit of the accused no less than for the commonwealth." *Benton v. Com.*, 90 Va. 328, 332, 18 S. E. 282.

"When the accused is ready for and demands trial by a court wherein he stands indicted, and may be lawfully tried, he is entitled to trial without delay, unless the prosecution shall show good cause for a continuance." *Benton v. Com.*, 90 Va. 328, 332, 18 S. E. 282.

But a prisoner is not entitled to be discharged from prosecution for an offense, merely because a new trial has been granted him on the ground that his case has been erroneously continued at one term of the county court on the motion of the commonwealth, against his protest. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

In reversing the judgment, this court (in 90 Va. 328, 18 S. E. 282) simply awarded the prisoner a new trial. That was the full extent of the decision, as the records of this court show. The court did not decide that for such error the prisoner should be discharged from prosecution, and could not have intended that such should be the effect of such reversal. *Benton v. Com.*, 91 Va. 782, 786, 21 S. E. 495.

Effect of Dismissal without Prejudice.—Where a prisoner, indicted in a county court, elected to be tried in

the circuit court, as he had a right to do at that time, but such jurisdiction of the circuit court was taken away by a subsequent amendment of the statute conferring it, and the case was dismissed at the next term of the circuit court for want of jurisdiction, such amendment did not have the effect of remanding the case to the county court again so that the subsequent terms of that court could be considered under § 4047, Va. Code, 1887, as entitling the prisoner to be discharged from prosecution. Nor did such amendment, depriving the circuit court of such jurisdiction, discharge the accused from further prosecution. The case fell with the repeal statute and the accused was properly indicted again in the county court. The dismissal was equivalent to a *nolle prosequi*. *Dulin v. Lillard*, 91 Va. 718, 20 S. E. 821.

And the prisoner was not entitled to be discharged from prosecution under § 4047 of the Code (as amended February 12, 1894, Acts of Assembly, 1893-4, p. 464). At no time, while the case was pending in either court, did even two terms of that court elapse without a trial. *Dulin v. Lillard*, 91 Va. 718, 20 S. E. 821.

Delay for Five Terms.—A prisoner charged with felony being indicted at the first term of the circuit court after his examination, the case is continued at that term for the want of time to try it. At the second term, the case is continued on the motion of the prisoner, upon the ground of the absence of a material witness for him. At each of the three succeeding terms, the case is again continued for the want of time to try it. It was held, that upon the expiration of the last of the five terms, the prisoner became entitled, under the statute, 1 Rev. Va. Code, 1887, ch. 169, § 28, to be forever discharged of the crime imputed to him. *Green v. Com.*, 1 Rob. 731.

5. Excuses for Failure to Try.

Statutory Ones Not Exhaustive.—The exceptions or excuses for failure

to try the prisoner, enumerated in the statute, are not intended to exclude others of a similar nature, or in *pari ratione*; but only that if the commonwealth was in default for three terms (now four) without any of the excuses for the failure enumerated in the statute, or such like excuses fairly imputable by the courts from the reason and spirit of the law, the prisoner should be entitled to his discharge. *Com. v. Adcock*, 8 Gratt. 662; *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

Incompetency of Commonwealth Witnesses.—And the fact that the commonwealth had made no preparation for trial on the day set, owing to the fact, as alleged, that an important witness was then incompetent to testify by reason of being a convicted felon serving his term of imprisonment, and that, if ruled to trial at that time the commonwealth would enter a *nolle prosequi*, is not good cause for postponing the trial against the objection of the prisoner. *Benton v. Com.*, 90 Va. 328, 18 S. E. 282.

Federal Injunction Obtained by Accused.—A prisoner is not entitled to be discharged from prosecution on the ground that four regular terms of a county court elapsed after the indictment was found without a trial, where the trial was prevented by an injunction from a federal court obtained at the instance of the prisoner. While such an injunction is not among the exceptions enumerated in the statute providing for such discharge, it is within its spirit and reason. The object of the statute is to insure speedy trials, and, in enumerating certain exceptions, it was not intended to exclude others of like nature. *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

Failure of Accused to Appear.—If a defendant fail to appear according to the terms of his recognizance, he can not claim a discharge by reason of three regular terms having been allowed to pass without a trial. *Crookham v. State*, 5 W. Va. 511.

Presumption That Cause Was Properly Continued.—Where the cause was continued twice by the state, and once "for reasons appearing to the court," it was held, that it is the duty of the prisoner to show, that that continuance was not granted for the causes declared by statute, W. Va. Code, 1899, ch. 159, § 25, as the court will not reverse, unless error appear affirmatively in the record; and the prisoner is not therefore entitled to a discharge. *State v. Newsom*, 13 W. Va. 859.

Continuance by Consent of Counsel.—The fact that the prisoner was not present in court at the terms when the case was continued, before his arraignment, by consent of counsel, does not make the continuances wrongful as to him, so that such terms should be counted in his favor as determining his right to be discharged. *Kibler v. Com.*, 94 Va. 804, 812, 26 S. E. 858.

6. Trial in Good Time and Verdict Set Aside.

A prisoner is indicted for embezzlement, and at the fifth term after he was examined for the offense, he is tried and convicted, but the verdict is set aside for a variance between the allegation and the proof, as to the ownership of the goods, and the case is continued. At the next term of the court the attorney for the commonwealth enters a *nolle prosequi* upon the indictment; and the prisoner is indicted again for the same offense, the indictment in the first count being the same as in the former indictment, and another count charging the goods embezzled to be the goods of another. Upon his arraignment he moves the court to discharge him from the offense, on the ground that three regular terms of the court had been held since he was examined and remanded for trial without his being indicted. The attorney for the commonwealth opposes the motion and offers the record of the proceedings of the circuit court upon the first indictment, to show that he had been indicted, tried and con-

victed, which was objected to by the prisoner. It was held, that the record was competent, and the only competent, evidence upon the question. *Com. v. Adcock*, 8 Gratt. 661.

The second indictment being for the same act of embezzling as the first, and the prisoner having been indicted, tried and convicted in time, and the verdict set aside for the variance, the second indictment was proper and in time, and the prisoner was not entitled to be discharged. *Com. v. Adcock*, 8 Gratt. 662; *State v. Strauder*, 11 W. Va. 745, 800.

"It would have been more accurate and strictly technical to have objected for a failure to try, since the penalty or sanction for a failure to indict is only discharge from imprisonment, whether with or without bail we will not stop to inquire. But as there could be no trial without an indictment, we may consider the objection for a failure to indict for three terms as inclusive of, and tantamount to charging a failure to try." *Com. v. Adcock*, 8 Gratt. 661, 671.

"The prisoner's counsel relied on *Cawood's Case*, 2 Va. Cas. 527, as a conclusive authority. But it wants one important, we might say indispensable feature, to render it at all parallel with or analogous to this. *Cawood* had not been indicted at all, an indictment, the finding of which is not matter of record, being tantamount to no indictment." *Com. v. Adcock*, 8 Gratt. 661, 678.

Where a prisoner plead that he had been held for trial more than four terms after indictment, a replication that during that period prisoner had been convicted and the conviction reversed, and that he had been held till reversal for punishment, not for trial, was held sufficient. *Smith v. Com.*, 85 Va. 924, 9 S. E. 148.

And if a prisoner has been tried and convicted of a crime, and a new trial awarded to him, although he should not be again tried till after the third

term (subsequent to his examination), he is not entitled to a discharge. *Vance v. Com.*, 2 Va. Cas. 182.

7. Indictment Found but Not Recorded in Court.

If, after the prisoner had been examined by the county court for an offense, two actual sessions of a superior court thereafter occurred, and it did not appear from the records of the superior court that an indictment had been found against him, he was entitled, under our statute, to be discharged from his imprisonment, although he had been in fact arraigned on, and had pleaded to, an indictment not appearing by the record to have been found by the grand jury. And if a third actual term had passed without such record of the finding, he was entitled, under the statute, to be discharged from the crime. *Com. v. Cawood*, 2 Va. Cas. 527.

"This court, in *Santee's Case* (ante, p. 363), decided, that the word term, means the actual session of the court. If, then, an examining court of Washington county, before whom the prisoner was charged with the murder of his wife, did sit, and remand the prisoner for trial to the superior court, and if two sessions of the superior court of Washington were thereafter actually held, the prisoner was entitled to a discharge from his imprisonment at the period that this question was adjourned to this court; that is, on the 15th of October, 1824, unless the attendance of the witnesses against him was prevented by himself, because it does not appear by the records of the superior court of Washington, that he was indicted at or before the second term of the said superior court." *Com. v. Cawood*, 2 Va. Cas. 527, 546.

"If, however, he was actually examined, and there is record proof of it, and three or more terms, or actual sessions of the superior court have passed without an indictment presented in open court and recorded, and without a trial on such indictment, we are

bound to say that he is 'forever discharged of the crime,' for the perpetration of which he was examined and committed." *Com. v. Cawood*, 2 Va. Cas. 527, 546.

It was held, that: "If he had been entitled to be discharged from his imprisonment as aforesaid, he could not have been arrested for the same crime, unless a bill of indictment had been found at the superior court of Washington, at the third term of that court actually held; but, that if he has not actually been examined by the examining court of Washington county, for the offense set forth in the paper purporting to be an indictment, he may yet be arrested and examined for the said offense, but not otherwise." *Com. v. Cawood*, 2 Va. Cas. 527, 547.

8. Effect of Failure to Indict.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

C. TO BE PRESENT AT TRIAL.

See the title CRIMINAL LAW for full treatment.

In What Cases Prisoner Must Be Present.—In felony cases the accused must be present throughout all the proceedings, and that fact must appear from the records. *Hooker v. Com.*, 13 Gratt. 763; *Gilligan v. Com.*, 99 Va. 816, 37 S. E. 962; *Coleman v. Com.*, 90 Va. 635, 19 S. E. 161; *Snodgrass v. Com.*, 89 Va. 688, 17 S. E. 238; *Shelton v. Com.*, 89 Va. 453, 16 S. E. 365; *Bond v. Com.*, 83 Va. 585, 3 S. E. 149; *Lawrence v. Com.*, 30 Gratt. 851; *Boswell v. Com.*, 20 Gratt. 865; *Jackson v. Com.*, 19 Gratt. 656; *Sperry v. Com.*, 9 Leigh 623; *State v. Allen*, 45 W. Va. 65, 30 S. E. 209; *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876; *State v. Greer*, 22 W. Va. 811; *State v. Sutfin*, 22 W. Va. 773; *State v. Conkle*, 16 W. Va. 747; *State v. Strauder*, 8 W. Va. 691; *Younger v. State*, 2 W. Va. 579.

Does Not Apply to Misdemeanor Cases.—In Virginia the verdict of guilty upon an indictment for a misdemeanor

may be rendered in the absence of the accused, even though the penalty is imprisonment. *Price v. Com.*, 33 Gratt. 819, 36 Am. Rep. 797; *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838.

D. CONFRONTATION WITH ACCUSERS AND WITNESSES.

Both the state and federal constitutions provide that in all capital or criminal prosecutions a man has a right to be confronted with his accusers and the witnesses against him. Va. Const., art. 1, § 10; *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838; *Brogy v. Com.*, 10 Gratt. 722; *Finn v. Com.*, 5 Rand. 710; *Caton v. Lenox*, 5 Rand. 31; *Mackaboy v. Com.*, 2 Va. Cas. 268; *Crite v. Com.*, 1 Va. Dec. 423. See *Carrico v. West Virginia*, etc., R. Co., 39 W. Va. 86, 19 S. E. 571. See the titles CRIMINAL LAW; WITNESSES.

Application Limited to Criminal Cases.—In civil cases this provision has no application, as the constitution expressly limits it to capital or criminal prosecutions. *Finn v. Com.*, 5 Rand. 710; *Caton v. Lenox*, 5 Rand. 31; *Carrico v. W. Va.*, etc., R. Co., 39 W. Va. 86, 19 S. E. 571.

Right to Be Present at Every Stage of Trial.—"It is the right of any one, when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses;' and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected." *Hooker v. Com.*, 13 Gratt. 763.

Trial for Misdemeanor after Due Summons.—The constitutional guarantee that the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him, etc., is in no manner violated by any of the statutory provisions for the trial and sentence of one indicted for a misdemeanor, on his failing to appear after due summons, without a *capias* for his arrest. See Virginia Code, 1887, §§

3999, 4112, 4076, 726. The appellants in the present case were given the opportunity, as the statute requires, to appear and defend, and their choice not to appear, but to make default, was a waiver of the constitutional provision now relied on. *Shiflett v. Com.*, 90 Va. 386, 389, 18 S. E. 838.

Reading Former Testimony of Absent Witness.—Both state and federal constitutions provide that in all capital or criminal prosecutions a man has a right to be confronted with his accusers and witnesses. Under this clause it is held in Virginia that the fact that the accused was confronted with his accusers at a former trial, at which their testimony was written down, is not sufficient to allow this testimony to be read in evidence on a second trial where the witnesses are absent from the commonwealth at the date of the second trial. *Finn v. Com.*, 5 Rand. 710; *Crite v. Com.*, 1 Va. Dec. 423. See the title HEARSAY EVIDENCE.

E. RIGHT TO BENEFIT OF COUNSEL.

The constitutions of the states usually contain a provision that the accused in felony cases shall be entitled to the benefit of counsel. The constitution of Virginia, however, contains no such provision. But in Virginia it is held, that argument by counsel can not be prohibited in a criminal case, however plain the case. *Word v. Com.*, 3 Leigh 743; *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784; *Jones v. Com.*, 87 Va. 63, 12 S. E. 226; *Early v. Com.*, 86 Va. 921, 11 S. E. 795. In West Virginia the benefit of counsel is guaranteed to accused by § 14, art. 3, of the constitution. See the title CRIMINAL LAW.

F. PRIVILEGE OF SILENCE.

To What Cases the Privilege Is Applicable.—See the title CRIMINAL LAW.

Another right guaranteed by both state and federal constitutions, is that no person shall be compelled in any criminal case to be a witness against

himself. This constitutional provision, however, is not limited to those cases where witnesses are called to testify in criminal prosecutions against themselves. But the privilege is as broad as the mischief against which it seeks to guard, and insures that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. *Cullen v. Com.*, 24 Gratt. 624; *Litton v. Com.*, 101 Va. 833, 44 S. E. 923; *Sprouse v. Com.*, 81 Va. 374; *Kendrick v. Com.*, 78 Va. 490; *Temple v. Com.*, 75 Va. 892; *Murphy v. Com.*, 23 Gratt. 960; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

A prisoner can not be compelled to give evidence against himself, and a law which would require him to do so would be unconstitutional, but he may waive such immunity. *Brown v. Eppes*, 91 Va. 726, 738, 21 S. E. 119.

Although the waiver must always be made understandingly and willingly, and generally after being fully warned by the court. *Cullen v. Com.*, 24 Gratt. 624, 637.

And it would seem that, to entitle a witness to his exemption, on the ground that an answer to the question would tend to criminate him, such exemption must be claimed at the time. *Litton v. Com.*, 101 Va. 833, 44 S. E. 923.

Effect of Immunity from Prosecution.—But where full protection is given witness against any prosecution for the offense concerning which his testimony is desired, he is not justified in refusing to testify on the ground that his answer would tend to criminate and disgrace him. *Kendrick v. Com.*, 78 Va. 491 (two judges dissenting). See also, *Temple v. Com.*, 75 Va. 892; *Cullen v. Com.*, 24 Gratt. 624, where the point was left undecided. See the titles DUELLING; GAMING.

G. EXEMPTION FROM BEING TWICE PUT IN JEOPARDY.

The constitutions of the United

States and that of Virginia (1902), both provide that no man shall be twice put in jeopardy for the same offense, and so with the W. Va. Const., art. 2, § 5. The constitution of Virginia, prior to 1902, contained no such provision, but the common-law maxim, on which it is founded, has always existed in Virginia. *Jones v. Com.*, 20 Gratt. 848. For full discussion of this subject, see the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 181.

H. EXEMPTION FROM CRUEL AND UNUSUAL PUNISHMENTS.

Scope of Prohibition.—The ninth section of the bill of rights, denouncing cruel and unusual punishments, was never designed to control the legislative right to determine, *ad libitum*, upon the adequacy of punishment, but is merely applicable to the modes of punishment. *Aldridge v. Com.*, 2 Va. Cas. 447, 449.

And the eighth amendment to the federal constitution does not apply to the state governments. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

Whipping Post Not a Cruel Punishment.—A statute which directs that a person convicted of a crime shall be imprisoned for a time not less than one, nor more than six months, and may receive stripes, at the discretion of the court, to be inflicted at one time, or at different times, provided the same do not exceed thirty-nine at any one time, is not within the constitutional inhibition against cruel and unusual punishments. *Com. v. Wyatt*, 6 Rand. 693; *Aldridge v. Com.*, 2 Va. Cas. 447.

Selling Negro Convicts as Slaves.—In *Aldridge v. Com.*, 2 Va. Cas. 447, an act under which grand larceny, when committed by free negroes and mulattos, might be punished by selling the criminal as a slave, and transportation and banishment beyond the limits of the United States, was held not to be contrary to the constitution of the state.

I. EXEMPTION FROM EXCESSIVE FINES.

The constitution also guarantees that excessive fines shall not be imposed. But the imposition and regulation of fines being within the discretion of the legislature, its discretion will not be questioned by the courts, except where the minimum penalty is so excessive as to shock the sense of mankind. Hence, a statute imposing a fine is not in conflict with this provision simply because it does not fix the maximum fine that shall be imposed for an offense. If the verdict of the jury, in such case, imposes an excessive fine, the court may set it aside. *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809. For full treatment, see the title *FINES AND COSTS IN CRIMINAL CASES*.

VII. Personal Liberty and Security.

A. MEANING OF "LIBERTY."

The liberty of the citizen which is guaranteed by the constitution of the United States and of this state embraces not only the right to go where one chooses, but to do such acts as he may judge best for his own interest not inconsistent with the equal rights of others, to follow such pursuits as he may deem best adapted to his faculties and will afford him the highest enjoyment, to be free in the enjoyment of all of his faculties, to be free to use them in all lawful ways, to live and work where he will, and to earn his livelihood by any lawful calling, and for that purpose to enter into and enforce all contracts which he may deem proper, necessary and essential to successfully conduct his private concerns. *Young v. Com.*, 101 Va. 853, 45 S. E. 327.

Saying: "These are individual rights, formulated as such under the phrase 'pursuit of happiness' in the declaration of independence, which begins with the fundamental proposition that all men are created equal; that they are en-

dowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." *Young v. Com.*, 101 Va. 853, 863, 45 S. E. 327. See *State v. Workman*, 35 W. Va. 367, 14 S. E. 9; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285.

"And to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression." *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285. See *State v. Dent*, 25 W. Va. 20.

"Said a learned jurist of Virginia, Judge Green, in 6 Rand., 'Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of civil government, which our ancestors in passing our constitution intended to secure to themselves and their posterity, effectually and forever.'" *Salt Co. v. Brown*, 7 W. Va. 191, 200.

Active Participation in the Government.—If our government is a government by the people, to seek active participation in the government is the plain privilege of every citizen. It is not only the privilege, but it might reasonably be held to be the plain duty of all the people, and this will not be denied as an original proposition, true in itself. *Louthan v. Com.*, 79 Va. 199. See post, "Freedom of Speech and of the Press," IX.

Enforcement of License Tax by Imprisonment.—The provision of the Virginia bill of rights that no man shall be deprived of his liberty except by the "law of the land or the judgment of his peers," does not forbid the state to enforce a license tax by imprisonment of the delinquent. The expression "law of the land" seems equivalent to "due process of law." *Com v. Byrne*, 20 Gratt. 165.

B. REGULATION OF PRIVATE BUSINESS.

See post, "Class Legislation in General," VIII, A; "Regulation of Use," X, D; "The Police Power," XIII.

The only authority which a statute has to prohibit, regulate or control the private business of a citizen grows out of its "police power," or power to enact laws pertaining to the public health, the public safety or the public morals. A state regulating such private business in a manner which in no wise pertains to public health, safety or morals is not a valid exercise of the police power. *Young v. Com.*, 101 Va. 853, 45 S. E. 327; *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 349; *State v. Dent*, 25 W. Va. 20.

"It is not a valid exercise of legislative power which attempts to prohibit and restrain the defendant in the lawful prosecution of a lawful business. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of a purpose not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations.'" *Young v. Com.*, 101 Va. 853, 870, 45 S. E. 327.

Regulation of Charges for Services.

—Natural persons are divided by the text writers into two classes, private persons and public officers. Private persons, with the exception of those engaged in certain sorts of business, * * * have a right to charge for their services any price, which the party they contract with is willing to pay; and if the party, for whom such private person proposes to render services is unwilling to pay for his services the

price which he demands, he is under no obligations to render his services, and he is at perfect liberty to decline doing so. No court will require of him to render services for such party. If he chooses to do so, he may by contract fix the price of his services, and the courts will enforce the price, which he has thus fixed on his services by contract; and no legislature in this country could by statute law require such person to render services at a price fixed by the legislature. *Laurel Fork, etc., R. Co. v. West Virginia Transportation Co.*, 25 W. Va. 324, 331.

But whenever the owner of private property devotes it to a use, in which the public has an interest, he in effect grants to the public an interest in such use, and he must to the extent of that interest submit to be controlled by the public for the common good, so long as he maintains such use; and if he would withdraw his grant to the public, he must discontinue such use. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 335; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285.

"It would seem to follow as a matter of course, that there must be a third class of artificial persons besides private and public corporations, which third class must correspond with this third class of natural persons, and which we may call quasi-public corporations, and which must be subject to the same public control by the courts and by the legislature, to which this third class of natural persons, quasi-public officers, are subject. These we will call quasi-public corporations, and the prices charged for the use of their private property are clearly subject to the control of the courts or of the legislature, which has a right from time to time by general statute to regulate the prices charged for the use of their property or for their services connected therewith." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 340.

And the law applicable to artificial persons or corporations is in these respects very similar to the law applicable to natural persons, and is obviously based on like grounds. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 332.

Regulation of Licensee's Business.—

A licensee, pursuing an avocation which the state has taken under its general supervision for the purpose of securing the safety of employees, by ventilation, inspection, and governmental report, must submit to such regulations as the sovereign thinks conducive to public health, public morals, or public security. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1005.

"Persons or corporations engaged in occupations in which the public have an interest or use may be regulated by statute. But the reasons assigned for these decisions are that the public has a use in these occupations, and that the persons engaged in them are in the exercise of a public franchise, or special privileges, not enjoyed by others not so engaged; that their business implies a trust and public duty; and that the government has, therefore, the power to see that this trust is not abused, and that the duty imposed by it is properly performed." *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285.

Mining of Coal.—And a statute prohibiting the mining of coal within five feet of the boundary line of another's land, without his consent, and imposing a penalty for so doing, is a valid exercise of the police power of the state. *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608. See the title MINES AND MINERALS.

Telegraph Companies.—See the titles INTERSTATE COMMERCE; TELEGRAPHS AND TELEPHONES.

As to regulation of other businesses, trades and professions, see the various specific titles.

C. PROVISION TO PREVENT HEREDITY IN OFFICE.

The provision of the bill of rights

which declares "that no man or set of men, are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services, which, not being descendible, neither ought the offices of magistrate, legislator or judge, to be hereditary," has no application to the private relations of the citizens, nor to the power of the legislature to pass laws regulating the domestic affairs of the people, but was only intended to provide against heredity in offices. *Smoot v. People's, etc., Ass'n.*, 95 Va. 686, 29 S. E. 746.

D. RIGHT TO CARRY ARMS.

See the titles *MILITIA*; *WEAPONS*. See also, post, "Class Legislation in General," VIII, A.

E. UNREASONABLE SEARCHES AND SEIZURES.

See the title *SEARCHES AND SEIZURES*.

VIII. Equal Protection of Laws, Privileges and Immunities.

See ante, "Regulation of Private Business," VII, B.

A. CLASS LEGISLATION IN GENERAL.

Under the amendment to the federal constitution providing that all persons shall have equal protection of the laws, and the rights and privileges of citizens shall not be abridged, the rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285.

Governmental powers are conferred upon the state primarily by the people, in trust, for the benefit of all of its

citizens; and whether exercised by the government directly through its own officials, or indirectly through the agency of corporations chartered by the state, must be exercised impartially and without discrimination for the benefit of all the people. This is the basic principle upon which our government is founded, and the philosophy of the constitutional provision securing to every one the "equal protection of the law." *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 293, 49 S. E. 39.

Does Not Prohibit Special Acts.—It has been repeatedly decided by the supreme court of the United States, in construing the fourteenth amendment, that it is no objection to a statute that it is special, if all persons or corporations subject to it are treated alike under the same conditions. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

It was for the legislature to say whether its operation should extend to all persons and corporations, or to those corporations only which are specially mentioned, and the discretion of the legislature in the matter is not subject to judicial interference. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806, 808.

Thus, an act of the legislature which requires a statutory acquittal of the defenses defined thereunder, which is mandatory in favor of persons who prove good character and standing in the community, and that they were in good faith armed only for self-defense, although not mandatory as to persons who fail to prove such good character, nevertheless, does not in terms deprive them of any right or guarantee to which they may be entitled under the constitution, nor should such deprivation be constructively implied. *State v. Workman*, 35 W. Va. 367, 14 S. E. 9. See the title *WEAPONS*.

Contracts between Employer and Employee.—The courts of West Virginia have regarded any attempt by the

legislature of that state to nullify contracts or other dealings between employers and employees as infringements of the right of the employer and employee. Thus in *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, a statute (Code, 1887, p. 983) declaring that all persons engaged in mining coal, ore or other minerals, or mining or manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, should not issue for the payment of labor, any order or other paper, unless the same purports to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, was held unconstitutional and void.

It is not competent for the legislature, under the constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation can not be sustained as an exercise of the police power. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285.

And a statute (acts, 1887, ch. 63, § 4) declaring that it shall be unlawful for any person, firm, or corporation engaged in mining or manufacturing and interested in merchandising, to knowingly and willfully sell any merchandise or supplies to any employee at a greater per cent. of profit than when selling merchandise or supplies of like quality, character, and quantity to other customers buying for cash, and not employed by them, is void, because it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and employee. *State v. Fire Creek Coal, etc., Co.*, 33 W. Va. 188, 10 S. E. 288.

But in *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385, an evenly divided court affirmed the judgment of the trial court which held, that a statute providing that employers should not pay the wages of their employees in other than lawful money of the United States, did not abridge the privileges and immunities of citizens, nor did it deprive any person of life, liberty or property without due process of law.

The case of *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, is distinguished in *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, on the ground that there it was an insidious distinction, separating miners and manufacturers from the rest of the community, and imposing upon them burdens not inflicted upon others, that rendered the act there construed unconstitutional as class legislation, which objection was removed in the principal case.

Saying: "When a few persons are engaged in an extensive business, and they have a multitude of customers or dependent employees, and it appears that the business is of such a character that the parties do not deal upon an equal footing, and that the many are at a disadvantage in their contractual relations with the few, the legislature may regulate these relations, with a view to prevent fraud, oppression, or undue advantage. Familiar illustrations are contracts for the loan of money; for transportation of persons and freight; for insurance of life and property; for the manufacture and sale of lard and artificial butter; for measuring and inspecting lumber, grain, tobacco, flour, etc. The number of these peculiar subjects must vary as trade and commerce increase or drift into new channels." *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1009.

Classifications of Corporations.—See the title CORPORATIONS.

Discrimination against Foreign Corporations.—A state may forbid foreign

corporations engaging in business within its limits, or it may impose reasonable restrictions upon the right to do business, provided that such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. *Toledo Tie, etc., Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37; *Slaughter v. Com.*, 13 Gratt. 767. See the title FOREIGN CORPORATIONS.

Discrimination against Nonresidents under the Police Power.—Where, however, in the regulation of any subject of internal police, a regard to justice and the due and convenient enforcement of its laws, requires a state to adopt a different mode of proceeding, or a modification of the regulation, in respect to persons residing outside of the state, in order fairly to meet and provide for the circumstances of their nonresidence, the competency of the state to so act is not taken away by § 2, art. 4 of the United States constitution. For example, a Virginia statute which provided that vessels of nonresidents sailing north should be searched, before sailing, by pilots, to ascertain whether any escaping slaves were on board, and that the captain of the vessel should pay the pilot a fee for making the search, was held not in conflict with the constitution. *Baker v. Wise*, 16 Gratt. 139. See post, "The Police Power, XIII.

Taxing Citizens of Another State Selling Goods by Sample.—It is competent for states to require a license to be obtained by every person selling goods by sample, who are not "resident merchants," as a man may be a resident citizen and not a resident merchant, and the reverse; hence, a statute requiring a license in such case is not unconstitutional as being a discrimination in favor of citizens of the state. *Speer v. Com.*, 23 Gratt. 935.

Taxation of Peddlers.—A state has the right to impose a tax on peddlers, where it operates uniformly upon all citizens and does not discriminate in

favor of its citizens and against citizens of other states, or where the tax imposed is in the exercise of police powers, and not a regulation of commerce under cover of the power, although incidentally it may have that effect. But where any injurious discrimination is made in favor of the resident against the nonresident, or with respect to the sales of articles manufactured in that state over similar articles manufactured abroad, the law is repugnant to the constitution of the United States, and therefore void. *Com. v. Myer*, 92 Va. 809, 23 S. E. 913. See the title HAWKERS AND PEDDLERS.

Statutes Giving Priority of Liens.—A statute confined in its operation to the giving of prior liens to parties furnishing supplies to transportation or mining companies is not unconstitutional if all persons subject to it are treated alike under the same conditions. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

Old Act of Additions.—The different estates, and degrees known to the common law, and required by the act of additions, to be added to the name in indictments, are not repugnant to our constitution, and bill of rights, so far as regards the difference between the degree of yeoman and laborer. *Com. v. Clark*, 2 Va. Cas. 401.

Bill of Rights Formerly Inapplicable to Slaves or Free Blacks.—Notwithstanding the general language of the bill of rights, it is undeniable, that as originally enacted and up to the time of the war amendment, it was neither intended nor considered to extend, either to the slave population or to the free blacks or mulattoes. *Aldridge v. Com.*, 2 Va. Cas. 447. See *Ruffin v. Com.*, 21 Gratt. 790. See ante, "Application of Bill of Rights to Convicts," IV, F.

Bequests to Educate White Children No Discrimination.—In *Kinnaird v. Miller*, 25 Gratt. 107, bequest for the foundation of the Miller School was

held not to be obnoxious to the fourteenth amendment by abridging the privileges or immunities of citizens of the United States, in that it discriminated in favor of white children. See the title *CIVIL RIGHTS*, vol. 2, p. 829.

B. PRIVILEGES AND IMMUNITIES GUARANTEED BY THIS CLAUSE.

The immunities and privileges secured to citizens of the United States by the constitution, are the right to protection by the government; the enjoyment of life and liberty; the right to acquire and possess property of every kind, and to pursue happiness and safety. They do not include the right to share the property belonging to the people of the state; and an act which forbids the planting of oysters in the water of the state by any person not a resident, is a constitutional act. *McCready v. Com.*, 27 Gratt. 985, affirmed in 94 U. S. 391.

And this, subject to such restraints as the government may justly prescribe for the general good of the whole. *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283.

Privileges Are Personal.—The privileges and immunities guaranteed to citizens of states of the Union are annexed to their status of citizenship; they are personal and may not be assigned or imparted by them or any of them to any other person natural or artificial. *Slaughter v. Com.*, 13 Gratt. 767.

If it were otherwise, and these citizens could impart their right to others, the limitation of the guaranty to citizens' would be without practical effect; the right might be imparted to classes, and for purposes in contravention of our policy and laws; and thus our welfare or even our safety be endangered. *Slaughter v. Com.*, 13 Gratt. 771.

Possession of Property.—It can hardly be questioned that the right to possess property is one of these rights,

and that right embraces the privilege of a citizen to keep in his possession property for another, though it is not denied that the keeping of property which is injurious to the lives, health, or comfort of all persons may be prohibited under the police power. *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283.

In *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, a statute making it an offense for any one without a state license therefor, to "keep in his possession, for another, spirituous liquors," etc., was held unconstitutional and void as an abridgement of the privileges and immunities of a citizen without any legal justification. But see the title *INTOXICATING LIQUORS*.

Right to Testify in Courts.—Ever since the passage of the fourteenth amendment it has been decided that a state has a right to exclude from testifying in its courts, any class of its inhabitants or citizens that it chooses. *State v. Strauder*, 11 W. Va. 745, 809, reversed on other grounds in 100 U. S. 303.

"The constitution of the United States had in no way prohibited such legislation by the states and all had admitted the right of the states to legislate on this subject as they chose. The thirteenth amendment conferred no rights on any freeman, and could not therefore possibly affect the rights of the state to legislate on this subject." *State v. Strauder*, 11 W. Va. 745, 808.

C. POWER OF STATE OVER ITS OWN CITIZENS.

See post, "Fourteenth Amendment Operates upon the States," X, A, 5.

The rights of the states over their own citizens were not intended to be changed by the fourteenth amendment of the constitution of the United States, and a state may now deny to any of its own citizens, any rights and immunities whatever, excepting only such as are protected from violation by express provision in the constitution of

the United States. *State v. Strauder*, 11 W. Va. 805, reversed as to other questions in *Strauder v. West Virginia*, 100 U. S. 303.

And it has been held, that the privileges and immunities guaranteed by the fourteenth amendment to the federal constitution are those of citizens of the United States as distinguished from those of citizens of the several states. *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000.

The court said in *State v. Strauder*, 11 W. Va. 745, 817: "I agree with the supreme court in the *Slaughter House* cases, that it is doubtful whether in the future, any action of a state is likely to occur, which will ever be held to come within the purview of this last clause of the first section of the fourteenth amendment, prohibiting a state to deny to any person the equal protection of its laws." See post, "In General," X, A.

D. RIGHTS OF CITIZENS OF OTHER STATES.

See also, the titles CITIZENSHIP, vol. 2, p. 823; REMOVAL OF CAUSES.

A naturalized citizen of the United States, or a native citizen of another state, is entitled to all the rights and privileges of a citizen of Virginia. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; *Baker v. Wise*, 16 Gratt. 213; *Com. v. Towles*, 5 Leigh 743.

And this is all the effect of this provision of the first section of the fourteenth amendment, so far as it operates on the immunities and privileges belonging to any person. By denying to the states the right to abridge the immunities of the "citizens of the United States," was evidently meant the denying to a state the right to abridge the immunities of persons having permanent residences in other states, or in the territories, as distinguished from citizens of the state. *State v. Strauder*, 11 W. Va. 805, reversed as to other questions in *Strauder v. West Virginia*, 100 U. S. 303.

Character of Rights Secured.—This provision of the constitution clearly recognizes the distinction between the character of a citizen of the United States and of a citizen of any individual state, and also of citizens of different states, and does not apply to those rights, which, from the very nature of society and of government, belong exclusively to the citizens of the state. Such are the rights of election and of representation, for they can not be imparted to any but citizens of the state. *Murray v. McCarty*, 2 Munf. 393, 398; *Baker v. Wise*, 16 Gratt. 139, 216.

Thus while a citizen of one state has the power to hold land in another, yet he can not interfere in those rights which, from the nature of society and the government, belong exclusively to the citizens of that state. *Murray v. McCarty*, 2 Munf. 393, 398.

Right to Exercise Corporate Franchise.—Regarding citizens of Connecticut and of Virginia respectively as having equal privileges and immunities in this respect, mere citizenship in Connecticut confers no corporate franchise in Virginia. *Slaughter v. Com.*, 13 Gratt. 771. See also, the title CORPORATIONS.

These citizens of Connecticut can have no greater "privileges and immunities" than those which an equal number of our own citizens might enjoy, and fifty or a hundred (whatever number) citizens of Virginia could not without a charter associate themselves together, and usurp the franchise of a corporation, adopt a corporate name or seal, establish a perpetual succession, exempt their members from personal liability for contracts of the association, or to any extent effect or repeal the laws regulating the succession to property, real or personal. *Slaughter v. Com.*, 13 Gratt. 771.

E. CIVIL RIGHTS.

See the title CIVIL RIGHTS, vol. 2, p. 829.

IX. Freedom of Speech and of the Press.

See the title LIBEL AND SLANDER.

The constitution of Virginia (1902), art. 1, § 12, and art. 4, § 58, wherein it is said: "Any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty;" and, "The general assembly shall not pass any law abridging the freedom of speech or of the press;" applies to and protects the rights of all citizens of the commonwealth, whether occupying a private or an official station. *Louthan v. Com.*, 79 Va. 196.

And the act of the legislature, approved March 18, 1884 (acts, 1883-4, p. 698), entitled "An act to prohibit the active participation in politics of certain officers of the state government," is inconsistent with the constitution of Virginia, and is therefore null and void. *Louthan v. Com.*, 79 Va. 196.

Liberty of the Press.—The summary punishment, as for a contempt, of the author of a libelous newspaper article is not an invasion of the liberty of the press, but is to be exercised with the utmost caution and reserve. *Burdett v. Com.*, 103 Va. 839, 48 S. E. 878. See the title CONTEMPT.

The constitutional provision guaranteeing freedom of speech and of the press was not intended, however, to restrict the right of taxation for the support of the government. Hence, a city ordinance which imposes a tax upon the business of publishing newspapers does not infringe upon this provision. *City of Norfolk v. Norfolk Landmark Co.*, 95 Va. 564, 28 S. E. 959.

X. Due Process of Law.

A. IN GENERAL.

1. Constitutional Provisions.

The federal constitution provides that no state shall "deprive any person of life, liberty, or property, with-

out due process of law." See fourteenth amendment thereto.

2. Meaning of "Deprive."

And the Virginia Const. (1902), art. 1, § 11, provides that "no person shall be deprived of his property without due process of law." See also, West Virginia Const., art. 3, § 10.

"The constitution contains no definition of the word 'deprive' as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or like connection. While this provision of the amendment is new in the constitution of the United States, it is old as a principle of civilized government." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 349.

3. Due Process Depends on Facts of Each Case.

So impossible is it to lay down any general rule of uniform application in this connection, that it may be said that each case must be decided with reference to its own particular facts. Many cases illustrate what is due process of law, and many attempt to define it, but it can not be said that any definition has been laid down which is of universal application. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

It depends on how the question arises; that is upon the matter or transaction involved. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

4. Includes Long Recognized and Established Proceedings.

"Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case." *Peel Splint Coal*

Co. v. State, 36 W. Va. 802, 15 S. E. 1000, 1008.

The fourteenth amendment to the federal constitution does not itself define "due process of law." What was such before its adoption continues such. It does not prohibit a state from future, new legislation, action, or proceedings necessary, in its judgment, in the administration of its government, so it bear alike on all similarly circumstanced, and be not unusual, oppressive, or arbitrary action, assailing the essential rights of the person. *State v. Sponaule*, 45 W. Va. 415, 32 S. E. 283; *State v. Cheney*, 45 W. Va. 478, 31 S. E. 920.

The fourteenth amendment to the constitution of the United States respects the common law, the statute law, and the remedies of procedure existing in the several states at its adoption. It does not destroy a remedy for and against all alike, existing long before, as it came to preserve, not to destroy existing rights. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

And in adopting the provisions of our constitution forbidding any person to be deprived of his property without due process of law, we can not be regarded as prohibiting proceedings, long recognized by the Virginia courts as proceedings under "due process of law." *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 503.

Generally.—"Due process of law" means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights securing to every person a judicial trial before he can be deprived of life, liberty or property. *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583; *Williams v. Freeland*, 19 W. Va. 599; *Griffie v. Halstead*, 19 W. Va. 602; *Peerce v. Adamson*, 20 W. Va. 57. See also, *Rickard v. Schley*, 27 W. Va. 617.

The court, in *Virginia Coal Co. v. Thomas*, 97 Va. 527, 540, 34 S. E. 486,

said that it apprehended that the fourteenth amendment to the United States constitution, in providing "that no man shall be deprived of his property without due process of law," made no change in the law of this state, as such had always been the law here. See *State v. Sponaule*, 45 W. Va. 415, 32 S. E. 283, 287.

5. Fourteenth Amendment Operates upon the States.

See post, "Considered in Relation to Constitutional Restraints," XIII, C.

The provision of the original draft of the United States constitution, that no person shall be deprived of life, liberty, or property without due process of law, was designed as a limitation of the powers of the national government, and is inapplicable to the legislation of the states. But the fourteenth amendment operates directly upon the states. Before the adoption of the fourteenth amendment the state might divest vested rights of property, where such rights were not vested by contract, but since its adoption this can only be done by "due process of law." *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583; *Com. v. Byrne*, 20 Gratt. 165; *Williams v. Freeland*, 19 W. Va. 599; *Griffie v. Halstead*, 19 W. Va. 602; *Peerce v. Adamson*, 20 W. Va. 57; *State v. Strauder*, 11 W. Va. 745, 816.

But it adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against the encroachment by the state upon the fundamental rights, which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it still remains there. *State v. Strauder*, 11 W. Va. 745, 816.

"Except as a limitation upon state action, the fourteenth federal amendment, is not new, as respects the demand of 'due process of law.' That is simply a new application. It only de-

mands of the states what Magna Charta demanded from the time our English ancestors set foot on American soil, and was in the constitutions of all the states. For the first time that amendment gave the national government a veto power upon state action upon the citizen not consonant with due process of law, but it gave no new definition of the term 'due process of law,' or its equivalent 'law of the land.' Before it, the state had the final right to say whether the act was due process; after, the supreme court has. That is all. The definition is the same." *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 287.

6. Public Office Not Property.

A public office is not property, within the meaning of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers. It is a mere public agency, revocable according to the will and appointment of the people, as expressed in the constitution and the laws enacted in conformity therewith. *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274.

7. Jurisdiction and Hearing.

Courts Must Have Jurisdiction.—In order to constitute due process of law it is necessary that the courts shall have jurisdiction, and that some recognized and accustomed mode of procedure be pursued. *Williams v. Newman*, 93 Va. 719, 26 S. E. 19.

Opportunity to Be Heard.—See post, "Abatement of Nuisance," XIII, F, 2, e.

"Due process of law also requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be made affecting his rights to liberty or property. It is not enough that the owner may by chance have notice, or that he may, as a favor, have a hearing. The law itself must require notice to him,

and give him a right to a hearing and an opportunity to be heard. While the legislature may prescribe the kind of notice and the mode of service, it can not dispense with all notice. *Violett v. Alexandria*, 92 Va. 561, 25 S. E. 909; *Norfolk v. Young*, 97 Va. 729, 34 S. E. 886; *Heth v. Radford*, 96 Va. 272, 31 S. E. 8; *Boggs v. Com.*, 76 Va. 989; *Kinney v. Beverley*, 2 Hen. & M. 318; *Peerce v. Kitzmiller*, 19 W. Va. 564.

And a statute which authorized a party to seize the property of another without due process or warrant, and to sell, without notification to the owner, for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the constitution. *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 1014.

"It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right until he has had the opportunity of being heard; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance." *Underwood v. McVeigh*, 23 Gratt. 409, 419.

An examination of both sides of the question, and deliberations between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence. A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, can not claim for its decrees the weight of a judicial sentence. *Underwood v. McVeigh*, 23 Gratt. 409, 418.

It is immaterial that defendant was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot on our civiliza-

tion and jurisprudence. "We can not hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right of administration of justice." *Underwood v. McVeigh*, 23 Gratt. 409, 421.

Opportunity to Make Intelligent Defense—Receiver's Liabilities.—In a suit to settle the estate of a general receiver of a court, and to adjust the liabilities of his sureties, it is not sufficient to state the amounts due by such receiver in numerous chancery causes in the names of such causes, nor in the name of a special receiver in each of such causes, even though a memorandum of the proceedings in each of said causes, and a statement showing how the amount claimed was arrived at, be filed before the commissioner who takes the account, and answers thereto be filed by such sureties and the personal representative of the general receiver. This is not "due process of law," because it does not afford the defendants an opportunity to make an intelligent defense to the demands against them. The claims should either be preferred in the names of the persons beneficially interested in the fund, or the accounts of the general receiver should be settled in the several chancery suits in which he was receiver, and a special receiver there appointed to prove the balances thus ascertained in the general suit. *Williams v. Newman*, 93 Va. 719, 26 S. E. 19.

Resort to Court of Justice.—"Due process of law does not in all cases require a resort to a court of justice to assert the rights of the parties against the individual, or to impose burdens upon his property for the public use." *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 1014.

And "If there is anything settled by the United States supreme court, it is that the requirement of due process of law does not always require judicial procedure." *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 287.

As said in *Rickard v. Schley*, 27 W. Va. 617, 632, due process of law, when applied to suits, does not mean that no person can be deprived of his property unless he be a formal party to some suit. It means that due course of legal proceedings according to the rules and forms established for the protection of private rights, requiring a hearing before a judge. Thus a commissioner of sale or receiver may have a decree rendered against him, where he has been served with a rule to show cause, etc., or where he has had an opportunity of being heard as to the amount of the funds in his hands subject to the order of the court.

Supreme Court of United States Final Arbiter.—It is with the supreme court of the United States to determine finally whether legislation or action under state authority is due process of law. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

8. Effect of Requirement on Police Power.

See post, "Considered in Relation to Constitutional Restraints," XIII, C.

B. TRANSFERRING PROPERTY BY LEGISLATIVE ACT, AND FORFEITURES.

See post, "Disposition of Private Property by Legislature," XI, D, 2.

For the legislature to attempt, by a simple statute, to transfer the property of one person to another, would be not only clearly repugnant to natural right and justice, but in direct violation of the bill of rights of West Virginia, which declares that "no person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers." W. Va. Const., art. 3, § 10; *Hall v. Webb*, 21 W. Va. 318, 325; *Griffin v. Cunningham*, 20 Gratt. 31, 51.

Invalid Judgment Can Not Be Validated.—An act of legislature attempting to validate proceedings before persons who undertake to act as judges, but who were wholly without authority, is unconstitutional and void, as in

effect taking one man's property from him and giving it to another. *Griffin v. Cunningham*, 20 Gratt. 31.

Prescribing Condition Precedent to Right of Action.—A fence law which requires a land owner to enclose his land by a lawful fence, as a prerequisite to the right to recover from damages done by trespassing animals, does not violate the constitutional provision that private property shall not be taken for public use without just compensation, nor does it deprive him of the means of acquiring or possessing property. *Poindexter v. May*, 98 Va. 143, 34 S. E. 971.

Forfeiture by Legislative Act.—See the title FORFEITURES.

Forfeitures of rights and property can not be adjudged by a legislative act, and confiscation, without a judicial hearing after due notice, would be void as not being by due process of law. *Boggs v. Com.*, 76 Va. 989; *Woods v. Cottrell*, 55 W. Va. 476, 483, 47 S. E. 275.

For it is contrary to the bill of rights and to principles of the social compact to confiscate the property of a person not a party to the proceeding, without notice, without trial, and without affording him an opportunity of being heard in his defense. *Boggs v. Com.*, 76 Va. 989, 998.

And so long as the proceeds of confiscated property paid into court, remain under its control, anyone entitled to the money may apply therefor to the court by petition. *Boggs v. Com.*, 76 Va. 989.

In passing the act of March 6th, 1880 (acts, 1879-89, p. 197), the object of the legislature was to forfeit vessels employed in violating the oyster laws; but that act contains no provision for any process against the vessels, and none whereby the owner may appear and controvert the claim of the commonwealth. And so far as it attempts the confiscation of the property of persons not convicted of the

offense, that act is void. *Boggs v. Com.*, 76 Va. 989.

But § 1, ch. 151, W. Va. Code, 1899, in authorizing the seizure of gaming tables or instruments covered by it, is not unconstitutional as depriving a person of property without due process of law. *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275. See the title GAMING.

C. TEMPORARY SEIZURE AND DETENTION.

The temporary seizure and detention of property, as authorized by a statute, awaiting judicial action, is not violative of the provision of art. 1, § 6, of the constitution, directing that no person shall be deprived of property without due process of law. *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 1015.

D. REGULATION OF USE.

See ante, "Regulation of Private Business," VII, B.

"Down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not all. The amendment does not change the law, in this particular, but simply prevents states from doing that which will operate as such deprivation." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 350.

"By the fifth amendment it was introduced into the constitution of the United States as a limitation upon the powers of the national government, and by the fourteenth as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislature of the states." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 349.

E. IN SETTING ASIDE WAR TRESPASS JUDGMENTS.

See post, "Judgments," XI, C, 3.

The provisions of § 3, ch. 58, acts of

1872-3, authorizing courts to set aside judgments rendered for acts done, in the prosecution of the late war, according to the usage of civilized warfare, upon affidavits and the inspection of the record in the cases therein specified, is unconstitutional and void, because the proceeding thus authorized is not "by due process of law" within the meaning of § 35, art. 8, of our constitution. *Harness v. Babb*, 22 W. Va. 315; *Peerce v. Kitzmiller*, 19 W. Va. 564.

Section 35, art. 8, of the constitution treats judgments as property and provides for the carrying out of the provision by "due process of law," and such judgments, as are contemplated by said section, were not to be set aside or destroyed, until by "due process of law" it was ascertained, that they were recovered "because of an act done according to the usages of civilized warfare in the prosecution of the war by either of the parties thereto." *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583; *Griffie v. Halstead*, 19 W. Va. 602; *Williams v. Freeland*, 19 W. Va. 599; *Peerce v. Adamson*, 20 W. Va. 57.

"Due process of law" means, as used in said section, in the due course of legal proceedings according to those rules and forms, which have been established for the protection of private rights, securing to every person a judicial trial before he can be deprived of life, liberty or property. *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583.

And a trial in an action on a super-sedeas, bond upon issues joined upon special pleas, which set up the defense, that the original judgment was "recovered because of an act done by a citizen of this state according to the usages of civilized warfare, etc.," and which issues were found for the defendants, and judgment for the defendants on the sole ground, that the original judgment was void, and in effect deprived the plaintiff of the benefit of

his judgment, was "due process of law." *White v. Crump*, 19 W. Va. 583, 585.

F. REVIEW BY APPELLATE TRIBUNAL.

"There is no absolute right in a suitor to have a decision reviewed, which must be respected in making laws, and, in the absence of some constitutional inhibition, it is within the power of the legislature to prescribe the cases in which, and the courts to which, parties shall be entitled to bring a cause for review." *Fleshman v. McWhorter*, 54 W. Va. 161, 166, 46 S. E. 116; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

"The people, in framing the constitution, and the legislature in passing statutes, have full and complete discretion and power to determine whether a review shall be allowed, and, if none is provided for, the courts have no power to give it." *Fleshman v. McWhorter*, 54 W. Va. 161, 166, 46 S. E. 116.

G. DUE PROCESS OF LAW IN CONDEMNATION PROCEEDINGS.

See the title EMINENT DOMAIN.

H. DUE PROCESS OF LAW IN LOCAL ASSESSMENTS.

See the title SPECIAL ASSESSMENTS.

I. DUE PROCESS OF LAW IN TAX SALES.

See the title TAXATION.

J. IN CRIMINAL PROCEEDINGS.

A statute providing that if alleged conspirators are present, aiding and abetting the commission of an act, it shall be presumed that the act was done in pursuance of a conspiracy, is not unconstitutional as authorizing the conviction without due process of law. *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883.

And a review by an appellate tribunal, whether upon an appeal or writ of error, is not part of due process of

law. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. See the title CRIMINAL LAW.

XI. Impairment of Obligation of Contract Prohibited.

A. CONSTITUTIONAL PROVISIONS AND GENERAL PRINCIPLES.

1. Terms and Nature of Prohibition.

The constitution of the United States, art. 1, § 10, prohibits any state from passing any "law impairing the obligation of contracts." See also, Va. Const. (1902), art. 4, § 58; W. Va. Const., art. 3, § 4.

"The obligation of a contract is the law which binds the parties to perform their agreement." *Homestead Cases*, 22 Gratt. 266, 288.

"The inviolability of contracts, public and private, is the foundation of all social progress, and the cornerstone of all the forms of civilized society, wherever an enlightened jurisprudence prevails. In our system of government it has been wisely placed under the constitution of the United States, and there it rests secure against all invasion." *Homestead Cases*, 22 Gratt. 266, 301. See *Lacey v. Palmer*, 93 Va. 172, 24 S. E. 930; *Antoni v. Wright*, 22 Gratt. 833, 858; *State v. Strauder*, 11 W. Va. 745, 805; *Clarke v. Tyler*, 30 Gratt. 134, 164.

Congress Can Not Authorize a State to Impair Contracts.—Congress has no power to authorize a state to pass laws impairing the obligation of a contract. *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507.

2. Liberal Construction.

"In the case of *Crenshaw v. Slate River Co.*, 6 Rand. 273, Judge Green said: 'A very liberal construction has been given to the clause of the constitution of the United States, which prohibits any state to pass any law impairing the obligation of contracts.' Ex parte *Hunter*, 2 W. Va. 122, 160.

3. Implied as Well as Express Contracts.

The constitution, both of the United States and of this state, protects the obligation of a contract against being impaired, which means an implied as well as an express contract, each of which is alike binding. *Kent v. Kent*, 28 Gratt. 840, 845.

4. Existing Laws as Part of Contract.

The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated into its terms." *Homestead Cases*, 22 Gratt. 266, 288; *Merchants' Bank v. Ballou*, 98 Va. 112, 119, 32 S. E. 481; *Roberts v. Cocke*, 28 Gratt. 207.

Judicial Construction of Statute as Part Thereof.—"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment." *Falconer v. Simmons*, 51 W. Va. 172, 175, 41 S. E. 193.

"It is difficult to sustain this exception on principle because a decision is not a 'law' impairing a contract; but it is only a right based on a statute that comes within this exception. The exception goes no further. It is plainly an exception made by the courts, at the call of justice, to protect a contract made on the faith of a statute as expounded in the first decision." *Falconer v. Simmons*, 51 W. Va. 172, 178, 41 S. E. 193.

But there must be a statute and a contract under it, the statute being a part of the contract; for a mere decision expressive of general or common law will not protect even a contract valid under that common law, tested by a prior decision, against the effect of a subsequent change of decision. *Fal-*

coner *v. Simmons*, 51 W. Va. 172, 178, 41 S. E. 193.

5. Inapplicable to Unconstitutional Law—Tax-Receiveable Coupons.

See for a treatment of the Virginia coupon cases, and the constitutional questions involved, the title MUNICIPAL, STATE AND COUNTY SECURITIES. And see ante, "Can Not Restrict Rights of Succeeding Legislatures," V, E, 1, h.

"No valid contract can be founded on a law which violates the constitution of a state. No binding obligation can result from such a law. It confers no legal right on the one party and imposes no corresponding legal duty on the other. Its repeal can, therefore, in no manner impair the obligation of a contract." Dissenting opinion of Staples, J., in *Antoni v. Wright*, 22 Gratt. 833, 863, subsequently approved in *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114.

Saying: "And Judge Staples, in his very able dissenting opinion, insisted, that the contract in this case was void, because of its repugnancy to §§ 7 and 8 of article 8 of the constitution of Virginia, by which certain portions of the state revenue are dedicated to the support of public free schools." *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114. See also, *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 364.

And a contract entered into by the legislature, which is entire in its nature, incapable of separation, and which violates the constitutional provision, is wholly unconstitutional and void. *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114.

In this case we find the final solution of the coupon legislation. It held, following *Vashon v. Greenhow*, 35 U. S. 716, 10 Sup. Ct. R. 987, and *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. R. 987, that, as the funding acts contemplated an entire contract, such contract, making the coupons receiveable for all taxes, was void in its entirety

and wholly unconstitutional. *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114.

The court said: "It may, with the utmost propriety, be said that the unfortunate decision by this court in *Antoni v. Wright*, 22 Gratt. 833, has indeed proved to be the 'Iliad of all our woes' touching the state's indebtedness; and, but for it, there never could have been any difficulty in the way of a just and equitable adjustment between the state and her creditors. If this court, instead of making the decision it did in that case, had promptly pronounced against the palpably illegal, and therefore unconstitutional, coupon feature of the act of March 30, 1871, the debt would have been promptly settled, and all this long and bitter controversy avoided. *Antoni v. Wright* was decided by a bare majority of a court of three judges, Moncure, P., not sitting, and Staples, J., dissenting, and insisting that the said act of March 30, 1871, which provides that the coupons attached to the bonds issued thereunder shall, after maturity, be receiveable (for all taxes, debts, dues, and demands due the state), was repugnant to the state constitution, notwithstanding the opinion of the bare majority that that feature of the act was not repugnant to the constitution, and constituted an irrevocable contract on the part of the state with the holders of such coupons. In the opinion of the majority of the court, it was admitted that 'one legislature can not, by an act of ordinary legislation, bind or control, in any manner, subsequent legislatures;' but it was said that 'by special legislation, amounting to a contract, a subsequent legislature may be bound.' In the light of this admission, taken in connection with the exception stated, it would seem to be sufficient to reply that the ingenuity of men can not suggest anything more essentially and completely within the scope of ordinary legislation than is the legislative power to assess, collect, control, and disburse, through recognized agents,

the state revenues." *Com. v. McCullough*, 90 Va. 597, 1 S. E. 114.

"It has been solemnly adjudged by the highest court in the land that the coupon feature of the act of 1871, so far as its validity was passed upon in *Hucless v. Childrey*, 135 U. S. 709, and in *Vashon v. Greenhow*, 135 U. S. 716, was unconstitutional and void. The same is true of the act of 1879, because the same vice enters into and invalidates them both." *Com. v. McCullough*, 90 Va. 597, 19 S. E. 119.

6. Prohibition Applies to State Constitutions.

This prohibition of the federal constitution is upon the state, without regard to the form its laws may take, or the agencies which enact them. It is certain that the obligation of a contract can no more be impaired by the constitution of a state than by an act of its legislature. *Homestead Cases*, 22 Gratt. 266, 280; *Speidel v. Schlosser*, 13 W. Va. 686, 700.

"And the prohibition extends as well to an ordinance of a convention assembled to form or revise a state constitution, as to an act of an ordinary state legislature." *Farmers' Bank v. Gunnell*, 26 Gratt. 131, 144.

Thus, the ordinance of the Virginia convention passed June 24th, 1861, which provides that, in cases specified, the parties to negotiable notes, bills and checks payable in such cities and towns (as before specified), shall remain bound after the maturity of such notes, etc., without demand, protest or notice, as if the requirements of the law in that behalf had been complied with, is, as to notes made and discounted before its passage, in violation of that provision of the constitution of the United States, which declares that no state shall pass any "law impairing the obligations of contracts." *Farmers' Bank v. Gunnell*, 26 Gratt. 131.

And the prohibition applies as well to the constitution of a state, adopted after the close of the war between the states and before the restoration of

such state to its full rights in the Union, for the United States supreme court has held, that seceding states were never out of the union, but that their rights were merely suspended, leaving their constitutional duties and obligations the same. *The Homestead Cases*, 22 Gratt. 266, 282. See ante, "Supremacy as the Law," IV, A.

7. Considered with Reference to Police Power.

No state, it is declared, shall pass a law impairing the obligation of contracts; yet with this concession constantly yielded, it can not be disputed that in every political sovereign community there inheres necessarily the right and duty of guarding its own existence, and of protecting and promoting the interest and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the eternal relations of government; they reach and comprehend likewise the interior polity and relations of life which should be regulated with reference to the advantage of the whole society. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 356; *Town of Mason v. Railroad Co.*, 51 W. Va. 183, 41 S. E. 418. See post, "Considered in Relation to Constitutional Restraints," XIII, C.

And it is not pretended that a state may not prohibit the enforcement of contracts resting upon a vicious or immoral consideration, the enforcement of which would have a vicious and immoral influence. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930.

Must Relate to Property or Objects of Value.—That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution has never been understood to embrace other contracts than those which respect property or some object

of value, and confer rights which may be asserted in a court of justice. *Railroad Co. v. Transportation Co.*, 25 W. Va. 324, 354.

8. Considered with Reference to Eminent Domain.

See the title EMINENT DOMAIN.

Every contract made with the state is in subordination to its right of eminent domain. And where a state leased land for a term of years for an insane asylum, agreeing to surrender possession at end of term, and during the term, in pursuance of an act of the legislature, instituted proceedings to acquire title by condemnation, it was held, that the act was not in violation of the constitution of the United States as impairing the obligation of a contract. *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

B. WHO MAY RAISE QUESTION.

The question whether a law impairs the obligation of contract can only be raised by one directly interested. Courts will not pronounce a statute unconstitutional because it may impair the rights of persons not complaining of its unconstitutionality. *Antoni v. Wright*, 22 Gratt. 833.

Stockholders in Foreign Corporation Can Not Attack Its Charter Laws.—No law of the state of incorporation of a foreign corporation, admitted to do business in this state, which was lawfully made a part of the charter of such corporation, and not contrary to any statute or rule of public policy of this state, can be held to be unconstitutional, as impairing the obligation of any contract existing between such corporation and a citizen of this state by its operation thereupon. All such stockholders are affected with notice of such law and are bound thereby. *Bockover v. Life, Ass'n*, 77 Va. 85. See the title FOREIGN CORPORATIONS.

C. CONTRACTS WITHIN CONSTITUTIONAL PROHIBITION.

1. Franchises.

See the titles CONTRACTS; ELEC-

TRICITY; FRANCHISES; STREET RAILROADS.

Municipal corporations have power to confer franchises on individuals or corporations to use their streets for the purpose of conveying electricity for the public use; and such franchises constitute valid contracts which can not be destroyed or impaired by subsequent legislation. But, in the absence of express statutory authority, they have no power to confer an exclusive franchise, and if they attempt to do so, such franchise does not constitute a contract within the meaning of the constitutional inhibition against the impairment of the obligation of contracts. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

And when a grant by a municipality to a railroad company to construct its road upon or over a street is accepted, it constitutes a contract which can not be arbitrarily revoked or impaired by the municipality; but such grant is subject always to conditions imposed upon it by statute or by the terms of the grant, and, moreover, is subject also to the proper exercise of police power by the municipality. *Mason v. Railroad Co.*, 51 W. Va. 183, 41 S. E. 418. See the title STREETS AND HIGHWAYS.

On the other hand, municipal charters are not contracts, but are granted for public purposes and may be amended or repealed at the discretion of the legislature. *Probasco v. Moundsville*, 11 W. Va. 501.

2. Privilege of Conducting a Lottery.

The privilege of conducting a lottery is not a contract. Any one, therefore, who accepts a lottery charter, does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies, may repeal it at any time when the public good shall require, whether it be paid for or not. *Justice v. Com.*, 81 Va. 209; *Dismal Swamp Canal*

Co. v. Com., 81 Va. 220; *Phalen's Case*, 1 Rob. 713.

It is but a matter of police, and the repeal of such privilege impairs the obligation of no contract, and is constitutional. *Justice v. Com.*, 81 Va. 209. See the title LOTTERIES.

3. Judgments.

See ante, "Encroachment upon Judiciary," V, E, 1, e, (2); "Laws Affecting Vested Rights," V, E, 2, d.

A judgment founded on contract is a contract and constitutes a vested right of property, the value of which the legislature can not destroy or diminish by retroactive legislation. *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481; *Martin v. South Salem Land Co.*, 94 Va. 28, 36, 26 S. E. 591.

And the act approved March 25, 1873, amending § 3 of the act of March 3, 1866, so far as it authorizes the reopening of a judgment rendered since March 3, 1866, is unconstitutional and void, both because it is an infringement upon the power of the judicial department of the government, and because it impairs the obligation of contracts. *Marpole v. Cather*, 78 Va. 239, approving *Ratcliffe v. Anderson*, 31 Gratt. 105.

Though said act may be prospective and enter into contracts made since its passage, and the judgment sought to be reopened and scaled under it may have been rendered since its passage, its unconstitutionality is not removed by those facts. *Marpole v. Cather*, 78 Va. 239.

Judgment Founded on Tort.—But a judgment founded on a tort is in no sense a contract; therefore, the section of the constitution of West Virginia, which provides, that "No citizen of this state, who aided or participated in the late war between the government of the United States and a part of the people thereof on either side, shall be liable in any proceedings civil or criminal, nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore ren-

dered or otherwise because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto," is not inhibited by § 10 of article 1 of the constitution of the United States, as it does not impair the obligation of a contract. *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583. See contra, *Arnold v. Kelley*, 5 W. Va. 446. And see ante, "Act of Oblivion as to Civil War," V, E, 4; "In Setting Aside War Trespass Judgments," X, E.

4. Right to Practice Law.

The act of the legislature of West Virginia, passed February 14th, 1866, in relation to the oaths of attorneys at law, is not unconstitutional in prescribing the test oath, as an ex post facto law, law impairing the obligation of a contract, or as denying due process of law. *Ex parte Hunter*, 2 W. Va. 122.

5. Private Rights Acquired under General Laws.

The prohibition has, however, "never been extended to private rights acquired under the operation of the general laws of the state, and without any consideration given, beyond the general purposes of promoting individual interests directly, and the interests of the community incidentally. Nor do I think it can be justly extended to the protection of rights so acquired. The legislature of the state is declared to be a complete legislature, and consequently has all the powers of sovereignty, except so far as they are limited by the constitutions of Virginia and of the United States." *Ex parte Hunter*, 2 W. Va. 122, 160; *Crenshaw v. Slate River Co.*, 6 Rand. 273.

Statute Conferring Mere Privilege of Judicial Inquiry.—If an act merely authorizes a judicial inquiry into the rights of parties, but does not confer the power to enforce the results of inquiry, its repeal is not prohibited by the constitution of this state or of the

United States. *Maury v. Com.*, 92 Va. 310, 23 S. E. 757.

"The remedy which is protected by the contract clause of the constitution is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The constitution preserves only such remedies as are required to enforce a contract." *Maury v. Com.*, 92 Va. 314, 23 S. E. 757.

6. Mere Authority to Contract.

Statute Authorizing City to Subscribe to Stock Creates No Contract.—And where a city is authorized by a statute to subscribe to corporate stock upon a majority vote of the residents in favor of such subscription, an ordinance submitting the question of such subscription to the vote of the inhabitants, and the mere vote of the prescribed number of the voters in favor of the subscription, does not itself create a contract with the railroad company. Until the subscription is made, the contract remains unexecuted. *List v. Wheeling*, 7 W. Va. 501.

The mere vote to subscribe did not, of itself, form such contract, with the railroad company, as would be protected by the tenth section of the first article of the constitution of the United States. Until the subscription was actually made, the contract was unexecuted. *List v. Wheeling*, 7 W. Va. 501, 526.

Authority to County to Construct a Bridge.—And where a county is authorized to build a bridge, this does not constitute such a contract as is pro-

tected against a subsequent repealing act. *Supervisors v. Luck*, 80 Va. 223.

7. Obligation to Pay Interest.

The legal obligation to pay interest on money due by contract, implied from the presumed intention of the parties, is a part of the obligation of the contract which state laws can not impair. Hence, a statute authorizing the abatement of interest upon such contracts beyond what was allowable by the laws in force when the contracts were made, is unconstitutional. *Roberts v. Cocke*, 28 Gratt. 207; *Cecil v. Deyerle*, 28 Gratt. 775; *Kent v. Kent*, 28 Gratt. 840; *Pretlow v. Bailey*, 29 Gratt. 212.

And so much of an act as empowers the courts to review judgments and decrees upon motion, and to abate interest as in said act provided, is repugnant to the constitution of the United States and this state, and therefore void. And this, though the evidence of debt on which the judgments are founded does not provide in terms for the payment of interest, but the judgments are for interest. *Roberts v. Cocke*, 28 Gratt. 207; *Cecil v. Deyerle*, 28 Gratt. 775.

Statutes Providing That Judgment Shall Include Interest.—And a statute providing that a judgment for the payment of money shall be rendered for the aggregate of the principal and interest due at its date, with interest thereon from that date, is not an impairment of the obligation of contract. *Fleming v. Holt*, 12 W. Va. 143; *Ruffner v. Hewitt*, 14 W. Va. 737.

Statutes Denying Interest to Parties Engaged in Rebellion.—A statute denying to persons who were engaged in the rebellion the right to recover interest for the time during which they were enemies of the government is constitutional. *Hutchinson v. Landcraft*, 4 W. Va. 313.

8. Services Rendered by Judge.

But services rendered by a judge do not partake of the nature of a contract so as to prevent the state auditor

from refusing to audit a claim for salary on the ground that it should be paid by a city, rather than the state, after such salary had been paid by the state for several years. *Holladay v. The Auditor*, 77 Va. 425. See also, *Foster v. Jones*, 79 Va. 642.

9. Privilege of Suing States.

The privilege of suing a state may be extended or withheld at the pleasure of the state, and once granted it may be recalled at pleasure, unless during its existence rights have vested under or by virtue of it which the state has no constitutional right to defeat or impair by its subsequent recall. Further, if an act merely authorizes a judicial inquiry into the rights of the parties, but does not confer the power to enforce the results of such inquiry, its repeal is not prohibited by the state or federal constitution. *Maury v. Com.*, 92 Va. 310, 23 S. E. 757.

10. Exemption from Taxation as a Contract.

See the titles CONTRACTS; TAXATION.

D. WHAT AMOUNTS TO IMPAIRMENT.

1. Laws Affecting Substantial Rights.

Creation and Increase of Exemptions.—The rule governing the creation and increase of homestead exemptions is as follows: If the effect of the statute is to withdraw from execution the property of the debtor liable to execution when the debt was contracted, leaving property insufficient for the payment of his prior debts, the statute is in violation of the constitution. It impairs the effectiveness of the creditor's remedy to the extent of the property attempted to be withdrawn, and to that extent impairs the legal obligation of the debtor's contract. *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507; *Speidel v. Schlosser*, 13 W. Va. 686; *Russell v. Randolph*, 26 Gratt. 713. See the title HOMESTEAD EXEMPTIONS.

Dispensing with Demand and Notice in Case of Dishonor of Negotiable Instruments.—A statute providing that certain parties to negotiable notes shall remain bound after the maturity of the notes without demand, protest and notice of dishonor, is unconstitutional as to notes made and discounted before its passage. *Farmers' Bank v. Gunnell*, 26 Gratt. 131. See also, *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457. See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

Statutes Postponing Time of Sale under Deeds of Trust.—So in a deed of trust to secure a debt, a provision for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and a law forbidding sales under such deeds for a limited time is therefore unconstitutional. *Taylor v. Stearns*, 18 Gratt. 244.

"The supreme court of the United States has, in a long series of decisions, announced their conclusion that 'any law which enlarges, abridges or in any manner changes the intentions of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge or the evidence of the contract, it impairs the obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes; imposing conditions not expressed in the contract; or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect, impairs its obligation.'" *Taylor v. Stearns*, 18 Gratt. 244, 274.

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired

at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." *Taylor v. Stearns*, 18 Gratt. 244, 275.

Acts Prohibiting Sale of Intoxicating Liquors.—See the title INTOXICATING LIQUORS.

2. Disposition of Private Property by Legislature.

See ante, "Transferring Property by Legislative Act, and Forfeitures," X, B.

Statutes Changing Beneficiaries under Public Trusts.—And an act providing that in the contingency of a division of any religious society the majority may determine to which branch such congregation shall thereafter belong, which determination shall conclude questions as to the property held in trust for such congregation, is void as a violation of a contract, so far as it attempts to give the benefit of the trust property to others than those to whom it was exclusively limited by the one creating the trust. *Finley v. Brent*, 87 Va. 103, 12 S. E. 228.

Authorizing Payment of Debt to Other than Creditor.—"In the case of the Bank of the Old Dominion *v. McVeigh*, 20 Gratt. 457, the court held, that an act of the legislature was unconstitutional, which authorized payment of a debt contracted to be made to the president and directors of the mother bank, by a citizen of the Confederate States, to be made to the branch bank, when the place of business and the directory of the mother bank were within the enemy's lines, because it impaired the obligation of contracts." *Antoni v. Wright*, 22 Gratt. 833, 876. (On rehearing.)

3. Change of Territorial Boundaries.

Reducing Territory and Salary of a Judge.—Under a constitutional provision that "all judges shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their

term," the legislature may curtail the territory of a judge's jurisdiction down to the constitutional minimum, although it diminishes his compensation. *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637. See also, *Holladay v. Auditor*, 77 Va. 425.

Reducing Territory of a County.—

And an act taking territory from the county, giving it to a city, does not impair the obligation of the creditors of the county. *Wade v. City of Richmond*, 18 Gratt. 583.

4. Providing for Sales under Execution to Be on Credit.

An act to prevent the sacrifice of property at a forced sale under an execution, which provides that the property shall be sold on a credit of twelve months, does not impair the obligation of the creditor's contract. *Garland v. Brown*, 23 Gratt. 173.

5. Sequestration of Debts.

The United States constitution, prohibiting a state from passing a law impairing the obligation of a contract and discriminating against citizens of another state, equally prohibits a state from enforcing as a law, an enactment sequestering debts owing to union men, come that enactment from whatever source. *Miller v. Cook*, 77 Va. 806.

The credit allowed to administrators, etc., for money owing from them to nonresidents adhering to the United States during the late war and paid by them under compulsion of the confederate sequestration enactment, rests on other and higher ground than such enactment. *Miller v. Cook*, 77 Va. 806; *Newton v. Bushong*, 22 Gratt. 629, contra.

"The administrators making payments as it were at the point of the bayonet, could well be heard to excuse themselves for acts which would have amounted to a devastavit, but for the compulsion under which they acted." *Miller v. Cook*, 77 Va. 806, 818. See the

title EXECUTORS AND ADMINISTRATORS.

6. Curative Statutes.

See ante, "Curative Laws," V, E, 2, e.

Statutes which validate contracts, otherwise invalid, are sustained where they go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law. The legislature may declare valid contracts which were usurious at the time they were entered into. *Smoot v. People's Building, etc., Ass'n*, 95 Va. 686, 29 S. E. 746; *Bosang v. Building, etc., Ass'n*, 96 Va. 119, 30 S. E. 440.

Deprivation of Right to Plead Usury.

—A law which gives validity to a void contract, as by taking away the right to plead usury thereto, can not be said to impair the obligation of a contract. To create a contract where none existed, and to impair one, are different things. *Danville v. Pace*, 25 Gratt. 1, 10.

7. Laws Affecting Remedies.

a. General Rule in Regard to Change of Remedy.

Litigants have no vested rights in the particular remedy existing at the time the contract is entered into. It is entirely competent for the legislature to change either the remedy itself, or the court in which it is to be asserted; provided that adequate and sufficient means of enforcing the contract is provided by law. *Shickel v. Berryville, etc., Co.*, 99 Va. 88, 37 S. E. 813; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481; *Martin v. Salem Land Co.*, 94 Va. 28, 36, 26 S. E. 591; *Poindexter v. Greenhow*, 84 Va. 441, 4 S. E. 742; *Roberts v. Cocke*, 28 Gratt. 207; *Homestead Cases*, 22 Gratt. 266, 288. But a statute purporting to affect the remedy only, but which in effect denies or obstructs rights accruing by contract, is directly obnoxious to the prohibition

of the constitution. *Homestead Cases*, 22 Gratt. 288; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481; *Roberts v. Cocke*, 28 Gratt. 207.

And any rule or regulation with regard to the remedy, which does not, under pretense of modifying or regulating it, take away or impair the right itself, can not be regarded as beyond the proper province of the legislature. *Jones v. Com.*, 86 Va. 661, 664, 10 S. E. 1005; *Ewing v. Com.*, 5 Gratt. 701; *Gaskins v. Com.*, 1 Call 194; *Day v. Pickett*, 4 Munf. 104, 109.

For the right to a particular remedy is not a vested right. This is the general rule, and the exceptions are of those peculiar cases where the remedy is a part of the right itself. *Jones v. Com.*, 86 Va. 661, 664, 10 S. E. 1005; *Beirne v. Brown*, 4 W. Va. 72, 75, overruled in later cases. See *Kyle v. Jenkins*, 6 W. Va. 371. And see ante, "Bills of Attainder," V, E, 2, c.

Nothing can be more material to the obligation than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which are guaranteed by the constitution against invasion. *Merchants' Bank v. Ballou*, 98 Va. 112, 119, 32 S. E. 481; *Homestead Cases*, 22 Gratt. 266, 288; *Speidel v. Schlosser*, 13 W. Va. 686, 700.

A deed of trust to secure a debt, which provides for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and the act of March 2, 1866, to stay the collection of debts for a limited period, which forbade sales under deeds of trust until the 1st of January, 1868, was, in relation to such deeds of trust, unconstitutional. *Taylor v. Stearns*, 18 Gratt. 244.

For where the parties to a contract expressly include in it the legal remedy by which it is to be enforced, the legislature can not pass any law to change the remedial process agreed upon. *Taylor v. Stearns*, 18 Gratt. 244, 284.

"Wherever a subsequent law affects to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution; and wherever a sale is required by the terms or law of a contract, no law can obstruct or clog it with new conditions without affecting the obligation of the contract; for it can be enforced only by a sale, and the prevention of such a sale is a denial of a right." *Taylor v. Stearns*, 18 Gratt. 244, 288.

But it can not be said that an act which requires a suit at law to enforce the collection of stock and entitles the defendant to a trial by jury is void as not affording an adequate remedy for the enforcement of the contract. *Shickel v. Berryville Land, etc., Co.*, 99 Va. 88, 99, 37 S. E. 813.

Taking Away Lien of Judgment.—"If the lien of a judgment be, as contended, a mere remedy for enforcing the judgment, the statute which gives that remedy forms a part of the contract for the lien, and any law which takes away such a remedy impairs the obligation of the contract." *Merchants' Bank v. Ballou*, 98 Va. 112, 120, 3 S. E. 481.

b. Change of Form of Action and Procedure.

See ante, "Laws Affecting Vested Rights," V, E, 2, d.

Though laws in force at the time and place of making a contract may enter into and form a part of the contract, yet changes in the forms of action and modes of proceeding do not amount to an impairment of the obligation of a contract, if an adequate and efficacious remedy is left. *Poindexter v. Greenhow*, 84 Va. 441, 443, 4 S. E. 742.

Thus, the act of April 7th, 1882 (acts, 1881-2, p. 343), taking away the remedy by mandamus, etc., in any case arising

out of the collection of revenue in which the applicant for the writ has any other remedy adequate for the protection and enforcement of his individual right, claim and demand if just, is not inconsistent with the federal or state constitution. *Poindexter v. Greenhow*, 84 Va. 441, 4 S. E. 742.

And a statute providing that when coupons from state bonds are tendered in payment of taxes, together with money for the payment of the same, the coupons shall be delivered to the judge of the circuit court, who shall, upon petition of the taxpayer, impanel a jury to try whether the coupons tendered are genuine, and, if they are, the court is to certify them to the treasurer, who is to refund the money paid for taxes out of the money in the treasury, in preference to other demands, does not create a vested right in the taxpayer which can not be taken away by subsequent legislature. *Maury v. Com.*, 92 Va. 310, 23 S. E. 757. See also, *Com. v. Jones*, 82 Va. 789, 1 S. E. 84.

c. Statutes Regulating Questions of Evidence.

The legislature may prescribe rules of evidence to govern the procedure of the state courts and the constitution of the United States has no application in such case. Hence, a statute requiring, in a suit to test the genuineness of coupons cut from state bonds, the production of the bonds with proof that the coupons were actually cut therefrom, is not repugnant to the constitution. *Cornwall v. Com.*, 82 Va. 644; *Newton v. Com.*, 82 Va. 647; *Com. v. Weller*, 82 Va. 721, 1 S. E. 102; *Com. v. Booker*, 82 Va. 964, 7 S. E. 381; *McGahey v. Com.*, 85 Va. 519, 8 S. E. 244; *Bryan v. Com.*, 85 Va. 526, 8 S. E. 246; *Cooper v. Com.*, 85 Va. 528, 8 S. E. 247; *Laube v. Com.*, 85 Va. 530, 8 S. E. 246; *Com. v. Larkin*, 88 Va. 422, 13 S. E. 901; *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164. See also, *Com. v. Jones*, 82 Va. 789, 1 S. E. 84; *Maury v. Com.*, 92 Va. 310, 23 S. E. 757.

"The first article, § 10, of the United States constitution provides, among other things, that no state shall pass any law impairing the obligation of contracts; but this provision has no application whatever to rules of evidence or procedure in the state courts. The same provision is found in the fifth article, fourteenth section, of the constitution of the state of Virginia." *McGahey v. Com.*, 85 Va. 519, 524, 8 S. E. 244; *Laube v. Com.*, 85 Va. 530, 8 S. E. 246; *Com. v. Weller*, 8 Va. 721, 723, 1 S. E. 102.

It is the province of the law-making power of the state to prescribe rules of evidence to govern the procedure in her own courts. The United States constitution has no application to the subject. *Newton v. Com.*, 82 Va. 647. See *Cornwall v. Com.*, 82 Va. 644; *Com. v. Booker*, 82 Va. 964, 7 S. E. 381.

But an act of congress laying a tax on stamps and prohibiting a party from giving an unstamped bond in evidence was held no violation of the constitution. *Woodson v. Randolph*, 1 Va. Cas. 128.

But where coupons cut from state bonds are made receivable for taxes, an act providing that expert evidence shall not be received as to the genuineness of such coupons, violates the obligation of the contract; and where coupons are receivable for taxes, and judgment has been recovered against a taxpayer for his taxes and costs, the taxpayer is entitled to pay the whole judgment with such coupons. *McGahey v. State*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, overruling *Com. v. Weller*, 82 Va. 721, 1 S. E. 102; *Com. v. Booker*, 82 Va. 964, 7 S. E. 381.

d. Changing Statute of Limitations.

Distinction between Remedies Revived and Cut Off.—A distinction is taken in favor of the former, between an act of the legislature which revives a remedy, which is lost by reason of a statute of limitation, and the case of a remedy cut off or destroyed by the same authority. The former does not

violate the obligation of a contract; the latter does. The former is a privilege which may be conferred by the same power by which it was divested; the latter affects the vested rights of a party. *Caperton v. Martin*, 4 W. Va. 138; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Keller v. McHuffman*, 15 W. Va. 64; *Huffman v. Alderson*, 9 W. Va. 616; *Wyatt v. Morris*, 2 W. Va. 575.

Vested Title and Mere Defense Compared.—Where title to property has vested under the statute of limitations, no act can, by extending the statute or reviving the remedy, impair such title. It would be unconstitutional, because depriving one of property without due process of law; but where the demand is on contract, or any class of action where the statute merely gives a defense, and does not vest property, there is no vested right to such mere defense, and the legislature may, by repeal of the statute or otherwise, revive the action and deprive one of such defense. *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239.

For while the remedy upon an express contract, which has become barred by the statute, may be revived at the will of the legislature, yet, where the action is to recover the possession of either real or personal property, and especially in cases of ejectment and detinue, the rule is very different. In such cases it is settled that, when the statutory bar attaches, not only the remedy for the recovery of the property is gone, but that the absolute title thereto is at once transferred to and thereby vested in the possession of the property. A subsequent repeal of the limitation law could not be given a retrospective effect, so as to disturb this title. It is vested as completely and

perfectly, and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant, or any species of assurance. *Hall v. Webb*, 21 W. Va. 318; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239; *Keller v. McHuffman*, 15 W. Va. 64; *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255.

"Retroactive legislation, merely because it is retroactive, is not unconstitutional or void, unless it impairs contracts or right of property, and there is no vested right in a mere defense to a personal demand, and statutes of limitations relate only to the remedy, and may revive a remedy once barred, as held in this state in *Huffman v. Alderson*, 9 W. Va. 616, and *Keller v. McHuffman*, 15 W. Va. 64." *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239; *Danville v. Pace*, 25 Gratt. 1, 18. See *Wyatt v. Morris*, 2 W. Va. 575; *Hall v. Webb*, 21 W. Va. 318, 324.

Thus, chapter 28 of the acts of 1872-73, which excluded as to a certain class of persons (unable to take the suitors' test oath) a definite period from the running of the statute of limitations, by the decision in *Huffman v. Alderson*, 9 W. Va. 616, was held to be constitutional when applied to express contracts; and by the same reasoning it is constitutional when applied to implied contracts, though the action was barred by the statute of limitations when the act was passed. In *Hall v. Webb*, 21 W. Va. 318, it was held, the said act, in so far as it attempts in actions for the recovery of land after the action had become barred, to revive the right of action, is unconstitutional. The suit was not barred. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263, 266. See *Keller v. McHuffman*, 15 W. Va. 64.

Reviving Right of Redemption of Land Sold for Taxes.—*Quære*, as to whether the legislature can revive a right of redemption of land purchased at a tax sale, where such right is al-

ready barred, without impairing the obligation of the purchaser's contract. *Harrison v. Thomas*, 103 Va. 333, 49 S. E. 485.

But a mere change of procedure requiring notice, and enabling the former owner the more certainly to exercise his right of redemption, the redemption period not having expired at the date of the amendment, does not impair the contract obligation. *Harrison v. Thomas*, 103 Va. 333, 49 S. E. 485.

e. Changing Mode of Enforcing Contracts against Joint Debtors.

And legislation providing that a creditor may compound or compromise with a joint contractor or co-obligor without releasing the others, and that the right of contribution shall not be affected thereby, does not impair the obligation of existing contracts. (Va. Code, 1873, ch. 141). *Yuille v. Wimbish*, 77 Va. 308.

"It preserves all rights, and only provides an express, direct and ready mode of doing, by and between joint contractors, what it was not unlawful to do before the statute was enacted, and which was done by roundabout and difficult indirection. It only removes technical difficulties out of the way of compromise and settlement." *Yuille v. Wimbish*, 77 Va. 308, 314. See the title COMPROMISE, ante, p. 37.

f. Regulating Manner of Adjusting Confederate Contracts.

And a statute providing a mode of adjusting confederate contracts by reducing the nominal amount contracted to be paid to its gold value does not change the contract of the parties, but only provides a mode of ascertaining the value of the confederate money contracted to be paid. *Pharis v. Dice*, 21 Gratt. 303. See the title PAYMENT, for treatment of these acts. See also, ante, "Control and Disposition of Public Funds and Property," V, E, 5.

8. Alteration or Repeal of Corporate Charters.

See the titles CONTRACTS; CORPORATIONS.

XII. Safeguards against Taking Private Property.

See post, "Right to Compensation," XIII, E.

The constitution of the United States, as well as those of the several states, provides that private property shall not be taken for public use without just compensation. Under these provisions the courts all agree that where the property is actually invaded for public purposes, compensation must be made to the owner. Some of the state constitutions provide that if property is taken or damaged for public use just compensation must be made to the owner for the damage as well as for the property actually taken. This last is true of the constitution of West Virginia, so in that state the cases hold that the owner must be compensated for damage done his property, as well as for that actually taken for public use. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Varner v. Martin*, 21 W. Va. 534; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780. For a full discussion of this subject, see the title EMINENT DOMAIN.

Taking Private Property for Private Use.—Although not forbidden by the constitution of this state, the legislature can not authorize the taking of private property for private use, as it is contrary to the fundamental principles of a republican government. *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 43 S. E. 194; *Varner v. Martin*, 21 W. Va. 548. See the title EMINENT DOMAIN.

XIII. The Police Power.

See, as to exercise of police power by municipalities, the title MUNICIPAL CORPORATIONS. As to principal subjects of regulation by police power, see the titles ADULTERATION, vol. 1, p. 183; ANIMALS, vol. 1, p. 373; AUCTIONS AND AUCTIONEERS,

vol. 2, p. 174; CARRIERS, vol. 2, p. 671; CEMETERIES, vol. 2, p. 731; DRAINS AND SEWERS; DRUGGISTS; ELECTRICITY; EXPLOSIVES; FENCES; FIRES; FISH AND FISHERIES; FOOD; GAME AND GAME LAWS; GAS; HAWKERS AND PEDDLERS; HEALTH; HOSPITALS AND ASYLUMS; INSPECTION; INTOXICATING LIQUORS; LICENSES; PLEDGE AND COLLATERAL SECURITY; PHYSICIANS AND SURGEONS; PILOTS; POISONS AND POISONING; REFORMATORIES; SEARCHES AND SEIZURES; STREETS AND HIGHWAYS; SUNDAYS AND HOLIDAYS; THEATERS AND SHOWS.

A. NATURE AND EXTENT OF POWER.

The police power of a state, in a comprehensive sense, embraces its whole system of internal regulation by which the state may subject persons and property to all kinds of reasonable restraints and burdens in order to secure the general comfort, health and prosperity of the state, to preserve public order, prevent offenses, and to establish, for the intercourse of citizens with citizens, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000; *Lacey v. Palmer*, 93 Va. 167, 24 S. E. 930; *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 112, 13 S. E. 340; *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 349; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 99.

This is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the state, in society, and in private life. The

power is vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances as they shall judge to be for the good and welfare of the commonwealth, and for the subjects of the same. *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 112, 13 S. E. 340 (dissenting opinion).

Its exercise in extreme cases is frequently justified by the maxim, "salus populi suprema lex est." It is used to regulate the use of property by enforcing the rule, *sic utere tuo, ut alienum non laedas*. Under it, the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering necessity, property may be taken or destroyed without compensation. The limit of the power can not be accurately defined; and the courts have not been willing definitely to circumscribe it. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285; *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 349; *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

The police powers of a state are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1006.

And the police power is coeval with government, and under it all criminal law finds its warrant. *Woods v. Cottrell*, 55 W. Va. 476, 482, 47 S. E. 275; *State v. Sponaugle*, 45 W. Va. 425, 32 N. E. 283; *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666.

Again, the "police power" has been generally defined to be that power which a state or municipality has to enact laws or ordinances which pertain to the public safety, the public health, or the public morals, and to this it is confined. *Young v. Com.*, 101 Va. 853, 863, 45 S. E. 327.

Hard to Define.—The precise limits of this power it may not be easy to define; but, undoubtedly, it extends to the suppression of nuisances, the preservation of the health, good order, morals and safety of the public. *Justice v. Com.*, 81 Va. 209, 212.

When Exercisable by Congress.—Congress may establish police regulations as well as the states, confining same to the subjects over which it is given control by the constitution, but such regulations do not often exclude the establishing of others by the states, governing very many particulars. But it is no part of the province of congress, under its granted powers, to enact police laws for the regulation of such affairs within a state as are properly local thereto, for the power to establish the ordinary police regulations has been left with the states individually, and it can not be taken from them, either wholly or in part, and exercised under legislation of congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 105, 13 S. E. 340 (dissenting opinion), overruled in *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 24 S. E. 837.

B. DELEGATION OR ALIENATION OF POWER.

To Municipal Corporations.—In the absence of constitutional restrictions,

the legislature may confer its police power upon municipal corporations in such measures as it deems expedient, and, when fully conferred, the courts can no more interfere with the manner of its exercise than they could with the state which confers it. *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 99.

It can not, of course, bestow greater power than the state itself possesses; and it must keep within the limitations, if any, imposed by the organic law. *Danville v. Hatcher*, 101 Va. 523, 530, 44 S. E. 723.

And the police power of the state, so far as it is necessary to protect the health of its inhabitants, has been delegated to the city of Norfolk. *Norfolk v. Flynn*, 101 Va. 473, 475, 44 S. E. 717.

Construction of Delegated Powers.—

The police power of a municipal corporation depends upon the will of the legislature, and a city, town or village can only exercise such police power as is fairly included in the grant of powers by its charter. *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197.

Saying: "This seems to be a conservative position on the question, and one which extends to municipal corporations all power that is necessary, supplemented by the state law, which extends throughout all cities, towns and villages of the state, to fully protect the interest and give complete exercise of all the police power of the state within municipal corporations." *Judy v. Lashley*, 50 W. Va. 628, 634, 41 S. E. 197.

But § 28, ch. 47, W. Va. Code, 1899, by vesting in the councils of municipal corporations power and duty "to protect the persons and property of the citizens of such city, town or village, and to preserve peace and good order therein," does not confer power to punish acts made criminal by the state law and fully covered thereby, except such as would be attended with circum-

stances of aggravation not included in the state law. Such power must be specifically and expressly given by the legislature before it can be exercised by such corporation. *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197.

To West Virginia County Court.—

The county court is the police court of the county, and to it the legislature may specially delegate the exercise of such power in specified cases. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666.

There are some police regulations which the public welfare may require in one town or district or county which would be ill timed, out of place, and therefore inconvenient, in another. Hence, a law may provide that the county court may or may not, as they, in their judgment, may think best and see fit, adopt same. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666, 668.

Alienation by State or Municipality.

—The police power of a state is a governmental function, the exercise of which neither the legislature, nor any subordinate agency thereof, upon which part of its authority may have been conferred, can alienate or surrender by grant, contract or other delegation. *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 47 S. E. 848; *Richmond, etc., Co. v. Richmond*, 26 Gratt. 83; *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 365.

This power can not be irrevocably granted away for any purpose, however meritorious, or for any consideration, however valuable. *Justice v. Com.*, 81 Va. 209, 212; *Davenport v. Richmond City*, 81 Va. 636, 638.

And there is an implied reservation of the police power of the state in every charter granted by the legislature. *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 660, 654, 47 S. E. 848.

C. CONSIDERED IN RELATION TO CONSTITUTIONAL RESTRAINTS.

Subordinate to Constitution.—But this power, however broad and exten-

sive, is not above the constitution, state or federal, and must be exercised in subordination thereto, so far as it imposes restraints. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285; *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930.

It can not be set up to control the inhibitions of the federal constitution, or the powers of the United States government created thereby. *State v. Lichtenstein*, 44 W. Va. 99, 28 S. E. 753, 754.

Power Liberally Construed.—"The right of the state to enact laws to protect the lives, health, and property of its citizens, and to preserve good order and the public morals is a matter of so much consequence, and so far reaching in its effects, that its courts ought not to hold that the statutes made for that purpose are inconsistent with the constitution of the United States unless they are plainly so." *Norfolk, etc., R. Co. v. Com.*, 93 Va. 754, 24 S. E. 837.

Due Process of Law.—The constitutional guaranties of due process of law, state and federal, must be considered in connection with the police power of the state; for it is settled beyond further judicial controversy that these inhibitions do not limit, and were not designed to limit, the subject upon which the police power of the state may be exerted. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666; *Woods v. Cottrell*, 55 W. Va. 476, 482, 47 S. E. 275; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

And the charter of a city or town located in this state, and the ordinances ordained by its council in pursuance of the provisions of §§ 28, 29, ch. 47, W. Va. Code, 1899, may, as an act of police regulation and power, provide for the taking and impounding cattle, hogs, horses, sheep, and other animals found running at large in the public streets during the night, and for selling them to pay charges for impounding, etc., without judicial inquiry or de-

termination, upon notice being given to the owner; and such provision will not be unconstitutional, as authorizing the forfeiture or confiscation of property without due process of law, or without compensation. *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012.

But what would be due process if done under the police power or taxing power, might not be, in many cases would not be, if not done under either of those powers. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 284.

Effect of Fourteenth Amendment.—See ante, "Fourteenth Amendment Operates upon the States," X, A, 5; "Power of State over Its Own Citizens," VIII, C.

"The fourteenth amendment was never intended to strike down the police power of the state, nor to control its exercise, except in cases where it (the act) amounts plainly to usurpation; and the wresting of private property from its legitimate owners without compensation." *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1008.

"In the celebrated *Slaughter House Cases*, 16 Wall. 36, it was held, that it was only the privileges and immunities of the citizens of the United States which are placed by this clause under the protection of the federal constitution, and that those of the citizens of the state, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment." *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1008; *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

Impairment of Contract.—See ante, "Impairment of Obligation of Contract Prohibited," XI.

"The prohibition of state laws impairing the obligation of contracts has never been construed as depriving the state of the power of protecting the public health, morals or safety of its citizens as one or the other may be af-

fectured in the execution of such contract. So that, while the state can not deprive a company of the lawful exercise of its functions under its charter, it may unquestionably, in the interest of public welfare, regulate the use and prevent the abuse of charter powers." *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 659, 47 S. E. 848. See *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930; *Davenport v. Richmond*, 81 Va. 636; *Town of Mason v. Railroad Co.*, 51 W. Va. 183, 41 S. E. 418; *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 356.

A general power contained in a charter authorizing an aqueduct company to open ground in the streets of a city or town for the purpose of laying and repairing its water pipes is subordinate to the power and control that the city or town then has, or that may be thereafter conferred upon it, over its streets. The power granted to the company is subject to legislative control as to the manner of its exercise. Such control is simply an exercise by the state of its police power, and does not impair any contract obligation with the company. *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 47 S. E. 848.

Interstate Commerce Clause.—See the title INTERSTATE COMMERCE.

While a state law which operates as a regulation of interstate commerce, or which affects it, except incidentally, could not be upheld under the police power of the state, and laws pretending or purporting to be in the exercise of the police power, but which are but devices and schemes under cover of that power to accomplish some purpose forbidden to the state, are void, yet state laws passed with the honest purpose of promoting the health, the morals or the well being of its citizens, are valid. *Lacey v. Palmer*, 93 Va. 159, 171, 24 S. E. 930. See post, "Preservation of Public Morals," XIII, F, 1.

Equal Protection of the Laws.—See ante, "Equal Protection of Laws, Privileges and Immunities," VIII.

D. LEGISLATIVE DISCRETION.

"It belongs to the legislative department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety—subject to the power of the court to adjudge whether any particular law is an invasion of rights secured by the constitution." *Farmville v. Walker*, 101 Va. 323, 328, 43 S. E. 558.

And although a law may have been unwise or injudicious, if it were passed by the legislature in the exercise of a police power, the courts have no authority to annul the act. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1007.

Validity of Its Exercise a Judicial Question.—Generally, it is for the legislature to determine what laws and regulations are proper in the exercise of the police power; but if it passes an act ostensibly for the public health and safety, and thereby destroys or takes away the property of a citizen, or interferes with his rights or personal liberty, then it is for the courts to determine whether it is a proper and reasonable exercise of the power, and if it is not to declare it void. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285; *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283.

For the legislature can not, by assuming to exercise the police power, act upon subjects which do not and can not fall within its dominion, nor impose restrictions or create or enforce discriminations which are not in the legitimate exercise of that power, and, while the judgment of the legislature is accepted upon doubtful subjects, yet the courts must in others overrule it, and refuse to sustain, as exercises of the police power, enactments not sanctioned by it. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666, 668.

Acts Done under Color of Power Must Be Arbitrary.—A statute which inhibits a person to "keep in his pos-

session, for another, spirituous liquors," is in conflict with both the federal and state constitutions as it is not a reasonable exercise of the police power, because it has no reference to the prohibition of the sale of liquor. It is simply an attempt to make the possession of liquor for any purpose a crime. *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283.

E. RIGHT TO COMPENSATION.

Although a party may be a loser pecuniarily in consequence of the passage of a statute or ordinance in the exercise of the police power, yet he has no claim for compensation, as there has been no appropriation of his property but only a regulation of its use. *Davenport v. Richmond*, 81 Va. 636.

Destruction of Liquor.—The ordinance of the city of Richmond, adopted April 2, 1865, on the eve of the evacuation of the city by the confederate forces, directing the destruction of all liquor in the city, and pledging the city for its payment, was ultra vires and void, and the owner of the liquor can not recover the value thereof from the city. The destruction of the liquor was not an exercise of the city's power of eminent domain, but was a police regulation for the preservation of peace and good order in the city. The charter of the city limited its exercise of the right of eminent domain to the acquisition of "ground for the purpose of opening or extending its streets," or other public purposes. The power exercised by the city council was not conferred, either in express terms or by fair implication, by the city's charter or by the general laws; nor is it indispensable to the performance of its corporate duties, or the accomplishment of the purposes of its incorporation. *Wallace v. Richmond*, 94 Va. 204, 26 S. E. 586; *Jones v. Richmond*, 18 Gratt. 517, disapproved.

Taking Private Property without Compensation.—"Sedgwick on the Construction of Statutory and Constitu-

tional Law, p. 435, under the head of 'Police Powers,' says: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.'" *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 1015. See ante, "Safeguards against Taking Private Property," XII.

F. SUBJECTS FOR ITS EXERCISE.

1. Preservation of Public Morals.

Sunday Laws.—The right to enact laws to protect the lives, health and property of the citizens of the state, and to preserve good order and the public morals, is a part of the police power reserved to the state, and though such laws may to some extent affect commerce, and persons engaged in it, yet if they are enacted in good faith, for police purposes, without discriminating against interstate or foreign commerce, and congress has not acted on the subject, they do not constitute a regulation of commerce within the inhibition of the "commerce clause" of the constitution of the United States. For example, a statute (Va. Code, 1904, § 3801) prohibiting the running or transportation, on Sunday, of certain locomotives and cars, is a proper exercise of the police power, as its object is to promote the physical and moral well being of society. *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 24 S. E. 837, overruling *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 13 S. E. 340; *State v. Railroad Co.*, 24 W. Va. 783. See the title SUNDAYS AND HOLIDAYS.

Laws against Gambling.—And under this power a state has authority to forbid its citizens to bet on horse racing in another state; and this right is not affected by the fact that the money is

to be placed in a third state. The act forbidden is a wager, and over it and the actors in it, the state has complete jurisdiction, and it is immaterial where the race is to take place. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930. See the title GAMING.

Use of Trading Stamps.—The use of "trading stamps" by which a merchant gives to each cash purchaser at his store of a given amount of goods, a stamp which, upon presentation by the purchaser to a third person, entitles such purchaser to receive from such third person some other specific article of merchandise in addition to his purchase, which article is known and ascertained before hand, is a legitimate business which the state has no power to prohibit in the exercise of its police power. *Young v. Com.*, 101 Va. 853, 45 S. E. 327.

Where the evidence shows that the element of chance or lottery, in the use of "trading stamps" in this instance, was entirely wanting, as the articles to be received were fixed and certain, and kept constantly on exhibition for inspection by persons proposing to take the "trading stamps," it is not obnoxious to the laws against lotteries. *Young v. Com.*, 101 Va. 853, 45 S. E. 327.

Prohibiting Sale of Liquors.—So, upon this ground, statutes prohibiting the sale of intoxicating liquors are not repugnant to the constitution of the United States, either on the ground that they impair the obligation of contracts, or deprive a person of his liberty or property without due process of law, or that they violate the privileges and immunities of citizens of the United States. Such statutes have been invariably held valid by the supreme court of the United States as police regulations, looking to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals, where they do not conflict with the paramount authority of congress to

regulate commerce with foreign nations and among the several states. *Savage v. Com.*, 84 Va. 619, 5 S. E. 565. See the title INTOXICATING LIQUORS.

2. Preservation of Health and Safety of Public.

a. Regulating Storage of Gunpowder.

Regulations and restrictions to promote and secure the public health and safety are also within the police power of the state and may extend to the protection both of person and property. In cities, and other places of dense population, the right to store gunpowder and other explosive and dangerous materials may be confined to certain limits, where the harm which may be produced by them will be reduced to the minimum. *Davenport v. Richmond*, 81 Va. 636.

The withdrawal of privileges previously granted to erect and maintain a powder magazine within the city limits is the valid exercise of the police power, with which, to that extent, the city is invested by the legislature, and with reference to which the privilege was granted and accepted. *Davenport v. Richmond*, 81 Va. 636, 638.

And an ordinance requiring the removal of powder magazines in a city, the sites whereof were sold by the city council to vendees for the purpose of erecting thereon such magazines, does not impair the obligation of a previous valid contract with the council and does not take private property without compensation; but is constitutional, being a valid exercise of the police power. *Davenport v. Richmond*, 81 Va. 636.

b. Regulating the Practice of Medicine.

Statutes regulating the practice of dentistry and medicine, providing means of securing the competency of persons engaged therein, and excluding all other persons from such practice, are defensible, both on the ground that they are in the interest of the public health and are designed and well cal-

culated to protect the public from imposition and fraud. They will not be pronounced invalid unless they make arbitrary discriminations between persons equally well qualified to engage in the profession to which such statute applies. *State v. Dent*, 25 W. Va. 1. See the title PHYSICIANS AND SURGEONS.

c. Fencing of Railroads.

Statutes requiring railroad companies to fence their tracks are police regulations, and are constitutional. *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86, 45 S. E. 750. See the titles ANIMALS, vol. 1, p. 373; RAILROADS.

d. Prevention of Riots, etc.

A municipal corporation clothed with general powers is authorized to order the destruction of private property within its boundaries when necessary for the public safety and good order. Hence, the ordinance of the city of Richmond, providing for the destruction of all liquors in the city, in anticipation of the evacuation of the city by Confederate forces and its occupation by Union forces, was within this rule, and valid. *Jones v. Richmond*, 18 Gratt. 517.

e. Abatement of Nuisance.

See the title NUISANCES.

The abatement of nuisance so clearly concerns the life, health and comfort of citizens, that it is one of the implied police powers of a municipal corporation, and need not be specifically granted in its charter. But such power can not be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance, which, in its nature, situation, or use, is not such. *Bristol, etc., Co. v. Bristol*, 97 Va. 304, 33 S. E. 588; *Justice v. Com.*, 81 Va. 209, 212.

But while a municipality has ample authority, in the exercise of its police power, to protect the public against nuisances per se, or anything that is likely to become an offensive or dangerous nuisance, it can not, in the first

instance, in the absence of such conditions, deprive the owner of his property in the carcass of a dead domestic animal without due process of law. A municipal ordinance, therefore, which, immediately upon the death of a domestic animal, and before it has become a nuisance or dangerous to public health, deprives the owner of his property therein and vests it in a public contractor, is the taking of private property without due process of law, and is void. *Richmond v. Caruthers*, 103 Va. 774, 50 S. E. 265.

But a city council, as a sanitary measure, in the interest of public health and safety, possesses ample power to enact and enforce such reasonable ordinances as may be necessary with respect to the speedy and orderly removal of dead animals to places of safety, by the owner primarily, or, upon his default, by such other agency as it may prescribe. *Richmond v. Caruthers*, 103 Va. 774, 777, 50 S. E. 265.

f. General Welfare.

A statute enacted in the bona fide exercise of the police power of a state for the suppression of a recognized vice, the prohibition of the sale or manufacture of adulterated or impure food, or the prevention of the spread of disease among men or beasts, will not be held invalid as repugnant to the commerce clause. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930.

The right of the state is well established under its reserved power, whether that power be called police, governmental or legislative, to regulate the relative rights and duties of persons and corporations within its jurisdiction, so as to provide for the public good and the public convenience, by laws which are not inconsistent with the constitution of the state, and which do not, by their operation, directly trench upon the authority of the United States, or violate some right protected by the federal constitution. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599,

614, 46 S. E. 911. See the titles **CARRIERS**, vol. 2, p. 671; **CORPORATIONS**; **INTERSTATE COMMERCE**.

Regulating the Sale of Oleomargarine.—The legislature, by virtue of its police power, has a right to prohibit and forbid the manufacturing and sale as an article of food, of any article designed to take the place of butter or cheese; and having the power to prohibit the sale or manufacture of such an article, it follows that they have the power to require that some distinguishing mark may be placed upon it to prevent deception or imposition in the sale of the same, even though it should have the effect of injuring the sale of the article in question. Hence, a statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink is constitutional, though applicable to that manufactured without as well as that manufactured within the state. *State v. Myers*, 42 W. Va. 822, 26 S. E. 539, overruled by *State v. Bruce*, 55 W. Va. 384, 47 S. E. 146. See the title **ADULTERATION**, vol. 1, p. 183.

Animals Running at Large.—A statute making it unlawful for hogs to run at large and imposing a fine upon the owner, and in addition giving the party injured by such hogs, when trespassing, a lien for double the amount of his damages, is a proper exercise of the police power and does not contravene any provision of the state or United States constitution. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666. See the title **ANIMALS**, vol. 1, p. 375.

Regulating Its Own Waters.—The navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by the state at its own discretion for the benefit of its citizens, only so as not to interfere with the authority of the government of the United States to regulate commerce and navigation. *McCready v. Com.*, 27 Gratt. 985; *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

Thus, where not restricted by the United States constitution, a state is entitled to legislate over her public property and regulate its use, especially fish and oyster beds within her limits; the same being the common property of her citizens, never ceded to the United States. *Boggs v. Com.*, 76 Va. 989; *McCready v. Com.*, 27 Gratt. 985. See the titles **FISH AND FISHERIES**; **NAVIGABLE WATERS**; **OYSTERS**.

"Scrip" Act and "Screening" Act Constitutional.—In *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, the acts of March 9, 1891, and March 7, 1891, known as the scrip and screening acts, were held constitutional as a valid exercise of the police power. See the title **MASTER AND SERVANT**. See ante, "Regulation of Private Business," VII, B; "Class Legislation in General," VIII, A.

Assessments for Public Improvements.—See the title **SPECIAL ASSESSMENTS**.

3. Power over Corporate Charters.

The rights given to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with the view to the public protection, health, and safety, and in order to guard properly the rights of all other individuals and corporations. Hence, a railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for the protection and safety of citizens and the general convenience and good order. These laws although imposing liabilities and duties on the company other than those contained in its charter or existing when it was granted, do not impair the obligations of the contract implied therein. *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83; *Va. Dev. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

Thus, where the right to propel engines by steam through the streets of a city, is not given to the railroad company in its charter, either by express words or necessary implication, the city council may prohibit the railroad company from so doing, and no contract is thereby violated. *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83. See the titles **CONTRACTS**; **CORPORATIONS**.

4. Mechanic's Lien and Poor Man's Laws.

A familiar instance of the exercise of this power is the statute giving a me-

chanic's lien, which is special in its character, and yet its validity has never been judicially denied because its operation is confined to a particular class. The poor man's law is another instance of the same sort. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

5. Regulation of Certain Businesses and Employments.

See ante, "Regulation of Private Business," VII, B.

6. Regulation of Speed of Trains.

See the titles **NEGLIGENCE**; **RAILROADS**.

Construction of Words.

Consult the words and phrases treated alphabetically throughout this series.

Construction of Written Instruments.

See the titles **CONSTITUTIONAL LAW**; **CONTRACTS**; **COVENANTS**; **DEEDS**; **INTERPRETATION AND CONSTRUCTION**; **ORDINANCES**; **PLEADING**; **STATUTES**; **WILLS**; **WORKING CONTRACTS**.

As to construction of leases, see the title **LANDLORD AND TENANT**

Construction of Pleadings.

See the title **INTERPRETATION AND CONSTRUCTION**.

Constructive Breaking.

See the title **BURGLARY AND HOUSEBREAKING**, vol. 2, p. 656.

Constructive Contempt.

See the title **CONTEMPT**.

Constructive Delivery.

See the title **SALES**.

Constructive Force.

See the title **ROBBERY**.

Constructive Fraud.

See the title **FRAUD AND DECEIT**.

Constructive Notice.

See the titles **NOTICE**; **SERVICE OF PROCESS**.

CONSTRUCTIVE POSSESSION.—See the title **ADVERSE POSSESSION**, vol. 1, p. 199. And see **POSSESSION**.

CONSTRUCTIVE PRESENCE.—See ACTUAL PRESENCE, vol. 1, p. 161.

The jury, while in their room in the courthouse consulting on their verdict, are still **constructively** in the **presence** of the court, and not in the charge of an officer, or out of court. *Gilligan v. Com.*, 99 Va. 817, 37 S. E. 962. See also, the title JURY.

CONSTRUCTIVE SEISIN.—See SEISIN.

Constructive Service.

See the title SERVICE OF PROCESS.

Constructive Trusts.

See the title TRUSTS AND TRUSTEES.

CONSTRUE.—In *Phillips v. Com.*, 19 Gratt. 525, it is said: "Thus abridged, it reads: 'No new law shall be **construed** to repeal a former law, as to any right accrued or claim arising under the former law, or in any manner whatever to affect any right accrued or claim arising before the new law takes effect; save only that the proceedings thereafter had, shall conform, so far as practicable, to the laws in force at the time of such proceedings,' etc. * * * Some stress is laid on the term **construed**, as if it contemplated a case, where the fact of repeal was doubtful and therefore a matter of construction; but this restriction conflicts with the broad design of this section, which was to fix and limit the effect of repealing laws."

CONSULS.

Affidavit of Vice-Consul of Foreign State.—Under an application for habeas corpus a claim of the vice-consul of a foreign state, that the applicants were slaves, supported by his own affidavit that he believed them to be so, but with an admission that the owners were to him unknown, did not afford sufficient ground for putting the applicants to their suit. *DeLacy v. Antoine*, 7 Leigh 438. See the title HABEAS CORPUS.

CONSUMMATING.—In *Hinchman v. Ballard*, 7 W. Va. 185, it is said: "Holloway pledges himself to come to the house of the said Thomas Johnson on the 18th day of April, 1861, for the purpose of **consummating** a compromise of a suit, etc., upon the following terms here agreed upon, to-wit, etc. The word **consummating**, as here used must be construed to mean 'completing.'"

Contagious Diseases.

See the title HEALTH.

CONTAINED IN.—Policy on vehicles and harness, plaintiff's own or sold, until removed, **contained** in a building occupied as livery and sales stables. Those destroyed were, at time of fire, at repair shop several hundred yards off. Held, the words **contained in** designate the usual place of deposit of the vehicles when not in use, or being repaired, and cover the destroyed property. The court said: "As was said by Adams, J., in *McCluer v. Insurance Co.*, 43 Iowa 349, the words **contained in** are in cases of this kind synonymous with the word 'kept,' and yet it would hardly be maintained that a plaintiff who had signed an ap-

plication, in which he had said that he kept his carriage in his barn, would be deprived of the benefits of the policy merely because at the moment he obtained the policy it was standing at the door of the insurer's office, and was there consumed by fire." *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, 964, 9 S. E. 694. See generally, the titles FIRE INSURANCE; INSURANCE.

CONTAINING.—In *Russell v. Keeran*, 8 Leigh 15, it is said: "Where the contract does not specify the number of acres sold or contracted to be sold, otherwise than by the general words 'containing so many acres,' this can hardly be looked on as a warranty of the quantity, but rather as a matter of description. *Keytons v. Brawford*, 5 Leigh 48." See also, the title VENDOR AND PURCHASER.

Contemporaneous Agreements.

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I. Definition and Nature.

A. DEFINITIONS.

1. In General.

"Contempt" is defined as an act in disrespect of the court or its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791. See also, *State v. Ralphsnnyder*, 34 W. Va. 352, 12 S. E. 721.

Blackstone's Commentaries, vol. 4, p. 285, defines contempt to consist, among other things, in "speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts of causes depending in judgment, and by anything, in short, that demonstrates a gross want of that regard and respect, which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people." *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

Barton, in vol. 2 (2 Ed.), p. 774, of his law practice, is to the same effect. "Contempt of court is a disobedience

to the court, or an opposing or despising the authority, justice or dignity thereof." *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

2. Direct and Constructive Contempts.

See post, "Practice," VI.

Cooley's Bl. Comm. bk. 4, p. 283, says that contempts "are either direct, which openly insult or resist powers of the court or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority." Thus contempts are of two kinds—direct and constructive. A direct contempt is one offered in the presence of the court, while sitting judicially. A constructive contempt is one which tends to obstruct and embarrass a court, though the act be not done in its presence. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58; *State v. Frew*, 24 W. Va. 469; *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

"I do not find it necessary to go into the distinctions between direct and constructive contempts, which are so un-

satisfactory to all who study this subject. There is always a struggle to relegate every contempt to the odious category of constructive contempts, in order to take shelter under these restrictive statutes. But I may say that, in my judgment, the courts will find that the legislature has not taken away any valuable power, when these statutes are properly understood. Notwithstanding the seemingly formidable array of authority, it may be that, after all, it is a mistake to say that all contempts not committed in the presence of the court are constructive only. The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects besides the place where it happens. To print hostile comments on the court, its officers, or proceedings, as in cases where the question generally arises, or to ride one's horse into the tavern where the judge sleeps, as in *Com. v. Stuart*, 2 Va. Cas. 320, may be only constructively a contempt, as it very indirectly obstructs the course of justice, if at all; but where it takes the form of an assault upon an officer, as when he was beaten and made to eat the process and its seal, in *Williams v. Johns*, 2 Dick. 477, S. C. 1 Mer. 302, note d, the impediment to the efficient administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him. *Com. v. Dandridge*, 2 Va. Cas. 408; *People v. Wilson*, 64 Ill. 195." *United States v. Anonymous*, 21 Fed. Rep. 761.

In the 9 Cyc. of Law and Procedure, p. 6, a constructive contempt is stated to be "an act done not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice." *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

West Virginia Statute.—The con-

tempts mentioned in West Virginia Code, 1899, ch. 147, § 27; i. e., misbehavior in the presence of the court so as to obstruct administration of justice, violence to judges, officers of court, jury and witness or party; misbehavior of an officer of court; disobedience or resistance of any officer of court, juror, witness, etc., to any lawful process, judgment, decree, or order of court, are of the class known and designated "direct contempts," as contradistinguished from constructive contempts. Direct contempts are such as are committed in the presence, or such as obstruct or interrupt the proceedings of the court. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

B. NATURE OF PROCEEDING.

Criminal in Its Nature.—A contempt of court is in the nature of a criminal offense, and the proceeding for its punishment is criminal in its character, and the rules of evidence governing criminal trials are applicable. *Com. v. Feely*, 2 Va. Cas. 1; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Craig v. McCulloch*, 20 W. Va. 148; *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868; *State v. Harness*, 42 W. Va. 414, 26 S. E. 270; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State v. Ralph-snyder*, 34 W. Va. 352, 12 S. E. 721; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40; *State v. Fred-lock*, 52 W. Va. 232, 43 S. E. 153.

Separate and Distinct from Cause in Which It Arises.—The proceeding for a contempt is a criminal proceeding in its nature, separate and distinct, upon the return of the rule or appearance thereto by the defendant, from the cause, in a violation of orders in which the contempt consists. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Alderson v. Commission-*

ers, 32 W. Va. 640, 9 S. E. 868; *Ruhl v. Ruhl*, 24 W. Va. 279.

II. Power of Courts—Abridgment of Right by Legislature.

A. POWER OF COURTS.

In General.—The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers. Without such power the administration of the law would be in continual danger of being thwarted by the lawless. *Com. v. Dandridge*, 2 Va. Cas. 408; *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310; *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878; *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143; *State v. Frew*, 24 W. Va. 416.

The power to confine and imprison for contempt is incident to every court of record. The courts *ex necessitate rei*, have the power of protecting the administration of justice, with a promptitude calculated to meet the exigency of the particular case. *Wells v. Com.*, 21 Gratt. 503.

A contention that the hearing of a rule should have been in a criminal court, can not be sustained, under § 21, ch. 197, of the West Virginia Code vesting in all courts power to punish for contempt. While proceedings for contempt are criminal in their nature, and the rules of evidence governing criminal trials are applicable, they may be punished summarily. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153.

Power to Release Repentant Contemnor.—While the West Virginia statute has made all contempts criminal in their nature, and all fines therefor go to the state, it has not taken away the wide discretion of the courts over the punishment, to enable them to compel obedience to their orders, by imprisoning at pleasure, or "until the

further order of the court;" so that, when the recalcitrant submits, the court may release him. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413, citing *Purcell v. Purcell*, 4 Hen. & M. 519.

Power of Supreme Court.—It is well settled that the supreme court may issue attachments for a contempt and fine summarily in cases of disobedience by any person to any of its lawful processes or orders. *Hutton v. Lockridge*, 21 W. Va. 258, citing *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 875; *State v. Frew*, 24 W. Va. 416.

Effect of Rule Entitling Proceeding in Name of State.—See post, "Entitling the Proceeding," VI, A.

"While it is true that, in case of disobedience to an order of a court of equity, the proceeding for contempt is entered and carried on in the name of the state on the law side of the court, after the return of the rule against the contemnor (*State v. Bridge Co.*, cited, and *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413), this seems to result from the statutory provision, allowing a writ of error for the review of a judgment in contempt cases. Code, ch. 160, § 4. This is not in conflict with the proposition that all courts are vested with power to punish for contempt." *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153.

Statutes Declaratory of Common Law.—Statutes conferring on courts the right to punish for contempts, are merely declaratory of the common law. The right of every superior court of record to punish for contempts of its authority or process, is inherent from the very nature of its organization, and essential to its existence and protection, and to the due administration of justice. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153.

B. ABRIDGMENT OF RIGHT BY LEGISLATURE.

Distinction between Legislative and Constitutional Courts.—In inquiring into the power of the legislature to

abridge the right of courts to punish for contempt, the distinction between constitutional courts and courts created by some act of the legislature is important. When a court is created and exists by some legislative act, it follows that the power which creates, may also confer, and can take away, its jurisdiction at its pleasure. As a consequence of this, the same power can define contempts against their authority, and prescribe the measure and mode of punishment, or even withhold altogether from such court the power to punish the same. These are not questions of power, but of expediency only, and of this the legislature must judge. But if the court be created, and its jurisdiction conferred by the constitution, then the power to punish for contempts, inherent in such courts, also exists by virtue of the constitution, and in the absence of any constitutional provision authorizing the legislature to do so, it can not deprive such court of that power. *State v. Frew*, 24 W. Va. 416, citing *Com. v. Dandridge*, 2 Va. Cas. 408, and distinguishing *Com. v. Deskins*, 4 Leigh 685, deciding that the act of the general assembly, passed on April 16, 1851, defining contempts, and limiting the power of courts to punish the same, deprived the courts of the power to punish summarily any contempts, on the ground that the jurisdiction of all courts created or existing under the constitution under which that case was decided, was conferred by the legislative act. *State v. Frew*, 24 W. Va. 416, cited with approval in *State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407.

Constitutional Courts.—Therefore, a statute abridging or even taking away the power of courts created by the legislature to punish for contempts, is constitutional and binding upon such courts. But not so in the case of constitutional courts. While the legislature may regulate the exercise of the power of constitutional courts to punish for contempt, it can not be de-

stroyed, or so far diminished as to be rendered ineffectual, by legislative enactment. *State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407; *State v. Frew*, 24 W. Va. 477; *Com. v. Deskins*, 4 Leigh 685; *Carter v. Com.*, 96 Va. 791, 32 S. E. 780; *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 876.

In the courts created by the constitution, there is an inherent power of self-defense and self-preservation; this power may be regulated but can not be destroyed, or so far diminished as to be rendered ineffectual by legislative enactment; it is a power necessarily resident in and to be exercised by the court itself, and the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it can not destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred. *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

If a statute is to be construed as a negation of the power of the court to punish a contempt by excluding it from its enumeration and classification of acts which may be summarily dealt with by the court, or by taking from the courts the power to punish at all, even those acts enumerated as contempts, such statute is unconstitutional because the legislature has transcended the powers prescribed to it by the constitution. *Carter v. Com.*, 96 Va. 791, 32 S. E. 780.

Inferior Courts—Rule in Virginia.—In accordance with the rule just stated, the legislature in Virginia only has the power to regulate the jurisdiction of circuit, county and corporation courts to punish for contempt. It can not destroy such power, because these courts do not derive their existence from the legislature, but are called into being by the constitution itself. *Carter v.*

Com., 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

And in *Elam v. Com.*, decided by the circuit court of Norfolk county and reported in 4 Va. Law Reg. 522, the Virginia statute (acts, 1895-6, p. 924), giving justices exclusive original jurisdiction in misdemeanor cases, was declared constitutional as it was not intended to interfere with the jurisdiction of courts of record to punish for contempts.

But in West Virginia inferior courts are created by the legislature under an enabling act contained in their constitution, and, therefore, any regulation by statute of their power to punish for contempts is constitutional. *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407, citing *State v. Frew*, 24 W. Va. 476; *Com. v. Deskins*, 4 Leigh 685.

Direct and Constructive Contempts.—In *State v. Frew*, 24 W. Va. 416, the supreme court of West Virginia, after an exhaustive review of the cases, held that the legislature can no more deprive the courts of the power to punish summarily constructive contempts than it has power to take from the courts the inherent power possessed by them to punish contempts in the face of the court. At common law the power to punish for such constructive contempts was as much inherent and necessary a power as the power to punish for direct contempt. Citing, amongst other cases *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Frew*, 24 W. Va. 416, cited with approval in *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407.

Statute Providing for Jury Trial.—There is an inherent power of self-defense and self-preservation in the courts of this state created by the constitution. This power may be regulated by the legislature, but can not be destroyed, or so far diminished as to be rendered ineffectual. It is a power necessarily resident in and to be exercised by the court itself, and the legislature can not deprive such courts

of the power to summarily punish for contempt by providing for a jury trial in such case. *Burdett v. Com.*, 193 Va. 838, 48 S. E. 878, citing *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

In *Carter v. Com.*, 96 Va. 816, 32 S. E. 780, the court declared the act of 1897, securing the defendant a jury trial in cases of direct contempt, unconstitutional.

III. Particular Acts Constituting a Contempt.

A. DISOBEDIENCE OF ORDERS AND DECREES.

1. In General.

One of the modes of compelling performance of decrees is by process of contempt. *Gross v. Percy*, 2 Pat. & H. 483; *Lane v. Lane*, 4 Hen. & M. 437.

Disobedience of an order of a court, committed by a party to a suit in which the order is made, is an act of contempt which the court has power to punish. Such order and such disobedience may relate to something other than the pendency of another suit. So it may relate to a suit which is not, in all respects, the same as the suit in which the order is made. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153.

2. Sufficiency of Decree Considered.

a. Must Be Clear and Certain.

Matter Must Be Actually Decreed.—

An attachment for contempt in disobedience of a decree of the chancery court, will only lie for disobedience of what is decreed, and not for what may be decreed. *Taliaferro v. Horde*, 1 Rand. 242.

Uncertain Decrees.—It is an error to decree an attachment for contempt against certain persons for refusing to obey a decree, which is general and uncertain and the extent of which so far as it concerns them, they have no adequate means to ascertain. *Birchett v. Bolling*, 5 Munf. 442.

b. Erroneous or Void Orders and Decrees.

No one can be punished for contempt for disobedience to a void order. *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676; *Ruhl v. Ruhl*, 24 W. Va. 283; *State v. Blair*, 39 W. Va. 704, 20 S. E. 658; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

Want of Jurisdiction.—Disobedience of an order of court, entered in the absence of jurisdiction of the subject matter, can not be punished as contempt of court. *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676; *Ruhl v. Ruhl*, 24 W. Va. 283.

It is not a contempt to disobey an order or decree which the court has no jurisdiction or authority to make. *Ruhl v. Ruhl*, 24 W. Va. 283.

Supersedeas.—See the title APPEAL AND ERROR, vol. 1, p. 433.

In *State v. Blair*, 39 W. Va. 704, 20 S. E. 658, it was held, that the disregard of a supersedeas improvidently issued and annulled, and vacated for want of jurisdiction, will not be punished as a contempt of the lawful process of the court. See *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864. See post, "Supersedeas," III, A, 4.

Disobeying a void order of the court will not constitute contempt. For example disobeying a supersedeas which the appellate court had no jurisdiction to award, will not subject the parties to punishment for contempt in disobeying it; for in such a case the order of this court granting the supersedeas may be treated as a mere nullity. On the other hand, if the court had jurisdiction to award the supersedeas, it is immaterial whether it was properly ordered, or whether it ought not to have been ordered upon the merits of the case. If this court had jurisdiction, the defendants are bound to obey its supersedeas though the court may have erred in granting it. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, citing *Swinburn v. Smith*, 15 W. Va. 500.

Injunction Erroneously Awarded.

When a court has jurisdiction in the sense of power to decide whether an injunction or other writ shall be awarded, the party against whom it issues is bound to obey it, although the awarding of it may have been erroneous, and, in that sense, improper and improvident, and it may operate unreasonably and unjustly. He must obey it until vacated or dissolved. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, citing *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

May Show Order Erroneous.—A court has no right to prevent a party in contempt from showing that the order which he did not obey was erroneous. *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676.

Relief from Erroneous or Void Decree.—An attachment having been served to compel performance of a decree in chancery, which was erroneous, and was improperly obtained against one of the defendants who had not been served with process; and the said defendant having been induced, under the influence of the decree, and duress of the attachment, without knowing his rights, to pay a sum of money and execute an obligation for a further payment; on a bill of review, the money was decreed to be refunded, and the obligation to be surrendered. *Nelson v. Suddarth*, 1 Hen. & M. 350.

3. Injunctions.

Nature of Proceeding.—A proceeding for contempt in disobeying an injunction is not one in or a part of the case, but is outside of it, and is a criminal proceeding. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868; *State v. Harness*, 42 W. Va. 414, 26 S. E. 270.

Statement of Rule.—The violation of an injunction may be punished as a contempt. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Harness*, 42 W. Va. 414, 26 S. E. 270; *Craig v. McCulloch*, 20 W. Va. 148; *Thornton v. Washington Savings Bank*, 76 Va. 432.

Preliminary Injunction.—Where a bill is filed to restrain the defendants from proceeding on two judgments at law obtained by one of the defendants, and the injunction is awarded until the answer comes in, the injunction is not dissolved by the coming in of the answer, but is a subsisting injunction until it is dissolved by the subsequent order of the chancellor, and an execution issued by the defendants on the judgments which had been enjoined, under the idea that the injunction had ceased to operate by the very terms of the order itself, is a contempt. *Turner v. Scott*, 5 Rand. 332, cited in *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 875.

Validity of Injunction Dependent on Unperformed Condition.—An injunction was granted to restrain certain defendants from executing or delivering any deed of conveyance of the whole or any part of certain lands or from incumbering the same in any way whatsoever, or from granting to any party the right to cut or transport from said lands any timber, or from cutting or transporting timber therefrom, during the pendency of a certain suit. But this injunction was not to take effect or be in force until the plaintiff, or some one for him, gave a bond, with securities to be approved by the clerk of the court in the sum of \$250, conditioned to pay all such costs as may be awarded the defendants should this injunction be dissolved. Before the giving of the required bond the defendants did certain acts violating the order of injunction and it was held that they were guilty of contempt. Held, that the injunction did not take effect until after the act was done, and that there was no breach of the injunction; consequently no contempt of the injunction order was committed. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

Motion to Dissolve Overruled.—Where the circuit court overrules a motion to dissolve an injunction, and thus leaves the injunction in full force,

in such case the act violates the process of that court and constitute a contempt thereof. *State v. Harness*, 42 W. Va. 414, 26 S. E. 270.

Injunctions Refused by Lower Court and Awarded by Supreme Court.—It is settled that when an injunction has been refused by a circuit court judge, and afterwards awarded by an appellate judge, it is the province of the inferior judge to enforce the same, and restrain any disobedience to the same, by attachment or other proper process, and this compels the chancellor sitting in review of the order of his superior to enforce the same by effectual measures. *Toll Bridge v. Free Bridge*, 1 Rand. 206; *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483.

Where a circuit court judge refuses to award an injunction, the remedy is by application, accompanied by the original papers and the order of refusal, to a judge of the supreme court, who may review and reverse the action of the circuit court judge, and award the injunction; which injunction, so awarded, it is the province of the circuit court judge to enforce, and restrain any disobedience thereto, by attachment or other proper process. *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483.

A dissolved injunction is revived by an appeal taken by the plaintiff in the court of chancery; and it is improper in the appellee to take out an execution, so long as the appeal is depending. *Turner v. Scott*, 5 Rand. 332.

Violation of Injunction after Appeal and Supersedeas.—It is a vexed question, as to what court has jurisdiction of a proceeding for contempt for violating an injunction, where such order is violated pending an appeal and supersedeas to the supreme court. The rule seems to be, however, that where the order of the lower court dissolves and ends the injunction, and then an appeal and supersedeas is taken to the higher court, such contempt proceeding must be in the appellate court; but

where the order of the lower court does not dissolve, but refuses to dissolve, and thus leaves the injunction in full force, the court awarding the injunction, not the supreme court, has jurisdiction of a proceeding for contempt for its violation. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Harness*, 42 W. Va. 414, 26 S. E. 270; *Turner v. Scott*, 5 Rand. 332.

"The court is of opinion, that the injunction was not dissolved by the coming in of the answer, but was a subsisting injunction until it was dissolved by the subsequent order of the chancellor; that the injunction was revived by the appeal allowed by this court; and that it was improper in the appellees to proceed to execute the judgment at law, so long as the appeal is still depending in this court, etc.; and that the appellee, John Scott, having reasonable notice of this order, do show cause on, etc., why an attachment should not be awarded against him for his contempt in issuing, or causing to be issued, an execution on the judgment enjoined, after notice of this appeal and service of the writ of superseas. But, as this court entertains some doubt whether such improper conduct should be punished by this court or the court of chancery, from which the appeal was prayed, the said John Scott, on showing cause, will not be precluded on this point." *Turner v. Scott*, 5 Rand. 333.

But in *State v. Harness*, 42 W. Va. 415, 26 S. E. 270, it was held, that the court awarding the injunction, not the supreme court, has jurisdiction of a proceeding for contempt for its violation. *Turner v. Scott*, 5 Rand. 333, cited.

Restraining Acts Outside Jurisdiction of Court.—A court of one country or state may enjoin an individual within its jurisdiction, from prosecuting his suit in a foreign state; and this injunction may be enforced by process of contempt. *Barton's Ch. Pr.* (2d Ed.) 51.

A court having jurisdiction in personam may restrain a party from prosecuting a subsequent suit in another county, the effect of which will be to withdraw from the court first acquiring jurisdiction, a part of the subject matter of the suit, and disobedience of the injunction order is an act of contempt which may be summarily punished. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164.

Removal of Property from State.—

The surety on the bond given by the husband of the life tenant of a slave with condition to obey the order of the court enjoining him from removing the slave beyond the bounds of the commonwealth, is guilty of contempt for the removal and sale of such slave beyond the limits of the commonwealth. It is competent for the court to give redress by decreeing in favor of the plaintiff—the reversioner of the slaves—against both the obligors of the bond the value of the reversion in such slave. *Johns v. Davis*, 2 Rob. 729.

Injunctions to Judgments.—But an order from the chancellor granting an injunction to a judgment at common law upon the usual terms, is not sufficient to stay the proceedings until the complainant has complied with the terms of the order by giving bond and security. In such case, it is no contempt of the court of chancery for the plaintiff or the sheriff to proceed to sell under the execution, notwithstanding the chancellor's order was shown them. *Clarke v. Hoomes*, 2 Hen. & M. 23.

Injunction against Sale under Trust Deed.—A trustee by direction of the creditor advertised lands conveyed by deed of trust to be sold on a certain day to pay debts. The debtor obtained an order of injunction against the said trustee and creditor enjoining the said defendant from selling the land under said deed of trust. The trustee by direction of the creditor after the injunction had been granted

added to the advertisement of the sale therefor posted, the words, "The above sale postponed to the 5th day of July, 1881," thereby offering said land for sale in spite of said injunction. Held, not a contempt of court. *Craig v. McCulloch*, 20 W. Va. 152.

Measure of Relief.—Upon a bill in equity by a reversioner of slaves against the husband or tenant for life, alleging a purpose to remove one of the slaves out of the commonwealth, an injunction is awarded, and bond given by the husband with surety, conditioned to abide by and perform the final decree of the court. Upon an amended bill against the surety as well as the husband, it appears that the surety, while bound as such, and of course with full knowledge of the plaintiff's claim, caused the slave to be removed and sold out of the commonwealth, through the instrumentality of an agent. Held, that the measure of relief is not for the value of the slave, but for the value of the plaintiff's reversionary estate in her, which should be ascertained by reference to a commissioner. *Johns v. Davis*, 2 Rob. 729.

Purging Contempt.—See post, "Purging Contempts," IV.

Where employees of defendant drove across railroad tracks, after an injunction had been granted restraining defendant from trespassing on said railroad, and removed some poles which had been dropped upon and near the edge of the roadbed of the railroad, and did some other trivial acts; which acts the company disclaimed, it was held, as there was no intention to disregard the injunction, the defendant was not guilty of contempt. *Postal Tel., etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 929, 14 S. E. 691.

4. Supersedeas.

See ante, "Erroneous or Void Orders and Decrees," III, A, 2, b.

In General.—An appeal and supersedeas to a decree or order dissolving an injunction keeps it in force pending the appeal, and acts prohibited by the

injunction constitute contempts. It is plainer still that when the order or decree refuses to dissolve, or perpetuate the injunction, an appeal, or appeal and supersedeas, does not impair the injunction, and acts forbidden by it are contempts. *State v. Harness*, 42 W. Va. 414, 26 S. E. 270; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Turner v. Scott*, 5 Rand. 332.

Authority to Issue.—Where a court has jurisdiction to grant an appeal and supersedeas to an order dissolving an injunction, the supersedeas issued by the order of such court is a lawful process, and disobedience of it will be punished though it is improvidently issued. In such a case a motion should be made to quash it, but it can not be disobeyed with impunity while it remains in force. But disregard of a supersedeas as improvidently issued and annulled and vacated for want of jurisdiction, will not be punished as a contempt of the lawful process of the court. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Blair*, 39 W. Va. 704, 20 S. E. 658; *Craig v. McCulloch*, 20 W. Va. 148.

Supersedeas Recites Wrong Date.—The fact that the process of supersedeas recites the wrong date to the decree superseded, will not ordinarily, without more, justify the accused in disobeying it. *Hutton v. Lockridge*, 21 W. Va. 254.

Receivers.—A supersedeas is only intended to stay further proceedings, to leave matters in the condition it finds them until the appellate court can hear the case, and pass on the question involved in the appeal; and, therefore, a receiver appointed by the court, in whose hands has been placed certain property, is not guilty of contempt in dealing with the property pending an appeal and supersedeas on the order appointing him receiver. *Bristow v. Home Bldg. Co.*, 91 Va. 18, 20 S. E. 946.

When a process of supersedeas, issued by the clerk of the supreme court

of appeals, states in accordance with the transcript of record, that the decree superseded was rendered by a certain circuit court on a certain day, and no decree was rendered by the said court on that day, but a decree was rendered on the day succeeding the one named in the process, and no other decree had been rendered in said cause, which could be supposed to be the one which the appellate court had superseded, such process is not void and inoperative. If after such process had been served on a special receiver, who by such decree had been authorized to rent out the real estate of the defendant, he proceeds to rent the same but announces publicly on the day of the renting, that if the appellate court on being applied to should hold such process effective, he would return to the renter his bond and repay his cash payment and not report the renting to the circuit court, and the appellate court is satisfied that he always intended to make such application to it to ascertain, whether such process was effective, before he placed the renter in possession of the property, and before he reported the renting to the court, it will not punish such special receiver for a contempt of the court because of such disobedience of its lawful process, the act of disobedience not having been consummated so as to injure any one, and no contempt being intended. But if the special commissioner in such a case delays to make an application to the appellate court to ascertain whether such process was effective, and the defendant moves the court to issue a rule against him for contempt, the court, though declining to punish him for contempt, will adjudge against him the costs of the proceedings. *Hutton v. Lockridge*, 21 W. Va. 254.

Violation of Injunction after Supersedeas Has Been Issued.—See ante, "Injunctions," III, A, 3.

5. Order to Open Road.

A road which has merely been or-

dered to be opened, but has never been actually opened, is not a road such as the Virginia Statute prescribes a penalty for obstructing. Merely resisting the carrying out of the court's order to open such a road is not an offense under that section but a contempt of the court. *Bailey v. Com.*, 78 Va. 21.

6. Mandamus.

See generally, the title **MANDAMUS**.

Refusal to Sign Bill of Exceptions.—

Where a mandamus issues to county commissioners to compel them to settle and sign a bill of exceptions, one of them is not guilty of disobedience of the order in that he took the exceptions to his chambers to settle the same, instead of meeting with his colleagues in banc for that purpose. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

Where a writ of mandamus issues to county commissioners to compel them to settle and sign a bill of exceptions "promptly and with all convenient dispatch," a delay of thirty days in doing so is not so unreasonable as to render them liable as for contempt. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

Electoral Boards.—A circuit court has power to award a writ of mandamus to compel a member of an electoral board to perform the duties imposed upon him by law, and for failure to obey such mandamus he may be punished for contempt. *Cromwell v. Com.*, 95 Va. 254, 28 S. E. 1023.

7. Habeas Corpus.

See the title **HABEAS CORPUS**.

Violating a habeas corpus for the custody of a child may be purged by disclaimer by defendant of any purpose to be guilty of contempt. *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786.

8. Order of Account.

If a party be ordered to account before a commissioner, and disobey such order, he may subject himself to process of contempt. *Barton's Ch. Pr.* (2d

Ed.) 689; *Lane v. Lane*, 4 Hen. & M. 437. See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

9. Executing Decrees Pending Appeal.

Commissioners proceeding to execute a decree after an appeal to the court of appeals has been taken, and the process has been served upon them, are guilty of a contempt of the appellate court; and their acts are null and void, as to the rights of the parties to the appeal. *McLaughlin v. Janney*, 6 Gratt. 609.

But it was decided in the case of *Cheshire v. Atkinson*, 1 Hen. & M. 210, that a sheriff who carried into effect a decree of a superior court of chancery after an appeal had been granted in vacation by the judge of that court, although the sheriff had notice of the appeal, was not in contempt of the appellate court, if such proceedings took place before the record had been brought up.

10. Orders and Mandates of Supreme Court.

See ante, "Supersedeas," III, A, 4; "Executing Decrees Pending Appeal," III, A, 9.

The general rule is that where a supersedeas is issued, or any order is made by this court, and it is disobeyed, such disobedience is a contempt of court. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 874, citing *McLaughlin v. Janney*, 6 Gratt. 609.

Mandate of Supreme Court.—Where a receiver has been appointed by an appellate judge, and the circuit judge has declined to enforce the order, and this court has issued a mandamus to compel its enforcement, and "contempt proceedings" have been instituted against said circuit judge; held, an appeal from the order appointing such receiver stays all proceedings under said order, and said mandamus and "contempt proceedings," should be dismissed. *Virginia, etc., Iron Co. v. Wilder*, 88 Va. 942, 14 S. E. 806.

11. Decrees against Absent Defendants.

An attachment to enforce a decree

pronounced against a person who was out of the commonwealth, can not be awarded against him after his return, until twelve months have elapsed from the time of service of a copy of such decree. *Horton v. Horton*, 4 Hen. & M. 403.

12. Decree for Sale of Land.

See the title JUDICIAL SALES.

A purchaser of land, sold under a decree of a court of chancery, may be compelled to comply with the terms of sale and complete his purchase, by paying cash, if it be a cash sale, or giving bond and security if it be on time, either by process of contempt or by a rule to show cause why the land should not be resold. *Gross v. Percy*, 2 Pat. & H. 483.

13. Decree for Alimony.

See the title ALIMONY, vol. 1, p. 297.

Where a defendant was in contempt for refusing to obey a decree for alimony, it was ordered that he be committed to jail until he complied with the decree. *Purcell v. Purcell* (1810), 4 Hen. & Munf. 507, 519, 520. In this case, the defendant was committed to jail, but afterwards being brought into court under a writ of habeas corpus, he was discharged upon his paying the amount of money then required to be paid and giving security to perform the decree of the court. Cited in *State v. Irwin*, 30 W. Va. 417, 4 S. E. 413.

14. Taking More than Is Decreed.

Where one of two joint tenants appropriated to himself more than his share of the proceeds of a decree rendered in favor of them all, he was held not guilty of contempt for obstructing the decree of the court. *Jones v. Jones*, 1 Hen. & M. 3.

15. Liability of Agents.

Upon a bill in equity by a reversioner of slaves against the husband of tenant for life, alleging a purpose to remove

one of the slaves out of the commonwealth, an injunction is awarded, and bond given by the husband with surety, conditioned to abide by and perform the final decree of the court. Upon an amended bill against the surety as well as the husband, it appears that the surety, while bound as such, and of course with full knowledge of the plaintiff's claim, caused the slave to be removed and sold out of the commonwealth, through the instrumentality of an agent. Held, that the agent of the surety, by his agency in the removal and sale of the slave, would have subjected himself to the like decree, if he had known at the time of the claim of the plaintiff, and had confederated with the surety to defeat the same. *Johns v. Davis*, 2 Rob. 729.

16. Procedure.

See post, "Practice," VI.

Where a defendant in a suit in equity disobeys the process, order, or decree of the court, the regular and proper proceeding for such contempt is for the plaintiff to file an affidavit setting up such fact, and move the court to issue a rule in the cause between the original parties; and when such rule is issued, served on the defendant, and returned to the court, then the contempt proceeding should be entirely separate from the chancery suit, and placed on the law docket, entitled the state of West Virginia, at the relation of the party at whose instance it was issued, against the offender, and be prosecuted on the law side of the court to judgment; and, if the rule is made absolute, the defendant should pay the costs, and, if it is discharged, it should be at the cost of the relator. To a judgment against the offender he may obtain a writ of error. But if such proceeding is had on the chancery side of the court, and the order there entered, such court has no jurisdiction, but, to reverse the order, the defendant is entitled to his writ of error. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

B. CONTEMPTUOUS CONDUCT TOWARDS JUDGE.

1. In Intervals of Adjournment.

In the intervals of adjournment during the term, the court is not to be regarded as sitting, so as to subject one to the process of attachment for contemptuous conduct to the judge, as would have amounted to a contempt during the actual sitting of the court. *Com. v. Stuart*, 2 Va. Cas. 320; *Com. v. Dandridge*, 2 Va. Cas. 408.

Noises in Hearing of Court.—The making of an affray and riot, accompanied with great noise and turbulence at the tavern (near the courthouse), where the judge of the court was, and of which the rioters were advised, during the night of a term (but the court being then in recess), is not a contempt of court. *Com. v. Stuart*, 2 Va. Cas. 320.

But in a prosecution for contempt in publishing an insulting libel concerning the judge of a court, the fact that the defendant thought that the court had adjourned at the time of the publication, or that the judge had in fact directed the sheriff to make the proclamation of adjournment, constitutes no defense. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

2. Criticisms of Official Conduct.

Offering Insult to Judge.—A person, being interested in the result of a suit pending in court, met the judge of the court on the steps, as he was proceeding to take his seat on the bench, and accused him of corruptness and cowardice in the cause then pending. Such a person is guilty of contempt, for which he may be fined or imprisoned or both, although the court was then not actually in session. *Com. v. Dandridge*, 2 Va. Cas. 408.

Justice Protesting to County Court.—A justice offering a protest to the county court against their proceedings in making certain appropriations, and complaining of their acting illegally and oppressively, is not guilty of a con-

tempt. *Stokeley v. Com.*, 1 Va. Cas. 330.

John Stokeley, a justice of a county court, entered two protests against a certain action of that court. In the first, he protested against the appropriation about to be made for the completion of the jail and clerk's office, on the ground that said buildings were not completed either as to time or workmanship according to the contract expressly set forth in the bond of the undertaker, and therefore no more money should be assessed against the people until the work was completed. In his second, he protested that the court according to the opinion of the subscribers, had transcended the authority given them by the law, if not by rescinding the order which had been made at last December court, and by nullifying a contract which had been made by certain citizens for the erection of a courthouse, certainly by hurrying on the order for erecting said courthouse and in infringing the interest of the people by amercing the county into a debt of upwards of eight hundred dollars more than the first contract. The lower court considered the protest as a contempt and fined him accordingly. Held, that such action was not a contempt. *Stokeley v. Com.*, 1 Va. Cas. 330.

Sufficiency of Grounds for Rule.—See post, "Practice," VI.

Where the contempt consists of an insult to the judge, relating to his official conduct, and is expressed to his face, though out of court, a written statement made by him, especially if supported by the affidavits of others, who heard the insult, is a sufficient ground for a rule. *Com. v. Dandridge*, 2 Va. Cas. 408.

3. Publications in Newspapers.

Where an article appeared in a newspaper, signed by the accused, in which he arraigned the conduct of the judge in a most severe and offensive manner as regards his action in a criminal pro-

ceeding against the accused for selling at retail ardent spirits and malt liquors without license, charging substantially that the grand jury which found the indictments acted under the dictation and constraint exercised over them by the judge; that under his influence twelve indictments were found when the question of guilt or innocence could have been established by making one offense, etc., such person is guilty of contempt of court. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

Where the editor of a newspaper charged in an editorial (among other things) that aid and comfort (under color of law) were being openly and outrageously extended to an alleged criminal, his gang and allied bullies; that the authorities of the county, including the county court, were actively, zealously, and unblushingly acting together to deliver such alleged criminal from the just grasp of the city authorities; and that all this was being done, not that the criminal might be punished, but that he might be shielded and delivered and kept at large as a terror to all law-abiding people, and to all who would put down lawless disorder, such an editor was held guilty of a contempt of court. So held by the circuit court of Norfolk county in the case of *Elam v. Com.*, decided May, 1898, and reported in 4 Va. Law Reg. 520.

Charging Members of Court with Aiding Political Party.—An editorial in a newspaper charged, in reference to a certain case then pending before the supreme court of appeals, that three of the judges of that court had promised the democratic caucus which passed the order out of which the suit then pending arose, more than a year before, that such order would be held constitutional; and that a decision would be rendered thereon before the meeting of the democratic state convention in order to simplify the situation, was held a contempt of court which it might summarily punish. *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

Libelous Publications by Attorney.—

A circuit court has not the power, under § 27 of chapter 147 of the West Virginia Code, which provides that a court shall issue attachments for misbehavior in the presence of the court, or conduct of such a character as to obstruct the administration of justice, to punish by summary proceedings, an attorney for writing, and causing to be published in a newspaper, a libelous charge against the judge of such court. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407. See post, "Summary Proceedings," V.

Liberty of the Press.—The summary punishment, as for a contempt, of the author of a libelous newspaper article, is not an invasion of the liberty of the press, but is to be exercised with the utmost caution and reserve. While any citizen may comment upon the decisions and proceedings of a court, and discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform their duties, he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is responsible. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878. See generally, the title CONSTITUTIONAL LAW, ante, p. 140.

"Nor do we think that the summary punishment as for contempt, of a newspaper article, constitutes an invasion of the liberty of the press. With respect to this feature of the case, it can, of course, make no difference whether the article refers to a pending or a past transaction. In *State v. Frew*, 24 W. Va. 417, 49 Am. Rep. 257, it is held, that a publication in a newspaper with reference to a case pending and undetermined in the supreme court of appeals, charging three of the four judges of the court with attending a political caucus more than a year before, and advising the action out of which the case arose, promising the caucus to

hold its action legal and proper, and charging the court with agreeing to decide the case before an approaching political convention for political purposes, was a contempt of court, for which it might be summarily punished." *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

Time of Exercising Power.—Courts have the power to punish, as for a contempt, libelous publications upon the proceedings of the court, or the judge thereof in his official capacity, and such power exists as well after a case has been finally disposed of as where it is still pending. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

C. MISCONDUCT OF OFFICERS OF COURT.**1. In General.**

It is impossible for a court to fully perform its functions, if it has no power to direct and control its executive officer; power to compel him to do what he is commanded to do; power to compel him to refrain from doing, under mere color of authority, what he is forbidden to do, or what he has no authority to do. Hence, he is under the control of the court through its power of attachment and punishment for contempts, for not executing its writs effectually, and for making false returns. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

2. Attorneys.

In General.—"An attorney, who would corruptly conspire with his client to obstruct the due administration of the law, and to bring the authority of a court of justice into contempt, by resisting and obstructing the execution of its lawful decrees, by whatever contrivance, even though it should be by procuring the interference of another court, which had no appellate or supervisory power, or jurisdiction of the subject matter of the suit, in abuse of its powers, to enjoin and inhibit the officers of said court and other persons from the execution or performance of

said decrees, he is at least as guilty of an offense against public justice, and of a contempt of court, as his client, and as justly liable to summary punishment." *Anderson, J., in Wells v. Com.*, 21 Gratt. 500.

Attorney an Officer of Court.—An attorney at law, though not a public officer of the state, is an officer of the court, under cl. 3, § 27, ch. 147, West Virginia Code, 1899, providing that courts and judges may punish summarily for misbehavior of an officer of the court in his official character. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791, citing *Ex parte Faulkner*, 1 W. Va. 269; *Ex parte Quarrier*, 2 W. Va. 569; *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721.

Acts in Official Character.—To punish an officer of a court for misbehavior as provided in cl. 3, § 27, ch. 147, W. Va. Code, 1899, the act must be done in his official character. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

Failure to Attend Court.—Where an attorney fails to attend court at the time of a trial previously fixed with his consent, because he had already entered upon the trial of another cause with every reasonable expectation of completing it before the time fixed for the hearing of the first cause, and finding this impossible, and being unable to obtain a continuance for the second cause, notifies the court of these facts, such an one is not guilty of a contempt of court. *Wise v. Com.*, 97 Va. 779, 34 S. E. 453.

Drafting Petition for New Trial.—The mere drafting by an attorney of a petition in respectful language, simply expressing the opinion of its signers that great injustice had been done a certain party in the verdict of the jury, and asking a new trial, is not a contempt. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 792. *State v. Parsons*, 48 W. Va. 275, 37 S. E. 548, is a sequel to *State v. Hansford*, 43 W. Va. 777, 28 S. E. 791.

Separate Trials and Postponements.

—An attorney was found guilty of contempt on the ground that he had asked for a separate trial of one of two defendants, and, on the following day, denied having done so; that he had asked a postponement of the case on the ground that he had just been called into it, but, on the trial, had introduced a copy of the evidence taken at preliminary examination, which he claimed to have written at the time himself. Held, that the judgment must be set aside, where the evidence as to the first alleged ground was conflicting, and, as to the second, it appeared that he was the attorney to the preliminary hearing, for a codefendant only. *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721.

Prompting Witnesses.—It is contempt for counsel to advise a witness not to answer, and a more serious contempt to prompt a witness in his answers. *United States v. Anonymous*, 21 Fed. Rep. 771, citing *Com. v. Feely*, 2 Va. Cas. 1.

Disbarment.—A contempt of court, consisting in libelous publications by an attorney against a judge of the court, is ground for disbarment. The court may, by summary proceedings, strike from its roll the name of such attorney. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407, citing *State v. Frew*, 24 W. Va. 476. See generally, the title ATTORNEY AND CLIENT, vol. 2, p. 145.

3. Fiduciaries.

A fiduciary can not be compelled by summary process for contempt, and under the threat of fine and imprisonment, to make distribution of an estate in his hands, especially where his accounts have not been settled in the suit, and it has not been shown that he has assets in his hands. *Cheatham v. Cheatham*, 81 Va. 395.

4. Receivers.

A decree was rendered by a certain circuit court authorizing a certain re-

ceiver to rent out certain real estate of the defendant. Upon application by the defendant a supersedeas was issued by the clerk of the supreme court of appeals which stated in accordance with the transcript of the record, that the decree superseded was rendered on a certain day by a certain court, when in fact no decree was rendered by said court on that day, but a decree was rendered on the day succeeding the one named in the process. Such process was served on the receiver. But after the service he proceeded to rent out the said real estate publicly stating at the time of the renting, that if the appellate court, on being applied to, should hold such process effective, he would return to the renter his bond and repay his cash payment and not report the renting to the circuit court. Held, that as receiver always intended to make application to the court to ascertain whether such process was effective, before he placed the renter in possession of the property, and before he reported the renting to the court, it would not punish such special receiver for a contempt of the court, because of his disobedience of its lawful process, the act of disobedience not having been consummated so as to injure any one, and no contempt having been intended. *Hutton v. Lockridge*, 21 W. Va. 254. See also, *Craig v. McCulloch*, 20 W. Va. 148.

D. MISCONDUCT OF WITNESSES. **Refusal of Witnesses to Appear and Testify.**

Avoiding Service of Subpœna.—Where a circuit superior court ordered a subpœna for witnesses to attend the grand jury then in session, and they intentionally concealed themselves from the sheriff to prevent a process from being served, until the grand jury had been discharged, it was held, upon the construction of the Virginia statute of 1830-31, ch. 11, § 25, that this did not constitute a contempt punishable by the court in a summary manner. *Com. v. Deskins*, 4 Leigh 685.

Refusal to Testify before Grand Jury.—A person refusing to testify before a grand jury in a prosecution for unlawful gaming is guilty of contempt. He is not justified in refusing to testify on the ground that his answer will tend to criminate and disgrace him since the Virginia statute secures to him absolute indemnity and complete amnesty against any possible penalty or procedure against him for any crimination or implication in the offense indicated by the pending prosecution in which he is called to testify. *Kendrick v. Com.*, 78 Va. 490. See the title WITNESSES.

Refusal to Appear before Commissioner or Notary.—A person who is summoned to appear before a notary and give evidence in a certain cause, is guilty of contempt if he refuses to obey such summons, and may be punished therefor. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 675.

Rule.—An attachment for a contempt in not attending the court as a witness, ought not to issue until a rule has been served upon the party to show cause why it should not. *Morris v. Crell*, 1 Va. Cas. 333.

E. PREVENTING WITNESS FROM ATTENDING COURT.

In *Com. v. Feely*, 2 Va. Cas. 1, it was held, that using means to prevent and preventing a witness from attending court, who had been duly summoned, was a contempt of court, and might be punished by information.

Information—Sufficiency.—The following information, for using means to prevent, and preventing a witness from attending court, who had been duly summoned, was held sufficiently certain. "Virginia, Wythe county, to wit: Be it remembered, that H. Chapman who prosecutes as Attorney for the Commonwealth in the Superior Court of Law for Wythe county, comes here into the said court in his proper person, this 11th day of May, 1814, and for the Commonwealth gives the court here to understand and be informed,

that John Feely, (Inn-keeper), late of the county of Wythe aforesaid, on the 15th day of October, 1812, at the county aforesaid, and within the jurisdiction of the Superior Court of Law, appointed by law to be holden in, and for, the county of Wythe aforesaid, did offer a contempt to the Superior Court of Law, held in and for Wythe county, in this, that he the said John Feely did use means to prevent, and did then and there prevent, one Samuel Wright from attending as a witness to give evidence to prove the execution of a deed of trust, which deed of trust was executed by the said John Feely to John Draper, after he, the said Samuel Wright, had been duly summoned to attend said Court as a witness, to prove said deed of trust on the fourth day of October Term 1812, by virtue of a summons issued by the Clerk of said Court, who was duly authorized to issue said summons, which act of the said John Feely is contrary to the laws and usages of this Commonwealth, and against the peace and dignity of the Commonwealth, etc.'" *Com. v. Feely*, 2 Va. Cas. 1.

F. INTERFERENCE WITH PROPERTY IN CUSTODIA LEGIS.

Meaning of Custodia Legis.—When property is lawfully taken by virtue of legal process, it is in the custody of the law. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

Interference with Control of Receiver.—An order appointing a receiver is in the nature of an injunction or writ of sequestration, preventing any alienation or disposition of the property except with the consent and concurrence of the court. Any interference with the control and possession of the receiver, whether forcibly or by legal proceedings, without the permission of the court, is regarded as a contempt of its jurisdiction and will be punished accordingly. *Thornton v. Washington Savings Bank*, 76 Va. 432.

Property levied upon under a fieri

facias is in the custody of the law, and the court has power, by attachment, punishment for contempt, and the writ of restitution, to maintain its jurisdiction against its own officers, parties and other persons. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

Property levied upon by execution is in custodia legis, in the custody of the law, through and by the court, holding by the hand of its executive officer, acting under the process of the court. The possession of the court is good against all individuals and all other courts and their officers, and the court must necessarily have the power to vindicate and uphold its right of possession. Otherwise, its jurisdiction would fail and it would be powerless to perform its functions under the law. In the first place, the forcible and wrongful dispossession of the officer in whose custody the property is, does not deprive the court of its jurisdiction. It may go on and render a binding judgment or decree. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

G. FAILURE TO OBEY SUMMONS TO APPEAR AND SERVE ON JURY.

A person, who is exempt from jury service by a statute, the terms of which have been complied with, is not guilty of contempt by not attending court and getting himself excused. A person exempt from jury service by law, is in like manner exempt from being summoned to serve on a jury. *Miller v. Com.*, 80 Va. 33; *Lewis, P.*, dissenting.

H. ABUSE OF PROCESS OF COURT.

1. Writ of Right in Name of Deceased Demandant.

A writ of right having been brought in name of H. against R. and P. and the mise regularly joined on the mere right, and the tenants showing by affidavits that H. was dead before the writ purchased, and that they had come to knowledge of the fact after the mise was joined; held, that court ought to

make a rule upon W. and his attorneys, and inquire into their conduct herein, as a contempt, and abuse of the process of the court; and that unless W. within reasonable time after rule given for the purpose, produce proof, that demandant was living at commencement of suit, it ought to be dismissed, and payment of tenants' costs enforced, by attachment, against W. or his attorney. *Howard v. Rawson*, 2 Leigh 733.

2. Suing in Feigned Names.

See the title **ISSUE OUT OF CHANCERY**.

Suing in feigned names or in the names of others without their privity and consent, is an abuse of the process of the court, and the parties so doing should be punished for contempt. *Howard v. Rawson*, 2 Leigh 733.

Where a suit has been brought in a fictitious name, or in the name of a person without his privity and consent, or of a deceased person, the court will interfere in a summary way, and will hold the party by whom the suit was prompted or even the attorney in the case, responsible for costs. *Pates v. St. Clair*, 11 Gratt. 24, 25, citing *Howard v. Rawson*, 2 Leigh 733.

3. Sale by Sheriff after Delivery of Suspending Bond.

A suspending bond had been delivered to the officer by a claimant of the property, and § 4 of chapter 107 of the West Virginia Code says that, "When such bond is so delivered, the sale of the property shall be suspended." From the reading of that section, it is manifest that the mere delivery of such bond operates a suspension of the sale. While it says that the suspension shall be at the instance of the claimant, he is not required by said section to do more than deliver the bond. Such bond effectually stays the execution in the sheriff's hands and he is powerless to sell. A sale thereafter is not only insufficient to pass title, but, if willfully made, or if made collusively, for the purpose of favoring the execution cred-

itor, it amounts to an abuse by the sheriff of the process of the court and would subject him to punishment for contempt. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

I. PRODUCTION OF DOCUMENTS.

See the title **PRODUCTION OF DOCUMENTS**.

A paper submitted to the executive council for the purpose of enabling it to perform its executive functions, and filed amongst its papers, ought not be withdrawn by the clerk, without the order of the council; and, therefore, no attachment should be awarded against the clerk for refusing to obey a subpoena *deces tecum*, commanding him to bring with him that paper, to be read in evidence in a suit between two individuals. *Morris v. Creel*, 2 Va. Cas. 49.

IV. Purging Contempts.

A. WANT OF INTENTION.

A contempt may be purged where the defendant denies any evil intention, as where a party in his answer under oath to a rule to show cause why he should not be punished for contempt, states that he acted in good faith, without any design, wish or expectation of committing any contempt of court. *Com v. Dandridge*, 2 Va. Cas. 441; *Wells v. Com.*, 21 Gratt. 509; *Postal Tel., etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 929, 14 S. E. 691; *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

Where it is clear from the character of the alleged act and from the answer of the party, that there was no intention to disregard the injunction, he ought not to be adjudged guilty of contempt. The idea of a technical contempt, committed by accident or misadventure, can not be supported, under the authorities, where the intention—the *malum animo*—is wholly wanting. *Postal Tel., etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 929, 14 S. E. 691.

And where an attorney has acted in good faith, although he may err in judgment, he is not guilty of contempt. To excuse his conduct it is not necessary to be shown that he is right in his opinions; but it is necessary to be shown that he has acted in good faith and in such a way as he believed would further his client's interest, and not from any disrespect of the court, or from a design to oust it of its lawful jurisdiction. *Wells v. Com.*, 21 Gratt. 500; *Postal Tel., etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 929, 14 S. E. 691.

Ambiguous Language or Acts.—If the intent with which a thing is said or done gives color and character to the act or words, a disclaimer of any purpose to be guilty of a contempt, or to destroy or impair the authority due to the court, is a good defense to a charge of contempt, but this is true only of language or acts of doubtful import, and which may reasonably bear two constructions. *Carter v. Com.*, 96 Va. 791, 32 S. E. 780.

False Statements to Obtain Continuance.—Where the accused having a case pending in court, received a telegram from his attorney to that effect, and he attempted to obtain a continuance of the action by means of false telegrams, wiring in response "sick with typhoid fever, and can't come" which statement as to his health was false and made without due consideration, it was held, that an answer to a rule issued against him to show cause why he should not be fined and attached for contempt, that he had no idea of interfering with or impeding the course of justice; that he did not make the statement for the purpose of obtaining a continuance, and nothing was further from his mind; that no disrespect to the court was intended, did not pudge the contempt. The effort to obtain a continuance of his cause by means of a statement as to his health which he knew to be false tended directly to impede and obstruct

the administration of justice. *Carter v. Com.*, 96 Va. 791, 32 S. E. 780.

Orders of Court.—"Based upon this decree is the further argument that the element of intent to disobey the injunction order or to condemn the court is lacking. Where the act of contempt is disobedience of an order of the court, the contemnor is not permitted to say his violation of the mandate of the court was unintentional. In such case he can not purge the contempt in that way. 4 Ency. Pl. & Pr. 791, and cases cited in note 3. The averment of want of intention only serves to mitigate the punishment. *Id.* There are, no doubt, contempts which may be purged in that way, where the facts and circumstances support the averment and negative the idea of intentional wrong, but in cases of this kind, the gist of the offense is the doing of the act forbidden, and not the intent with which it is done." *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153.

But it has been held, that in a proceeding for contempt for failure to obey a lawful order of court, in the absence of evidence that the act complained of (which rendered obedience impossible) was done for the purpose of defeating the jurisdiction and authority of the court, and when the facts shown do not naturally bear such an interpretation, upon disclaimer by the defendant of such a purpose, he should be discharged. *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786, reaffirming *Carter v. Com.*, 96 Va. 791, 32 S. E. 780.

Recklessness.—Where a contempt is merely inadvertent or reckless, a fine may be imposed. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

B. ADVICE OF COUNSEL.

See the titles FALSE IMPRISONMENT; LIBEL AND SLANDER; MALICIOUS PROSECUTION.

The advice of counsel may, under some circumstances, be a palliation of

the offense of his client in disobeying the lawful orders of the court, but the extent of such palliation must depend upon the circumstances of the case and the character of the advice given. Such advice will not condone a willful disregard of the order of the court; but when a person acts upon hasty and inconsiderate advice or has failed to give counsel correct information as to the facts of the case, the offense will be palliated to the extent only of making it a reckless disobedience of the process of the court instead of a willful contempt. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Wells v. Com.*, 21 Gratt. 500; *Postal Tel., etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 931, 14 S. E. 691; *Hutton v. Lockridge*, 21 W. Va. 261; *Wise v. Com.*, 97 Va. 779, 34 S. E. 453; *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786, 5 Va. Law Reg. 94.

C. REPENTANCE AFTER COMMITMENT.

Where defendant was brought into court under a commission of rebellion for refusing obedience to former order of court, and committed to jail, the writ of habeas corpus was granted on motion of defendant's counsel because it was stated to the court that defendant was ready to do what was required of him; and the defendant having been brought into court under the said writ, was discharged upon his stating to the court that he was willing to do anything the court should order. *Purcell v. Purcell*, 4 Hen. & M. 519, cited in *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

D. LEGAL EXEMPTIONS.

It is a complete and lawful answer to a rule issued against a party to show cause why he should not be fined for an alleged contempt of court in failing to obey a summons executed upon him to appear and serve on a jury, that he was exempt by law from serving on a jury, by reason of the fact that he was a member of a volunteer military company. *Miller v. Com.*, 80 Va. 33, President Lewis dissenting.

V. Summary Proceedings.

As to right of legislature to abridge power of courts to punish for contempt, see ante, "Abridgment of Right by Legislature," II, B.

Rule in Virginia.—The power of courts of record to punish summarily for contempts, is generally conceded to be inherent, and applies as well to constructive as to direct contempts. *Dandridge's Case*, 2 Va. Cas. 408; *Carter v. Com.*, 96 Va. 816, 32 S. E. 780; *Elam v. Com.*, 4 Va. Law Reg. 520.

A circuit superior court ordered a subpoena for certain persons to be summoned as witnesses to attend before the grand jury then in session, and these persons intentionally concealed themselves from the sheriff to prevent the process being served, and so did prevent it being served until the grand jury was discharged. Held, under the Virginia statute (Sup. to Rev. Code, 1819, pp. 143-4) this did not constitute a contempt punishable by the court in a summary way. *Com. v. Deskins* (1834), 4 Leigh 685. The court, in this case, however, says that it does not intend to intimate an opinion that the parties might not be proceeded against by indictment or information, for corruptly endeavoring to obstruct or impede the due administration of justice—opinion, 685-6. The statute referred to in this case provides, as to summary punishment for contempt by a witness, that it shall not extend, except as to "disobedience or resistance of any witnesses," etc., "to any lawful writ, process, etc.," "of the said court." The said statute also provided that if any person should corruptly impede, etc., or endeavor to obstruct, etc., the administration of justice, he should be liable to indictment, etc. The present statute, as to summary conviction for a contempt by a witness, is similar to the statute above cited. Va. Code, 1887, ch. 183, § 3768, cl. 4, and § 3772.

Rule in West Virginia.—By W. Va. Code, 1899, ch. 147, § 27, only those

contempts enumerated therein are punished summarily and in the usual way; but all other contempts are punished by indictment, being misdemeanors by that statute. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721; *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791, citing *Com. v. Deskins*, 4 Leigh 685; *State v. Frew*, 24 W. Va. 416.

In *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 876, the court seemed to be of the opinion that courts would have a right to punish summarily for some other sorts of contempt than those specified in § 27, ch. 147, of the West Virginia Code, though it does say that summary punishment shall only be inflicted in the cases specified. The reason is that the punishment for contempt summarily was inherent in all courts of justice.

Supreme Court.—In West Virginia, the power of the supreme court of appeals to punish summarily both direct and constructive contempts was held to be the same as exists at common law. And that the act of the Virginia legislature restricting the cases in which courts and judges may punish summarily for contempts, and which has been handed down through successive Codes and is now found in chapter 147 of the West Virginia Code, was not intended to apply and does not apply to the supreme court of appeals. *State v. Frew*, 24 W. Va. 416, approved in *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

Inferior Courts.—But the West Virginia statute (§ 27, ch. 147, Code, 1887) restricting the right of courts to punish summarily, was declared constitutional and binding upon circuit and other inferior courts in *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407. See also, *State v. Hansford*, 43 W. Va. 773, 28 S. E. 792.

It was also decided in *State v. McClaugherty*, 33 W. Va. 250, 10 S. E.

407, that an attorney who wrote and caused to be published in a newspaper a libelous charge against the judge of the circuit court, could not be punished by such court by summary proceedings, under § 27, ch. 147 W. Va. Code, regulating the punishment for the class of contempts therein mentioned.

VI. Practice.

A. ENTITLING THE PROCEEDING.

Before the attachment for the contempt issues, the proceedings are to be entitled in the names of the parties to the suit, but afterwards in the name of the state. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Alderson v. Commissioners*, 32 W. Va. 647, 9 S. E. 871. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153; *McMillan v. Hickmar*, 35 W. Va. 705, 14 S. E. 227, citing *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

The proceeding after the attachment issues is distinct from the suit in which the contempt was committed, and it is entitled in the name of the state against the offender, as the proceeding for the punishment of a contempt of court is criminal in its nature. *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227, citing *Ruhl v. Ruhl*, 24 W. Va. 279.

Upon the return of the rule for an appearance thereto by the defendant in a proceeding for contempt, the proceeding is to be then entitled in the name of the state on the relation of the party complaining against the offender. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 863.

In the early cases we find the proceeding for contempt in the names of the original parties to the suit, where the contempt was committed by a party. See *Taliaferro v. Horde*, 1 Rand. 242.

B. NECESSITY OF AFFIDAVIT.

1. Direct Contempts.

In cases of contempt in open court

it is the uniform practice for the judges to proceed upon their own information and of their own motion. In such cases they act upon the evidence of their own senses, and in cases of contempt, not in open court, if the judges have such evidence they are at liberty to act upon it. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58; *Hook v. Ross*, 1 Hen. & M. 319; *State v. Frew*, 24 W. Va. 416; *Com. v. Dandridge*, 2 Va. Cas. 408.

2. Constructive Contempts.

General Rule.—But where a contempt is not committed in open court the judges generally have no evidence of their own to proceed upon. In such cases an affidavit or other sworn statement of the facts constituting the alleged contempt is essential. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58; *Hook v. Ross*, 1 Hen. & M. 319; *Com. v. Dandridge*, 2 Va. Cas. 408.

Where a defendant in a suit in equity disobeys the process, order, or decree of the court, it is the usual and regular practice for the court to proceed for the contempt upon the affidavit and motion of the plaintiff in the suit. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

On the other hand, it has been held, that though the rule to show cause why an attachment should not issue is usually based in cases of constructive contempt on the affidavit or other sworn statement of the facts constituting the alleged contempt, yet this is not always essential. The court may act on its own information or on the unsworn statements of a member of the bar in cases where the facts are clear and unmistakable. *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58; *Com. v. Dandridge*, 2 Va. Cas. 408.

A publication in a newspaper when charged as a contempt, is of such a character as to permit the judges to act on their own motion and upon their own information. *State v. Frew*, 24 W. Va. 416.

Contemptuous Conduct Towards Court.—In *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58, a rule was issued to show cause why he should not be attached for the following remarks, to-wit: "That in the recess of that day for dinner, in the courthouse yard, in public, used disrespectful, abusive, and slanderous language about and of the judge of said court in relation to his official conduct in the discharge of his duties on the bench whilst conducting the business of the court." The objection to the issuing of this rule was that it was not supported by proper affidavits. It was held, however, that neither the statute law nor the common law makes it absolutely necessary that affidavits should be filed on which to base such a rule. Citing *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257. •

3. Sufficiency of Affidavit.

It seems that the affidavit on which the rule is based should state the particular language used by the defendant claimed to have been in contempt of the court. But such an objection will be cured by subsequently filing in court a paper in which the words constituting the particular contempt complained of were set out. The object in setting out the particular language used by the defendant is to afford him a proper opportunity to take issue on the truth of these allegations. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58.

4. Waiver of Affidavit.

Where a rule has issued on the unsworn statement of counsel, though it be defective in form or substance, yet if defendant appears and submits to rule and admits facts sufficient to support the charge of contempt, the court will disregard all objections to proceedings for want of affidavit or defects in the rule, although the objection be made in the answer of defendant. *State v. Frew*, 24 W. Va. 416; *Com. v. Dandridge*, 2 Va. Cas. 408.

C. RULE TO SHOW CAUSE AND ATTACHMENT.

1. In General.

As the object of attachment is to bring the defendant into court, so that of the rule is no other than to give him notice, and a day in court, to make his defense. The party may not choose to appear to show cause against the rule, in which case, the attachment must issue to bring him in. But if he does appear on the rule, and instead of moving to discharge it, submits to answer interrogatories, if by these he does not purge the contempt, there can be no good reason (he being actually present in court), why the court should go through the formality of an attachment, and a repetition of the interrogatories. But as the whole end of the more formal proceeding is answered, and there is nothing in the law which positively enjoins a rigid technicality, it would seem as proper to proceed at once to judgment. In like manner, there is nothing in reason, or the letter of the law, which makes a formal technical rule indispensably necessary. The rule is intended for notice to the defendant; and if the proceedings against him shall appear to have given him the same notice and opportunity of defense, that he would have had on a formal rule, there is no reason why it should be deemed absolutely indispensable. It is on these grounds, that both the rule, and attachment, are dispensed with, when the contempt is committed in the face of the court. *Com. v. Dandridge*, 2 Va. Cas. 427.

2. Direct and Constructive Contempts.

In General.—The substantial difference between a direct and constructive contempt is one of procedure. Where the contempt is in the presence of the court, it may proceed on its own knowledge of the facts and punish the offender without further proof, and without issue or trial in any form, while in contempt not in the presence of the court (called indirect contempt), the offender must be brought before the

court by a rule or other sufficient process; but the power of the court to punish is the same in both cases. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

Direct Contempts.—An attachment for contempt has no other object than to bring the party into court. When the contempt is in open court, the party being present, there is no need of any process to bring him into court. *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791; *State v. Miller*, 23 W. Va. 801; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

Where a party uses insulting language to the judge while holding court, he may be punished therefor without any rule being issued against him. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 59.

Constructive Contempts.—But where the contempt is not in open court, the usual course is to issue a rule to show cause why an attachment should not issue, though the attachment sometimes issues without the rule. If the party appear to the rule, to show cause, and instead of moving to discharge it, submit to answer interrogatories, there is no necessity for the attachment. *Com. v. Dandridge*, 2 Va. Cas. 408; *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 675; *State v. Frew*, 24 W. Va. 469; *State v. Miller*, 23 W. Va. 801; *State v. Hansford*, 43 W. Va. 773, 28 S. E. 792; *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878.

It was held in *Morris v. Creel*, 1 Va. Cas. 333, that an attachment against the clerk of the executive council of the commonwealth, who had been served with a subpoena duces tecum, should not issue from the superior court of a remote county until a rule had been issued, and served upon said witness to show cause why it should not issue.

It has been held, that though the usual course is to issue a rule to show cause why an attachment should not issue in cases of contempt not com-

mitted in open court, yet the attachment sometimes issues in the first instance. *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257; *Com. v. Dandridge*, 2 Va. Cas. 408.

But in *State v. Irwin*, 30 W. Va. 404, 4 S. E. 422, it was said: "In some of the states the attachment issues in the first instance and the party is arrested and brought into court, and then tried; but in Virginia and this state a rule must issue." Citing *Morris v. Creel*, 1 Va. Cas. 333.

Waiver of Attachment.—An attachment sometimes issues without the rule even where the contempt is not in open court. If the party appear to the rule to show cause, and instead of moving to discharge it, submit to answer interrogatories, there is no necessity for the attachment. *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

If before the rule to show cause why an attachment should not be awarded, the party be present in court, and a rule be made upon him, to show cause "why he should not be fined, or committed for his attempt," returnable on the morrow, and he be recognized to appear on the return of the rule, the rule for an attachment, as well as the attachment itself, may be dispensed with. *Com. v. Dandridge*, 2 Va. Cas. 408.

On the return of such rule, if the party be again ruled to appear on the next day, to answer interrogatories, and he do appear to answer them, and he does not purge himself of the contempt, the court may proceed in the same way as if he had been attached, and those interrogatories had been propounded to him, and answered by him whilst so attached. *Com. v. Dandridge*, 2 Va. Cas. 408.

3. Sufficiency of Rule.

Where a party is adjudged guilty of contempt of court in violating an injunction thereof prohibiting them from selling intoxicating liquors at a certain house, a rule against the accused ought

to be discharged if it does not set out with sufficient certainty in what respect or manner the defendants had violated the injunction, so as to render themselves liable to the charge of contempt; and this is such error as calls for reversal by this court although this question is raised here for the first time. *State v. Davis*, 50 W. Va. 100, 40 S. E. 331, citing *Old v. Com.*, 18 Gratt. 915.

4. Erroneous Rule as Ground for False Imprisonment or Malicious Prosecution.

See the titles FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

However erroneous a rule for contempt may be, it can not be made the foundation for an action of false imprisonment, for it is a judicial act; but an action of malicious prosecution may be founded on such rule, provided the application for the same is without probable cause, actuated by unworthy and malicious motives, and founded on falsehood or misrepresentation. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 675.

5. Service of Attachment.

An attachment to compel an appearance is not properly served so as to support a decree if it is returned "a copy left." Upon the return there should be an attachment with proclamation. *Watts v. Robertson*, 4 Hen. & M. 442.

6. How Order of Attachment Executed.

The sheriff is the proper officer to execute an order of attachment for contempt. *Hook v. Ross*, 1 Hen. & M. 319.

7. Returns.

a. Non Est Inventus—Cepi Corpus.

Upon an order for attachment for contempt two returns may be made; either a non est inventus, upon which an attachment with proclamation issues, or a cepi corpus; if he returns the latter, the next step is a habeas corpus to bring up the body; for the sheriff can

not carry him out of his county. *Hook v. Ross*, 1 Hen. & M. 319.

"And, if, upon an attachment for not performing a decree, the sheriff returns *cepi corpus*, and lets the party to bail (which he should not do, where the writ is marked for the execution of a decree), there a sequestration is granted immediately. So, if he be brought up by habeas corpus, and will not perform the decree, but obstinately lies in prison. If upon an attachment with proclamation, the sheriff return *non est inventus*, a commission of rebellion issues; and, if upon that, a *non est inventus* be returned, the sergeant at arms, who is the immediate officer of the court, is sent to seek him. And this officer our law expressly authorizes the court to appoint. And he may execute the order of the court in any part of the state, where the party may be found, which the sheriff could not; and he might also, as I conceive, bring up the body of the party in contempt, without committing him to the jail of the county, and waiting for a habeas corpus, as the sheriff must. After all this process, if a *non est inventus* be returned, a sequestration issues." Judge Tucker in *Hook v. Ross*, 1 Hen. & M. 320.

b. Entry of Return.

Upon the return of the rule for an appearance thereto by the defendant in a proceeding for a contempt, it must be entered in the law order book, though the contempt was in disobedience of process or orders in chancery, and it is error to fail to enter it in the law order book. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, citing *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

D. RIGHT OF ACCUSED TO INTRODUCE EVIDENCE AND MAKE DEFENSE.

1. In General.

Where a party to a suit is charged with contempt of court, an opportunity

should be afforded him to purge himself of the contempt by his own affidavit. *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676; *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58.

If a person be present in court when fined for contempt, a rule need not be served upon him, but he must be allowed to make defense, except for acts done in the open presence of the court. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791, citing *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Miller*, 23 W. Va. 801.

2. Direct Contempts.

a. In General.

Where a party uses insulting language to the judge while holding court, he may be punished therefor without any rule being issued against him, and the judge in such case may act on his own knowledge, and absolutely refuse to hear any other evidence of the language used by such party. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 59; *Com. v. Dandridge*, 2 Va. Cas. 408.

b. Interrogatories.

Where a contempt is committed in open court and the party charged is present, there is no need of interrogatories to ascertain what has occurred. *Com. v. Dandridge*, 2 Va. Cas. 408.

3. Constructive Contempts.

But if the offense takes place out of the presence of the court it is contemnor's right to offer evidence in his own behalf. *State v. Gibson*, 33 W. Va. 97, 10 S. E. 59; *Com. v. Dandridge*, 2 Va. Cas. 408.

4. Right to File Written Answer.

As the very object of a rule is to cite the defendant to make defense, he has a right to make it except where the act of contempt is in open court in its presence. If the defendant asks leave to file a written answer to the accusation made against him by witnesses giving information to the court, it is not error to refuse it if he orally presented his defense against the rule, and it was considered, but it would be error to refuse

such answer if such oral defense had not been allowed. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791, citing *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58.

5. Conclusiveness of Answer of Accused.

In proceedings against a party for a contempt of court, the weight of the authority is in favor of the admission of other evidence than the answer of the defendants to the rule. On the trial of such case the answer of the accused is not conclusive, but affidavits may be read against as well as for him. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, citing *Com. v. Dandridge*, 2 Va. Cas. 408; and disapproving *Wells v. Com.*, 21 Gratt. 500 (holding affidavit of accused conclusive).

In *United States v. Anonymous*, 21 Fed. 768, the court characterizes the decision in *Wells v. Com.*, 21 Gratt. 500, as an "aberration from the general line of authority."

But it is said in *Barton's Law Pr.* (2d Ed.) 778, "A person offering to purge himself of contempt must do it in person, and usually his answer must be taken as true and can not be traversed; but it must be credible and consistent with itself, or the court may draw its own inference from the facts stated."

E. CONTEMNOR'S DISABILITIES.

In General.—A court is not limited to fine and imprisonment in enforcing obedience to its orders, but it has control over its own proceedings, and can refuse the benefit of them to a party in contempt when asked as a favor, and can prevent him from taking any aggressive proceedings against his adversary; but it has no power to stay him in his proceedings by motion or appeal, where the object is to rid himself of the alleged contempt, or show that the order which he did not obey was erroneous. *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676; *Fisher v. Fisher*, 4 Hen. & M. 484; *Lane v. Ellzey*, 4 Hen. & M. 504 (holding that while a

defendant is in contempt no plea or demurrer, can be admitted, but upon motion in open court).

Leave of Court upon Conditions.

In *Fisher v. Fisher*, 4 Hen. & M. 484, it was held, that one of the defendants who was in contempt and had moved for leave to file an answer, would be granted such leave upon condition that trial would not be delayed by a general replication. "The rule of practice is, that after being in contempt, no plea or demurrer shall be admitted but upon motion in open court." Per chancellor, in *Lane v. Ellzey*, 4 Hen. & M. 504.

Alimony—Appeal.—Where a defendant was in contempt for refusing to pay alimony in accordance with a decree of the court, from which decree an appeal lay only in the discretion of the court, an appeal was granted defendant only on condition that he would come into court and free himself of his contempt by paying up the arrears of alimony, and by giving security for the support of his wife pending the appeal, if it should be granted. *Purcell v. Purcell*, 4 Hen. & M. 518.

Motion to Dissolve Injunction.—A party in contempt can not move to dissolve an injunction. In such case, while still at rules, and not matured for hearing, the court, having overruled defendant's motion to dissolve the injunction, can not proceed to enter a decree settling the principles of the cause. *Fadely v. Tomlinson*, 41 W. Va. 606, 24 S. E. 645.

Motion to Recommit Commissioner's Report.—On a motion to recommit the report of a commissioner in chancery, if the previous neglect, or contumacy, of the party render it proper to overrule his motion, so far as it goes to open the accounts anew; he may, nevertheless, be permitted to show himself entitled to credits not considered by the commissioner, if it appear probable, from the evidence in support of the motion, that he is entitled to such credits. *Snickers v. Dorsey*, 2 Munf. 505.

Pleading to Scire Facias to Revive Decree.—A defendant's being in contempt of the process of the court is not in contempt of the decree, and forms no objection to his pleading to a scire facias brought to revive that decree. *Lane v. Ellzey*, 4 Hen. & M. 504.

Right to Show Order Erroneous.—A court has no right to prevent a party in contempt from ridding himself of the alleged contempt, or from showing that the order which he did not obey was erroneous. *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 677.

F. FINES AND COSTS.

See the titles COSTS; FINES AND COSTS IN CRIMINAL CASES.

1. Fines.

Measure of Punishment.—When the contempt is merely inadvertent and reckless, the court will generally impose a fine only on the party. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

Some contempts result from the violation of the rights of the public, and the punishment for such violation is in the interest of the public. In such cases if a fine is imposed its maximum is limited by general law, and its proceeds when collected go into the public treasury. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

Other contempts result from a violation of the right of the individual, who is a suitor before the court, and has established a claim upon its protection. In these cases the authority of the court is exerted in behalf of the private individual, and the fine imposed is measured by his loss or injury, and the proceeds when collected go to him as indemnity. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

Presence of Accused.—See the title CRIMINAL LAW.

When the fine is imposed a rule must be issued against the accused. But if he be present in court when fined, no rule need be served upon him. *State v. Miller*, 23 W. Va. 801; *State v. Hans-*

ford, 43 W. Va. 773, 28 S. E. 791; W. Va. Code, 1899, ch. 162, § 14.

Presumptions on Appeal.—The statutes provide that no court shall impose a fine for a contempt unless the defendant be present in court, or shall have been served with a rule to show cause on some certain day, and shall fail to appear and show cause. Under this statute it has been absolutely necessary that he should be present when each witness is examined, and when every motion in the progress of the cause is made, or the whole trial is vitiated and would be set aside, if it results in his being found guilty. But his presence in court when the proceedings in his case began on each day, is sufficient evidence that he was there during the whole day, while any action of any sort was being taken in his case. For being once present, unless the contrary appears, he is presumed to remain in the court room. Therefore, the record need not show affirmatively that he was present during the whole of the trial and that he was not absent when any witness was examined, or when any motion was made to the court during the progress of the trial. *State v. Miller*, 23 W. Va. 801, *Johnson and Woods, JJ.*, dissenting.

Enforcement.—If a fine is imposed, the court may imprison the party, if such fine be not paid in the time prescribed by the court. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

Remission of Fines.—Fines for contempt may be remitted wholly or in part by the court during the same term. W. Va. Code, 1899, ch. 36, § 8; Va. Code, 1904, § 724.

2. Costs.

The costs of contempt proceedings are generally paid to the party by whose direction the proceeding is prosecuted, if he proves the contempt; but if he fails to prove the offense the costs fall on him. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Jones v. Jones*, 1 Hen. & M. 3.

It was held, in *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, that the parties adjudged guilty of contempt for violating an injunction of the court, should pay to the originator of the contempt proceedings, the costs expended by him in the prosecution of such proceedings.

On overruling a motion on behalf of A. for an attachment against B. for a contempt in obstructing a decree of court, of which motion notice had been duly given, costs will be taxed, including attorneys' fees against A. *Jones v. Jones*, 1 Hen. & M. 3.

Where an appeal is taken from the judgment and order of the circuit court adjudging an attorney guilty of contempt, and imposing a fine upon him, and further that the privilege theretofore granted to the defendant to practice as an attorney in said court be revoked, if so much of the judgment and proceedings of the circuit court as holds the defendant guilty of a contempt of the court, and imposes a fine upon him, is reversed, and in other respects the judgment is affirmed, the state is not entitled to costs against him in this court, plaintiff in error having prevailed in this court as to that part of the proceeding relating to the contempt. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

Process of Supersedeas.—Where a special receiver was adjudged not guilty of contempt of a process of supersedeas to a decree authorizing him to rent out certain real estate, because it appeared that he intended to make application to the appellate court to ascertain whether such process was effective, it was held, that if he delayed to make such application, costs of the proceeding would be adjudged against him. *Hutton v. Lockridge*, 21 W. Va. 254.

G. ORDER OR JUDGMENT.

1. Sufficiency.

A judgment for contempt is sufficient if it set out the fact that it was

for a contempt generally without stating the specific cause. *State v. Miller*, 23 W. Va. 801.

2. Order to Undo Unlawful Acts.

Sometimes the courts order the improper act which has been done in disobedience of its lawful process or orders to be undone, where justice requires this course to be adopted. As, for example, requiring the defendants to pull down so much of a bridge as has been built by them in disobedience of the process of this court, or that a deed improperly executed shall be cancelled, or where an execution has been improperly levied in disobedience of an order of court, that the defendants should restore the property thus illegally levied upon. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

H. IMPRISONMENT.

See the title SENTENCE AND PUNISHMENT.

Willful Contempts.—When a contempt is willful, the court may imprison the party. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

Duration.—In the absence of statutory enactment, it seems that the duration of the punishment for contempt is in the discretion of the court, whose authority has been defined. *State v. Frew*, 24 W. Va. 416; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. See also, *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Craig v. McCulloch*, 20 W. Va. 148; *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 675.

Release from Imprisonment.—While the statute has made all contempts criminal in their nature, and all fines imposed therefor go to the state, yet it has not attempted to take away the wise discretion of courts over the punishment for contempt, to enable them, by proper coercive measures, to compel obedience to their orders, by imprisoning at the pleasure of the court, or "until the further order of the court;" so that, when the recalcitrant party submits, the court may release

him from imprisonment. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413, citing *Purcell v. Purcell*, 4 Hen. & M. 519.

VII. Evidence.

A. IN GENERAL.

In a proceeding to punish for contempt, the same rules of evidence are applicable as in other criminal cases. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721.

B. WEIGHT AND SUFFICIENCY—PROOF BEYOND REASONABLE DOUBT.

It is very well established that a contempt of court is in the nature of a criminal offense, that its punishment is criminal in its character, and that the evidence must be sufficient to establish guilt beyond a reasonable doubt in order to convict. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153. See generally, the title REASONABLE DOUBT.

Disobedience to Injunction.—On the trial of persons charged with contempt in disobeying an injunction, the evidence must be sufficient to establish guilt beyond a reasonable doubt; otherwise the rule should be discharged. *State v. Davis*, 50 W. Va. 100, 40 S. E. 331, citing *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

VIII. Appeal and Error.

A. CONSTITUTIONALITY OF STATUTES.

The act of the legislature of 1897-8, which has been adjudged unconstitutional in some of its aspects, is a valid statute in so far as it gives the appellate court jurisdiction upon writ of error in cases of contempt. *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786.

B. RIGHT DEPENDENT ON STATUTE.

It is laid down in *Wells v. Com.*, 21 Gratt. 500, that the sole adjudication of contempt and punishment thereof, belongs exclusively to each respective court; and a judgment of conviction, unless the power to supervise is given by statute, is not subject to review in any other court.

By the West Virginia acts, 1882, ch. 128, § 4, a writ of error lies from a judgment for a contempt committed in open court. *State v. Miller*, 23 W. Va. 801.

Writ of Error to Circuit Court.—The West Virginia statute provides that a writ of error shall lie from the supreme court of appeals to the judgment of a circuit court for a contempt of court, other than for the nonperformance of, or disobedience to a judgment, decree, or order. W. Va. Code, 1899, ch. 160, § 4.

Section 4053, Va. Code, 1904, gives the writ of error in cases of contempt with certain exceptions. The statute is in these words: "To a judgment for a contempt of court, other than for the nonperformance of, or disobedience to, a judgment, decree, or order, a writ of error shall lie, when the judgment is of a county court, from the circuit court having jurisdiction over such county; when it is of a circuit, or a corporation, or a hustings court, from the court of appeals." *Wells v. Com.*, 21 Gratt. 504.

C. MANNER OF REVIEW.

1. By Appeal or Writ of Error.

A contempt of court is in the nature of a criminal offense; and the proceeding for its punishment is in the nature of a criminal proceeding. The judgment in such proceeding can be reviewed by a superior tribunal only by writ of error, and not always in that way. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40; *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Miller v. Com.*, 80 Va. 33;

Kendrick v. Com., 78 Va. 490; *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868; *State v. Miller*, 23 W. Va. 801; *Wise v. Com.*, 97 Va. 779, 34 S. E. 453. So held by the circuit court of Norfolk county in the case of *Elam v. Com.*, decided May, 1898, and reported in 4 Va. Law Reg. 520; *Stokeley v. Com.*, 1 Va. Cas. 330; *Wells v. Com.*, 21 Gratt. 500; *State v. Blair*, 29 W. Va. 474, 2 S. E. 333; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227.

Dissolution of Injunction.—A proceeding for a contempt in disobeying an injunction is in the nature of a criminal proceeding, and the judgment in such a proceeding can only be reviewed by a superior tribunal by writ of error, and not always in that way. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40.

2. By Habeas Corpus.

See the title HABEAS CORPUS.

Proceedings for contempt can not be reviewed in the court of appeals on application for a writ of habeas corpus. *Cromwell v. Com.*, 95 Va. 254, 28 S. E. 1023.

A commitment for contempt is a commitment in execution, and the judgment of conviction, unless the power to supervise is given by statute, is not subject to review in any other court; not even upon a writ of habeas corpus. *Wells v. Com.*, 21 Gratt. 504.

D. REVIEW OF JUDGMENT OF ACQUITTAL.

Proceedings for the punishment of a contempt being in their nature criminal, as has already been shown, the supreme court has no jurisdiction to review a judgment of acquittal. *Craig v. McCulloch*, 20 W. Va. 148, cited in *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227. See ante, "Nature of Proceeding," I, B.

Discharge of Rule to Show Cause.—The right of appeal does not give an appellate court authority to take the place of the court below. The lower court has power to punish for con-

tempt; but if it discharge a rule to show cause why a party shall not be punished for contempt in disobeying an order or decree of the court, its ruling on that point is not reviewable in the appellate court on appeal. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227.

E. REVIEW OF JUDGMENT OF CONVICTION.

In proceedings for the punishment of a contempt of court, a writ of error lies to the supreme court in cases of conviction. *Craig v. McCulloch*, 20 W. Va. 148, citing *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 874; *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *State v. Miller*, 23 W. Va. 801.

Judgment Imposing Fine.—Under the fourth section of the act of Virginia assembly, approved January 14th, 1871, Sess. Acts of 1871, p. 31, ch. 34, an appeal may be taken to the court of appeals from the judgment of a circuit court imposing a fine upon a person for a contempt of the court, in aiding to obstruct the execution of a decree of the court. *Wells v. Com.*, 21 Gratt. 500.

It was held, in an early case, that a writ of error from a superior court lies to a judgment of a county court imposing a fine for contempt of the county court. *Stokeley v. Com.*, 1 Va. Cas. 330.

Conviction for Disobeying Erroneous Order.—If a person is convicted of contempt for refusing to obey an erroneous decree of the court and imprisoned therefor; and the record affirmatively shows that the only alleged offense against him is his refusal to obey the erroneous decree, he is entitled to have that portion of the decree which erroneously commits him, set aside and reversed on appeal. *Ruhl v. Ruhl*, 24 W. Va. 286.

Refusal to Quash Execution on Judgment.—A writ of error from an order

of court refusing to quash an execution upon a judgment for contempt, does not carry with it for review by the appellate court the order or judgment on which the execution purports to be founded. *State v. Blair*, 29 W. Va. 474, 2 S. E. 333.

F. REVERSIBLE ERROR.

Irregularities in Proceedings.—If a contempt proceeding is tried in the wrong court, and the order placed on the wrong record, the proceeding is irregular and will be reversed on writ of error. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Ruhl v. Ruhl*, 24 W. Va. 279.

Constructive Contempts—Denial of Defense to Accused.—It was also held, in *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58, that if a contempt be committed not in open court by using insulting language against the judge, a rule should be issued against defendant, and he should be allowed to prove by witnesses the language actually used by him, and for a denial of this privilege a judgment against him would be reversed in the appellate court.

Entitling the Proceedings.—See ante, "Entitling the Proceeding," VI, A.

If the inferior court fails to enter the proceedings separately and entitle them in the name of state against the offender, it is error for which the appellate court will, on appeal by the offender, reverse so much of the decree, if improper on its merits, as orders his punishment. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

Entry of Order.—It is reversible error to enter the order in the chancery order book, instead of the law order book. A court can not prevent the reversal of an erroneous order by entering it in the wrong order book. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

G. EXCEPTIONS AND OBJECTIONS.

See the title EXCEPTIONS, BILL OF

1. Rule as to Time and Notice of Taking.

The rule as to notice of intention to take an exception or of taking it at the time of the ruling, does not apply to a summary judgment for contempt without the formality of a trial. Such a proceeding is wholly ex parte. There is no opposing party to be affected by it who might claim injury to himself on account of want of earlier notice. As the purpose of the rule is to protect the opposing party, where there is no such party, the rule does not apply. *Page v. Clopton*, 30 Gratt. 415.

2. Record—Bill of Exceptions.

If a party, who is fined for contempt, desires the specific nature of the contempt and the facts out of which it is supposed to have originated, set out in the record, he must make them a part of the record by taking a bill of exceptions to the judgment of the court against him, in which the nature and facts may be set out. *State v. Miller*, 23 W. Va. 801; *Page v. Clopton*, 30 Gratt. 415.

IX. Constitutional Law.

A. RIGHT TO TRIAL BY JURY.

See the title JURY.

Where the courts have the right to summarily punish for contempt, it is not necessary to impanel a jury and bring witnesses to testify in person. They proceed without an indictment and without a jury. By so proceeding, the constitutional guaranties relating to indictment and jury trial are not violated. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153; *Carter v. Com.*, 96 Va. 791, 32 S. E. 780.

Supreme Court.—This court, for which the law provides no means of impaneling a jury, has that power and has exercised it. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, citing *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Frew*, 24 W. Va. 416.

By § 28, ch. 147, W. Va. Code, inferior courts may punish direct contempts without a jury by a fine not ex-

ceeding fifty dollars and imprisonment not more than ten days. But the statute goes on to say that in any such case the court may impanel a jury (without an indictment or formal pleading) to ascertain the fine or imprisonment proper to be inflicted and may give judgment according to the verdict. But this statute is held not to apply to the supreme court of appeals. *State v. Frew*, 24 W. Va. 416. See also, *Com. v. Feely*, 2 Va. Cas. 1.

Discretion of Court.—In a proceeding against a party for contempt under § 27, ch. 147, of the West Virginia Code, conferring on courts power to punish summarily for contempt, the proceeding is without indictment and without a jury, unless the court, in its discretion, should see fit to impanel the jury. The contemnor is not entitled to a jury. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, citing *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

Interference with Property in Custodia Legis.—In a proceeding for contempt against the defendant for interfering with property in the custody of the law, the court may, if necessary, imprison the parties offending, without indictment or information, and yet the guaranty of a trial by jury is not violated. *August v. Gilmer*, 53 W. Va. 69, 44 S. E. 143, citing *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Frew*, 26 W. Va. 214; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

B. RIGHT OF CONFRONTATION,

See the title CONSTITUTIONAL LAW, ante, p. 140.

In summary proceedings against the accused for contempt, it is not necessary that he be confronted by the witnesses against him. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153.

CONTEST.—In *Wingfield v. Crenshaw*, 3 Hen. & M. 256, it is said: "The words of that section are, 'where any person or persons, etc., shall think themselves, aggrieved, etc., or where the contest shall be concerning mills, roads, etc., such person may enter an appeal from the judgment or sentence,' etc. Now this word person has been always construed to mean a person party to the contest or the judgment; and that construction is rendered more proper as to the case in question by the use of the word party; but the word contest puts it beyond controversy, that there can only be an appeal in the case of mills, etc., where there has been a contest; and that in favor of one of the parties to the controversy."

Contested Elections.

See the title ELECTIONS.

CONTIGUOUS.—In *Holston Salt, etc., Co. v. Campbell*, 89 Va. 398, 16 S. E. 274, it is said: "What, then, is the meaning of contiguous? Its primary meaning, according to all the lexicographers, is 'in actual contact, or 'touching,' from the two Latin words con and tangere. It is not synonymous with 'adjacent,' although sometimes used in that sense, and vice versa. 'What is adjacent,' says Worcester, 'may be separated by the intervention of some other object; what is contiguous must touch on one side.'"

Contiguous Proprietors.

See the title ADJOINING LANDOWNERS, vol. 1, p. 175.

Contingent Fees.

See the titles ATTORNEY AND CLIENT, vol. 2, p. 164; CHAMPERTY AND MAINTENANCE, vol. 3, p. 774.

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I. Discretion of Court.

See post, "Review," XI.

A. IN GENERAL.

A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case. *Harman v. Howe*, 27 Gratt. 676; *Carter v. Wharton*, 82 Va. 264-267; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 35-45, 22 S. E. 811; *Clinch River Mineral Co. v. Harrison*, 91 Va. 122-128, 21 S. E. 660; *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504; *Hite v. Com.*, 96 Va. 489, 31 S. E. 895; *Ross v. Norvell*, 3 Munf. 170; *Bledsoe v. Com.*, 6 Rand. 674; *State v. Betsall*, 11 W. Va. 703-727; *Davis v. Walker*, 7 W. Va. 447; *Riddle v. McGinnis*, 22 W. Va. 253-268; *Smith v. Knight*, 14 W. Va. 749-759; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 301.

B. WHERE PURPOSE IS TO DELAY OR EVADE TRIAL.

See post, "Motion to Delay or Evade Trial," III, I, 2.

This court has repeatedly decided that where the trial court is satisfied that the real purpose of the party in moving for a continuance is to delay or evade the trial, and not to prepare for it, the motion ought, of course, to be overruled. *Hewitt's Case*, 17 Gratt. 627; *Myers v. Trice*, 86 Va. 835, 11 S. E. 428; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Phillips v. Com.*, 90 Va. 401, 18 S. E. 841.

Where the court is satisfied that a party is merely fighting off the trial instead of preparing for it, refusal of a continuance is held to be proper. *Bank v. Ralphsnyder*, 54 W. Va. 239, 46 S. E. 206.

Where the trial court sees the only object for a continuance is matter of delay, the court commits no error in refusing to grant it. *State v. Jones*, 53 W. Va. 613, 45 S. E. 916.

In *Harman v. Howe*, 27 Gratt. 676-686, citing *Hewitt v. Com.*, 17 Gratt. 627, it was said: "Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then though the witnesses have been summoned, and the party has sworn to their materiality, and that he can not safely go to trial without them, the continuance should be refused." *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 301; *Riddle v. McGinnis*, 22 W. Va. 269; *Buster v. Holland*, 27 W. Va. 510-535. See *Early v. Com.*, 86 Va. 921-925, 11 S. E. 795.

II. Continuance as Matter of Right.

In General.—In *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25, construing W. Va. Code, ch. 50, § 58, it was held, that the defendant was entitled to a continuance as of right only when he makes oath that he has a just defense to the action.

Revival of Proceeding on Scire Facias.—In *Stearns v. Richmond Paper Mfg. Co.*, 86 Va. 1034, 11 S. E. 1057, construing Va. Code, §§ 3308, 3309, it was held, that on motion for continuance it should be allowed as a matter of right, when an order was entered during term reviving a proceeding on scire facias against a new party, provided the continuance was asked at the term at which the order was entered. But this right was not allowed when the proceeding was revived at rules.

Correction of Errors at Rules.—In *Southall v. Exchange Bank of Va.*, 12 Gratt. 312, it was held, that though the court had by statute the authority to correct errors at rules, the defendant in such case would have been entitled to a continuance as a matter of right provided he demanded it.

III. Grounds for Continuance.

See post, "The Affidavit," V.

A. IN GENERAL.

A continuance must have some tangible ground, some probability that it will further the ends of justice, not a mere desire of postponement, not a mere hope that something may possibly develop for the party's interest, but a well-founded belief that evidence will come to light, and that belief must be grounded on known facts. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982; *State v. Maier*, 36 W. Va. 757, 15 S. E. 991; *State v. Madison*, 49 W. Va. 97, 38 S. E. 492; *Com. v. Mister*, 79 Va. 5, 11; *Clements v. Powell*, 9 Leigh 1; *Riddle v. McGinnis*, 22 W. Va. 253-267; *Keesee v. Border Grange Bank*, 77 Va. 129-132; *Bledsoe v. Com.*, 6 Rand. 673.

Where an issue is made up in a cause at the first term after the suit is brought, and the defendant, when the cause is called, moves for a continuance, he must, according to the Va. act, 1819, p. 508, ch. 128, § 78, show good cause for such continuance; otherwise, the court, although it be the first term, will try the cause at that term. *Herrington v. Harkins*, 1 Rob. 591.

B. FAILURE TO GIVE SECURITY FOR COSTS.

See the title COSTS.

When plaintiff, a nonresident, fails to give security for costs on suggestion by defendant, and as a consequence defendant does not prepare his case, it is error, costs being secured later, to rule defendant into trial without a continuance, if he demands it. *Jacobs v. Sale*, Gilmer 123; *Graham v. Douglas*, Wright (Ohio) 738. See *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

Reversible Error.—Error to rule a defendant to trial on a motion for a continuance, when the plaintiff has failed, until the term at which the motion is made, to give security for costs, after a rule to do so. *Jacobs v. Sale*, Gilmer 123.

C. AMENDMENTS.

See generally, the title AMENDMENTS, vol. 1, p. 316.

In General.—The amendment of a pleading at any time during the progress of a case is not sufficient ground for continuance, unless it becomes necessary to promote the ends of justice, and secure a fair trial of the issues. *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

In *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526, in construing Code, W. Va. ch. 125, § 12, p. 601, it was held, the provision that, "if such amendment be made after appearance of the defendant, the court may impose such terms upon the plaintiff as to a continuance of the cause as it may deem just," did not give the defendant a continuance as a matter of right, but still left it to the discretion of the court, and since in this case it was obvious that the amendment operated no surprise to the defendant, a continuance was properly denied.

If a party during the trial of an appeal from a justice is entitled to amend his pleadings, that right can not be made to depend solely on whether the adverse party is then ready to proceed with the trial. If such amendment

would be a surprise to the other party, a continuance will obviate that objection. *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405.

Plea of Payment.—In *Chisholm v. Anthony*, 1 Hen. & M. 27, it was held error for the court to refuse to allow defendant to amend his plea of payment and put in plea of "fully administered." There was also a motion for continuance.

Returns.—In *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348, it was held, that the amendment of return on summons, though before such amendment there was nothing to show a valid service of the writ, was no ground for a continuance, especially in view of the fact that the case, by consent, had been previously set for trial on the same day on which the order permitting the amendment was made.

Variance between Allegations and Proof—Costs.—The question of continuance generally is one addressed to the sound discretion of the court; but § 15, ch. 25, W. Va. Code, 1899, makes provision for amendments of the pleadings at the trial in case of a variance between the evidence and allegations or recitals, when the court may, if, in its opinion, substantial justice will be promoted thereby, allow the pleading to be amended; and, if it be made to appear that a continuance of the cause is rendered necessary by such amendment, such continuance shall be at the costs of the party making the amendment. This provision is obviously just, as a change in the pleadings after the taking of evidence may be a surprise to the opposite party and he should have an opportunity to prepare to meet the new phase of the case. Yet he must make it appear that time is necessary for such preparation. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 827.

Cross Bill.—In suits for divorce, courts are liberal in allowing continuances and suspensions of the hearing to supply defects in the evidence or

pleadings. In the case in judgment, it was error to refuse to allow appellant to amend her cross-bill, charging the appellee with additional recent acts of adultery. The evidence does not disclose a lack of proper diligence on her part. *Willard v. Willard*, 98 Va. 465, 36 S. E. 518.

Harmless Error.—See post, "Review," XI.

In *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580, it was held, since the amendment allowed in that case operated as no surprise, the defendant was not injured by a refusal to continue the cause, and a continuance was properly refused.

Immaterial Amendments.—In *Danville, etc., R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278, it was held no error to refuse a continuance when the sole ground was that the court had allowed defendant to make an amendment, which was wholly immaterial and unnecessary.

It is not error to refuse a continuance merely because an amended bill of particulars is filed by a plaintiff on the motion of the defendant, where it appears that the amended bill was not called for till eleven months after the action was brought, and two months after the filing of the original bill of particulars, and the latter gave the sources of all the information contained in the former, and the information furnished by the amended bill was not material to the defense. *American, etc., Co. v. Milstead*, 102 Va. 683, 47 S. E. 853.

Reversible Error.—The M. & F. B. brought an action of assumpsit on a bill of exchange against M. & G., as partners. M. demurred to the declaration, pleaded nonassumpsit and the statute of limitations, and issue was joined thereon. An amended declaration was subsequently filed, alleging the bill to be lost, to which M. also pleaded nonassumpsit. M. filed an affidavit at the same term when the amended declaration was filed, denying the partner-

ship. The M. & F. B. then moved a continuance. M. thereupon withdrew his affidavit denying the partnership. The court refused a continuance, and the plaintiff being unable to proceed with the proof under the amended declaration, was nonsuited, which the court at a subsequent term refused to set aside. Held, that the court erred in refusing a continuance and also in not setting aside the nonsuit. *Manufacturers, etc., Bank v. Mathews*, 3 W. Va. 26.

D. ANOTHER SUIT PENDING.

See post, "Continuances in Criminal Cases," IX.

In view of the provisions of chapter 46 of the Virginia Code to secure speedy action in condemnation proceedings instituted by internal improvement companies, and to transfer litigation about title from the land to the fund paid into court, it is not error to refuse a continuance of a motion to confirm the report of commissioners assessing damages until another suit to settle the title to the land has been decided. This is especially so where the party complaining is a party to the condemnation proceedings, and has abundant opportunity of introducing evidence in his behalf, and of being heard by counsel. *Richmond, etc., R. Co. v. Seaboard Air Line Railway*, 103 Va. 399, 49 S. E. 512.

E. WANT OF PREPARATION.

See post, "Surprise and Mistake," III, K.

Harmless Error.

Time to Consult Authorities.—When the question is one of interest to the whole community, such as the right to hold the office of judge, the question should be speedily and promptly adjudicated and it is proper to refuse a continuance when the sole ground is that counsel had not time to consult the authorities and prepare his defense, especially when the precise question raised by the pleadings had been recently adjudicated by the supreme court

of the state. *Bland & Giles Co., Judge Case*, 33 Gratt. 443.

Failure of Appellee to Close Depositions in Time.—Where the cause is called at the December term of the court (the first term after the cause had been matured at rules), and the appellant appeared and filed his answer denying the existence of the agreement set up in the bill, and moved for a continuance on the ground that the appellee had not closed its depositions until Monday, the 28th day of November, 1898, and that he was not notified of that fact until the 29th of that month; that at the time he was engaged as chairman of the board of supervisors of Wise county in the business of said board, and was so engaged until Friday, the 2d of December, following, and therefore did not have time to prepare his defense by taking his depositions which he was advised were material to his defense, it was held, that the action of the court in overruling the motion to continue the cause was not reversible error. The court said, however, that the better practice would have been to have continued the case in order that the appellant might have taken proof to meet the appellee's depositions, taken and closed so recently before the term of the court as not to give the appellant time to take his proof before the term commenced. *Kelly v. Lehigh Mining, etc., Co.*, 98 Va. 405, 36 S. E. 511.

Failure to Examine Papers in Cause.

—Mere failure to examine the papers in the cause when counsel, called in, had erroneously supposed the cause was removed from county to circuit court, is no cause for a continuance, especially when the original counsel was in court and alleged no want of preparation. *Hogshead v. Baylor*, 16 Gratt. 99.

Settlement of Accounts.—In *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901, a motion for a continuance was held properly overruled, because ample time and opportunity had been given for a

settlement of the accounts, and because to grant the motion would be to reward negligence, and to unreasonably delay the cause which was then ready for hearing.

Criminal Cases.—See post, "Continuances in Criminal Cases," IX.

"One assignment of error is that the court did not give the accused time to consult his attorney, but forced him into trial without time to prepare his defense. About three o'clock p. m. the prisoner was asked by the court if he had any counsel, and he said that he understood that a certain law firm had been employed to represent him, and that firm refusing to do so, the court appointed three attorneys to defend the prisoner, one of whom had been appointed by the court several days before, and after spending from fifteen to twenty minutes in private consultation with the prisoner, the attorneys asked the court to give them until the next morning to consult with their client and learn whether witnesses could be found who knew any facts material to the prisoner concerning the homicide; but the court refused to grant the delay, and went on with the trial. It seems to us that the court should have exercised its discretion otherwise, but that is not our question. The question here is whether it is cause for reversal of the judgment. If we could see that any evidence for the accused was in existence or attainable, we might say he was prejudiced by this haste, and we could see some force in this complaint; but not a person was suggested as a probable witness; not one matter which the accused could prove, or expected to prove as required by law. *Hurd's Case*, 5 Leigh 715. We can not reverse when we can see no object to be attained by it. We must have something of substance on which to reverse a solemn trial. If we treat this matter under the law of continuance, this point must be ruled against the prisoner. *State v. Lane*, 44 W. Va. 731, 29 N. E. 1020, is much akin

to this case, though stronger for a continuance, and it was held, in that case, that refusal of a continuance will not justify reversal unless plainly erroneous." *State v. Madison*, 49 W. Va. 97, 38 S. E. 492.

Reversible Error.

Time to Take Depositions.—A bill was filed at April rules, and at the following May rules the defendant filed his answer, and the clerk put the case on the docket *ex mero motu*; the plaintiff took the deposition of one witness, which at the instance of the defendant was taken during the term of the court, which met during the month of May; when the case was called at the same term the plaintiff moved for a continuance, upon the ground that he had not had time to take evidence to sustain his case and he filed an affidavit setting out the facts. The court overruled the motion and dismissed the bill. Held, the action of the court was plainly erroneous, and the decree must be reversed. *Apperson v. Cabell*, 1 Va. Dec. 557.

Where sickness has disabled the movant from preparing his case for trial, it is error to overrule a motion for a continuance on this ground. *Mc-Alexander v. Hairston*, 10 Leigh, 486; *Radford v. Fowlkes*, 85 Va. 826, 8 S. E. 817.

Where the dereliction of one of the parties is due to the fact that he in good faith relied on an agreement entered into with the other party that depositions taken in another case might be read in the case at bar, and that relying upon this convention made in the interest of economy and for the promotion of speedy justice, they had failed to prepare their case, affords good ground for a continuance. *Spilman v. Gilpin*, 93 Va. 698, 25 S. E. 1004.

F. DELAY IN FILING PLEADINGS.

Under the statute, a defendant has a right to file his answer at any time before final decree; but if it be not filed

in due time, the suit shall not thereby be continued, unless the court shall for good cause so order. *Tracewell v. Boggs*, 14 W. Va. 254, followed in *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022.

"Was the motion for continuance properly overruled by the court? In order to reach a proper conclusion upon this question, we must consider the fact that this bill was filed at rules, on the 9th of October, 1895, and the answer was not tendered until January 11, 1896, in term time; and after the answer was filed, and the plaintiff replied generally thereto, the defendants asked a continuance of the cause, to give them an opportunity to prove the allegations of their answer, which motion was overruled. The defendants offered no affidavit in support of their motion, or in any manner showed to the court that they had any proof to take or any good cause why such continuance should be granted, when § 53 of chapter 125 of the Code expressly provides that 'at any time before final decree a defendant may file his answer, but a cause shall not be sent to the rules or continued, because an answer is filed in it unless good cause be shown by affidavit filed with the papers therefor.' Under this section, then, and in the circumstance of the case, I think the motion for continuance was properly overruled. * * * In support of this conclusion, see the case of *Tracewell v. Boggs*, 14 W. Va. 254, in which this question was raised and passed upon, the court holding (point two of the syllabus) that 'under the statute the defendant has a right to file his answer at any time before final decree, but, if it be not filed in due time, the suit shall not thereby be continued, unless the court shall for good cause so order.'" *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022, 1023.

Continuance to File Additional Pleas.—The case had been continued at a former term of the court for the defendant. Upon the plea of payment,

which was the only plea in the case when the motion to continue was made, it was conceded that the defendants had no evidence to introduce. No sufficient ground, indeed, no legal ground at all, was shown, why the case should be continued in order that the defendants might have further time in which to file additional pleas. The court's refusal to continue, instead of being plainly erroneous, was manifestly right. *Kinzie v. Rieley*, 100 Va. 718, 42 S. E. 672.

G. ABSENCE OF COUNSEL.

Where the movant states on oath that one of his counsel, in whose assistance he materially relies, is absent, a continuance on this ground should be allowed. *Hook v. Nanny*, 4 Hen. & M. 157; *Rossett v. Gardner*, 3 W. Va. 531.

Change in Time of Holding Court.—It is held, that a party is entitled to a continuance where he has used due diligence to be prepared for a trial, and one of his counsel is absent by reason of a change in the time of holding the circuit courts in an adjoining circuit, having been previously engaged in the last-mentioned court and in attendance at the same; and where his other counsel, although present during the term, was absent when the cause was heard. *Rossett v. Gardner*, 3 W. Va. 531.

The absence of counsel because of quarantine regulations is a sufficient cause for continuance. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

The absence of leading counsel on account of sickness is a good cause for continuance. *Myers v. Trice*, 86 Va. 840, 11 S. E. 428.

Sickness in counsel's family, rendering it impossible for him to attend or prepare for trial, is sufficient ground for a continuance. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

Rules of Court.—A motion for a continuance on the ground that a chan-
cery cause was heard in spite of a rule

that prevailed in the circuit court of that circuit not to try a case at the first term after it was brought, in the absence of counsel, unless both parties consented, is properly overruled where there is no evidence that there was any such rule of court as is relied on; where it does not appear that counsel was absent, and where the record shows no motion for a continuance. *Aiken v. Connelley*, 2 Va. Dec. 383.

Due Diligence.—In *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25, a motion was made for a continuance on the grounds of being without counsel and the absence of a witness. It was held no error to refuse continuance since it appeared that no effort had been made to obtain counsel and no summons had been issued for the witness.

The bill of exceptions states that the demurrer was argued on May 17, 1878, and the court took time to consider it, and at the same time fixed the 22d day of May for the trial of the case, both parties stating they then expected to be ready for the trial; but the court being occupied with other business on that day this case was not called for trial or the opinion of the court on the demurrer announced; but its opinion was announced on the 29th of May, 1878, the judge stating that the case would be tried the next day. On the next day the defendant, when the case was called for trial, moved the court to continue the case, because it was not ready for trial, it being stated by one of its counsel that the principal counsel of the defendant was absent, and the counsel who was present having expected him to be present had not had time to prepare for the trial of the case and confer with his client. The commonwealth's attorney stated that he had notified the defendant's counsel several months before that the case would be pressed for trial at that term. Held, the court did not err in overruling motion of the defendant for a continuance. *State v. Baltimore*, etc.,

R. Co., 15 W. Va. 365, 36 Am. Rep. 803.

Harmless Error.—See post, "Review," XI.

In *Dillard v. Dillard*, 77 Va. 820-825, 2 Va. Dec. 28, it was said: "At that time he, (the appellant) was represented by counsel, and it does not appear that his rights were prejudiced on account of his absence, or, that if a continuance had been granted, he would have been able to attend before the commissioner within a reasonable time thereafter. The motion appears to have been prompted rather by a desire for unreasonable delay than for any other purpose, and was rightly overruled."

On the trial of an indictment for forgery it was held, that the court did not err in refusing to continue the case on account of the absence of counsel, where the affidavit on the part of the state shows that the only counsel who ever appeared for him was present in court on the trial, and had declined to serve him because he failed to carry out certain preliminary arrangements agreed upon. *State v. Koontz*, 31 W. Va. 127, 5 S. E. 328.

Reversible Error.—In *Rossett v. Gardner*, 3 W. Va. 531, it was held, error to refuse a continuance since it appeared the defendant had used due diligence to prepare his case, but one of his counsel was unavoidably absent and the other absent at the hearing though present on the preceding day of the term. Maxwell, J., dissented.

H. ABSENCE OF PARTIES.

Where a defendant, after the overruling of his demurrer, has failed for such length of time to plead, had two continuances, and merely procures the filing of affidavits showing illness and necessary absence, without pleading, or, in any way, disclosing a defense, and without making a formal motion for a continuance, there is no error in failing to continue the case and rendering judgment. *Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206.

Excuse for Absence Must Be Sufficient.—"Upon the calling of the case for trial on that day, the defendant being absent from the city, by consent of parties by counsel, it was set for trial on the 27th of May. When called for trial on the day to which it was so postponed, there was a motion by counsel for the defendant to continue the case. The ground assigned for the motion was that the defendant was unable to attend and testify by reason of an important business engagement in the city of Baltimore, and that his testimony was material. The record contains no explanation of his absence from the city, and not attending the court on May 22d, for which day the trial was first set; and, as to his absence on May 27th, it appears that the business appointment that kept him away was made several weeks before the day fixed for the trial of the case, and yet he made no effort to have the day for the trial of the case changed until it was called. Under the circumstances shown, the court properly overruled the motion for the continuance." *Payne v. Zell*, 98 Va. 294, 295, 36 S. E. 379.

Sickness of Defendant.—It was held, error for the county court, at the term next after the cause had been transferred to that court, to rule the defendant into trial overruling his motion for continuance on the ground that he had been and was still too ill to prepare his case. *McAlexander v. Hairston*, 10 Leigh 486; *Radford v. Fowlkes*, 85 Va. 826, 8 S. E. 817.

Due Diligence.—"That the failure of the defendants did not consist of mere want of diligence in procuring the attendance of witnesses is not overlooked. The persons whose absence was necessitated by the illness of Alpha Ralphsnyder were defendants. Being parties, there was no necessity for process to bring them into court as witnesses. The summons commencing the action brought them in for all purposes, and the affidavits may have suffi-

ciently accounted for their absence. Nevertheless, the defendants were in default. They had failed to put upon the record as evidence of their good faith that they had any defense to the action and had persisted in withholding their defense to a point which justified a conclusion on the part of the court that they had no defense and were merely resorting to pretexts and subterfuges to prevent the entry of judgment against them." *Bank v. Ralphsnyder*, 54 W. Va. 239, 46 S. E. 206.

I. ABSENCE OF EVIDENCE OR WITNESSES.

1. In General.

To entitle a party to a continuance on the ground of the absence of a witness, it must be shown that he has used due diligence to procure his attendance; that he is material; that the same fact can not be proved by any other witness in attendance, and that the party making the application can not safely go to trial in the absence of such witness. *Tompkins v. Burgess*, 2 W. Va. 187; *Davis v. Walker*, 7 W. Va. 449; *Wilson v. Wheeling*, 19 W. Va. 323; *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 32-48; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. Rep. 299.

As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the trial, and shall swear that the witness is material, and that he can not safely go to trial without his testimony, a continuance ought to be granted. The party thus shows, *prima facie*, that he is not ready for trial though he used due diligence to be so; and in the absence of anything to the contrary the court should credit him with honesty of intention. *Hewitt v. Com.*, 17 Gratt. 627; *Carter v.*

Wharton, 82 Va. 267; Phillips v. Com., 90 Va. 401, 18 S. E. 841.

2. Motion to Delay or Evade Trial.

See ante, "Where Purpose Is to Delay or Evade Trial," I, B.

In General.—Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial and not to prepare for it, then, though the witnesses have been summoned, and the party has sworn to their materiality, and that he can not safely go to trial without them, the continuance should be refused. *Hewitt v. Com.*, 17 Gratt. 627. To the same effect, see *Mendum v. Com.*, 6 Rand. 704; *Harris v. Harris*, 2 Leigh 584; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Bank v. Ralphsnyder*, 54 W. Va. 239, 46 S. E. 206; *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

Where the motion for a continuance on the ground of absence of material witnesses appears to have been made for the purpose of delaying or evading the trial, the motion will be overruled. *Herrington v. Harkins*, 1 Rob. 591.

Though the affidavit state that the witness is material and that due diligence has been used to obtain his continuance, yet if it appear on examination that the continuance was moved for, not that he might have the benefit of the evidence of an absent witness, but merely to delay the trial, the motion should be denied. *Mendum v. Com.*, 6 Rand. 704-716.

No Presumption That Delay Is the Object.—When there is no lack of diligence on the part of accused and the motion does not appear to be for the purpose of evading or unnecessarily delaying the trial, the court should give the prisoner credit for honesty of intention and continue the case in his motion because of the absence of a material witness. *Welch v. Com.*, 90 Va. 318, 18 S. E. 273; *Phillips v. Com.*, 90 Va. 403, 18 S. E. 841.

Must State Evidence When.—In *Harris v. Harris*, 2 Leigh 584, it was held,

that if the judge believes the party moving for a continuance on the ground of absence of a material witness, is mistaken as to the materiality of the evidence he expects to prove by such witness, or that the motion was made to delay the trial, he may require the party making the motion to state what he expects to prove by such witness. *Mull's Case*, 8 Gratt. 695; *Harman v. Howe*, 27 Gratt. 676.

It is not error for the trial court to compel a defendant who is seeking a continuance for the purpose of delay to disclose what she expects to prove by an absent witness. "The court had a right to examine her as to what she intended to or could prove by the absent witness so as to ascertain the sincerity of her motion. To this question she gave no intelligible or sufficient answer, but her conduct and evidence shows that her only object was delay. The continuance was properly refused. *State v. Madison*, 49 W. Va. 96, 38 S. E. 492; *State v. Lane*, 44 W. Va. 731, 29 S. E. 1020; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982." *State v. Jones*, 53 W. Va. 613, 45 S. E. 916.

Affidavit of Witness.—After one continuance has been granted, and when there are many witnesses so that every probability is against a future attendance of many of said witnesses, the court may require the affidavit of the witness, on account of whose absence the motion was made, to be produced, that the court might judge of the materiality of the witness. *Mendum v. Com.*, 6 Rand. 704.

3. Absence with Connivance of Movant.

The court being satisfied from the evidence that a witness is absent with the connivance of the prisoner, her absence is not ground for a continuance on his motion. *Wormeley v. Com.*, 10 Gratt. 658.

Daughter of Accused.—In *Wormeley v. Com.*, 10 Gratt. 658, it appeared that the absent witness alleged to be material was the plaintiff's daughter and

absent with his connivance, and the motion for a continuance was accordingly held to have been properly refused. *Com. v. Wormley*, 8 Gratt. 712.

4. Convict Accomplice.

In *Benton v. Com.*, 90 Va. 328, 18 S. E. 282, the continuance was granted solely upon the ground suggested by the commonwealth's attorney, that he could not convict the prisoner without the testimony of a convict accomplice who would soon be released. The case was reversed for improper continuance. See *Const. Va.*, art. 1, § 10; *Code W. Va.*, ch. 131, § 6; *Acts W. Va.* 1882, ch. 120, § 6; *Anderson v. Com.*, 84 Va. 77, 3 S. E. 803; *Keese v. Border Grange Bank*, 77 Va. 129; *State v. Maier*, 36 W. Va. 757, 15 S. E. 991; *Code of Va.* 1887, § 4016.

5. Absent Witness a Party.

See ante, "Absence of Parties," III, H.

The fact that the absent witness, if material, who has been duly summoned to appear at the trial, is a party plaintiff or defendant in the suit, can not prejudicially affect the motion for continuance, unless the court has good grounds to doubt the fairness of the motives of the party moving for the continuance, and to suspect that the object of the motion is mere delay. And in such event, the court may enquire further into the materiality of the witness, require the party to state what he expects to prove by the absent witness, and even send an officer with a rule, or an attachment, if a rule has been previously served, for the absent witness, whether he be a party, who has been summoned as a witness, or any other witness. *Carter v. Wharton*, 82 Va. 267.

6. Impeaching or Impeached Witness.

It is proper to overrule a motion for a continuance on account of the absence of witnesses as to the character of the accused on a trial for homicide, where the testimony of these witnesses has, to the fullest satisfaction of the

trial court, been utterly discredited by a great number of witnesses who prove that they are entirely unworthy of belief. *Ferguson v. Com.*, 3 Gratt. 594, 46 Am. Dec. 196, citing 1 Chitty's Criminal Law 492.

At a murder trial the motion of accused for a continuance on the ground that an absent person, who had not been summoned, would, it was rumored, testify that one of the commonwealth's numerous witnesses present at the homicide, was an ex-convict, was overruled; held, no error. *Myers v. Com.*, 90 Va. 705, 19 S. E. 881.

7. Sickness of Witness.

The absence of a material witness on account of sickness, when the accused makes affidavit that he believes the witness will be able to attend at the term to which he moved the case to be continued, is a ground for continuance in the absence of any intention to delay or evade the trial. *Phillips v. Com.*, 90 Va. 401, 18 S. E. 841; *Gwatkin v. Com.*, 10 Leigh 687; *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

Though one continuance had been granted, yet since a material witness was absent who had been duly summoned, the summons being returned executed, the cause of the absence of the witness being shown to be that he was sick in bed, it was held error to refuse another continuance. *Gwatkin v. Com.*, 10 Leigh 687.

After a former conviction set aside on appeal, defendant moved for a continuance for absence of a material witness from sickness, but convalescent and able to attend (in defendant's opinion), at the term to which he moved the case to be continued, though the physician stated there was but little chance of his recovery; held, refusal to grant the continuance was a reversible error. *Phillips v. Com.*, 90 Va. 401, 18 S. E. 841.

Sickness in Family of Witness.—It seems that sickness in the families of witnesses from time to time, is ground

for a continuance because of their absence. *Radford v. Fowikes*, 85 Va. 820, 8 S. E. 817.

8. Nonresident Witness.

Where an absent witness is a nonresident, the affidavit should state, not only the party's belief that his attendance can be secured, but also the grounds of such belief. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982.

An affidavit by accused that he has four material witnesses whose testimony is necessary in order to his having a fair trial, is not sufficient to support a continuance, where he also shows they are nonresidents and does not name them nor show that he has made any effort to procure their attendance or that he expected to be able to procure their attendance if a continuance should be granted him. *Hurd v. Com.*, 5 Leigh 715.

Witness in Employ of Party.—In *Fire Association v. Hogwood*, 82 Va. 342, the absence of a material witness who was in the employ of the company and was a nonresident of the state and therefore not subject to the process of the state court, was held to be no ground for continuance; especially as the court had continued the case a sufficient time to allow the plaintiff in error to procure his attendance.

The absence of a material nonresident witness, who is in the service of defendant, is no ground for a continuance when the suit has been pending for a considerable time and no effort has been made to obtain his deposition, defendant relying merely on the promise of the witness to attend. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431-447.

9. Necessity of Exercising Due Diligence.

a. In General.

In order to entitle a party to a continuance on the ground of the absence of a material witness, it is necessary that he should have used due diligence to ascertain the materiality, and to

procure the attendance, of the witness. *Matthews v. Warner*, 29 Gratt. 570; *Holt v. Com.*, 2 Va. Cas. 156; *Fiott v. Com.*, 12 Gratt. 564; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901; *Herrington v. Harkins*, 1 Rob. 591; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Evans v. Pettyjohn*, 26 Gratt. 610; *Tompkins v. Burgess*, 2 W. Va. 187; *Davis v. Walker*, 7 W. Va. 447.

Where, from the character of the testimony in support of the motion for a continuance, on the ground of the absence of witnesses, the trial court is satisfied that the apparent effort made on the part of the defendant to get ready for trial was simply a subterfuge to get ready for a continuance, it will be refused. *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

It is a rule that a man can not have a continuance without showing diligence in preparation. *State v. Madison*, 49 W. Va. 99, 38 S. E. 492; *Moore v. Com.*, 9 Leigh 645.

In *Holt v. Com.*, 2 Va. Cas. 156, the court was held to have properly overruled a motion for a continuance, principally because due diligence had not been used in summoning the witness. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

To entitle a party to a continuance of a cause for the absence of a witness, he must show that he has used due diligence to procure the attendance of such witness or his deposition, where the attendance can not be had, and an affidavit stating that a material witness had been discovered recently, without showing any other reason for not procuring the evidence, is not a sufficient compliance with the rule. *Handley v. Chesapeake, etc., R. Co.*, 9 W. Va. 474.

But where no lack of diligence is shown, a continuance should be granted to obtain the attendance of a material witness. *Walker v. State*, 4 W. Va. 749-752.

Sickness—Prevalence of Small-Pox Quarantine Regulations.—Where parties have been diligent in their efforts

to be ready for trial, but have been prevented by circumstances beyond their control, the court should grant them a continuance. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

b. What Is Due Diligence.

As a general rule, when a witness for a party fails to appear at the time appointed for a trial, if such a party show that a subpoena for a witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the time for the trial, and shall swear that the witness is material, and that he can not safely go to trial without his testimony, a continuance ought to be granted. The party thus shows, *prima facie*, that he is not ready for trial, though he has used due diligence to be so; and, in the absence of anything to show the contrary, the court ought to give him credit for honesty of intention, and continue the case if there be reasonable ground to believe that the attendance of the witness at the next term of the court can be secured, especially if the case has not been before continued for the same cause. *Phillips v. Com.*, 90 Va. 401, 18 S. E. 841.

It was held due diligence that parties had summoned witness who was material and was thought to be in attendance. Held, error to refuse continuance on account of his absence. *Anthony v. Lawhorne*, 1 Leigh 1.

On motion to dissolve an injunction granted against the sale of land because of defective notice of sale and because the deed of trust was alleged to be tainted with usury, it appeared that there was no usury in the transaction. It was held, error to refuse a continuance to allow complainant to obtain evidence of the defective sale, which evidence he could not have obtained before by use of due diligence. *Vaught v. Rider*, 83 Va. 659, 3 S. E. 293.

Absent by Agreement.—The absence of a material witness duly summoned

is good ground for continuance, especially, as in this case, there was an agreement to allow her to remain away only in case she allowed an agreement to be produced in evidence, which she refused to do. *Taylor v. Peck*, 21 Gratt. 11.

A delivery of a memorandum to the clerk to issue a subpoena for a material witness was held due diligence though there was no proof of receipt of the summons by the sheriff. The clerk deposed that he believed the summons was issued in the case according to the custom practised by him of leaving summons at a store for the sheriff as he had been requested to do. *Deford v. Hayes*, 6 Munf. 390.

An honest mistake in summoning the wrong man, he being a brother of the witness wanted, does not show a want of due diligence, and in the absence of any suspicion of a purpose to delay or evade trial, the court should grant a continuance if the absent witness is material. *Myers v. Trice*, 86 Va. 835-840, 11 S. E. 428.

Negligence of Clerk.—In *Hook v. Nanny*, 4 Hen. & M. 157, one of the grounds for continuance was that defendant stated on oath that one of his counsel, in whose assistance he materially relied, was absent. He also stated as a ground for continuance absence of a material witness to whom summons was sent but clerk failed to deliver letter. Held, continuance should have been allowed.

c. What Constitutes Failure to Use Due Diligence.

Failure to Inquire at Witness' Place of Business.—There is no error in overruling a defendant's motion for a continuance on the ground of the absence of an alleged material witness, where following facts are shown: "The witness formerly did business at 150 Nassau street, New York, from which place he addressed a letter to the defendant company, dated February 17, 1892. The present suit was commenced in the fol-

lowing August, depositions for the plaintiff were taken in December of the same year, and yet no effort appears to have been made to find the witness, or even to communicate with him, until some time in January, 1893, when the defendant's attorney, being in New York, made, as he says, 'diligent search' for him without success. He did not, however, inquire for him at 150 Nassau street, because his former partners said he had gone out of business and that they had not been able to find him. Nor did he attempt, for aught that appears, to communicate with him through the mail, or to find him by looking in the New York city directory. We are of opinion that the record does not show due diligence on the part of the defendant to obtain the testimony of the absent witness." *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277, 18 S. E. 195.

Settlement of Administration Accounts.—The court will refuse to continue a suit against an administrator to compel him to settle his agency accounts and administration accounts, and recommit the same to the commissioner for further inquiry and report touching his transactions as agent and administrator, on the ground that in consequence of his illness and absence abroad he had been prevented from attending in person and fully submitting his evidence before the commissioner when the accounts were taken, it appearing that ample time and opportunity had been given for a settlement of the accounts, and because to grant the motion would be a reward to negligence, and unreasonably delay the case, which was then ready for hearing. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

Failure to Issue Summons.—In *Mull's* case, 8 Gratt. 695, it was held, no error to refuse a continuance when the ground of motion was absence of a brother of the prisoner, alleged to be a material witness. No summons had been served though he had ample time

and some delay had already been made to await the return of the witness. See *Roussell v. Com.*, 28 Gratt. 930; *Schönberger v. Com.*, 86 Va. 489, 10 S. E. 713.

In *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34-45, 22 S. E. 811, though the absent witness was in the employ of the company and only lived eight or ten miles from the courthouse where the trial took place, yet no subpoena was put in the hands of an officer for him but the plaintiff in error undertook to have him present at the trial. Held, this was not due diligence, and a continuance was properly refused.

"The question is, did the defendant company bring itself within the rule applicable to continuances of causes? We think it clearly did not. About six months has elapsed since the order was made directing the issue in the cause, all of which period, except a very few days just preceding the trial, was permitted to pass without any effort to ascertain, either by talking with the witness or by corresponding with him, what would be the character of his testimony, or whether it would be material or not. And notwithstanding the agreement between counsel, made about the middle of May, subject to the approval of the court, that the case should be tried on the 8th day of June, the summons for this witness was not issued until the 28th day of May, the day on which the court fixed upon the 2d day of June for the trial of the case, and only three or four days prior to the trial. This, so far from evincing that degree of diligence required by the rule, shows gross negligence and indifference on the part of the defendant." *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 432, 18 S. E. 901.

Improper or Defective Summons.—In the absence of suspicion of a purpose to delay or evade the trial by any unfair play, a mistake in summoning a material witness is excusable and a continuance should be granted. *Myers v. Trice*, 86 Va. 840, 11 S. E. 428.

In the case of *Walton v. Com.*, 32 Gratt. 855, it was held, error to refuse a continuance when the officer instead of duly executing the process, improperly returns it, "not executed for want of fees," when the witness was material and there is apparent no intention to delay or evade the trial.

In *Roussell v. Com.*, 28 Gratt. 937, it was held, no error after two continuances, to refuse another, when the sole excuse for not properly summoning the witness was that it was the habit of clerks of other courts, when a subpoena for a witness had been ordered in a case, to continue to issue it afterwards from term to term until trial, without further directions. It appeared that summons had been sent but was twice returned with the endorsement, "not time to execute."

In *Moore v. Com.*, 9 Leigh 639, the motion for continuance was held to have been properly overruled because the evidence to be proved by the witness was immaterial, and also because though summons had issued, it did not appear what had become of it. See also, *Wilson v. Kochnein*, 1 W. Va. 145.

Failure of Witness to Produce Important Documents.—It was held no error to refuse a continuance to get material evidence when the witness, though summoned and in attendance, had not been informed what he was expected to prove, and had not been instructed to bring the books without which he could not show the dates desired, especially since two continuances had already been granted him. *Spengler v. Davy*, 15 Gratt. 381.

Although the time for hearing a case is changed on the docket, a motion for a continuance on the ground of the absence of a material witness will be refused, if the party had time to summon the witnesses to appear on the day set down for hearing, if the proper diligence to secure the attendance of the absent witness had not been used. *Tompkins v. Burgess*, 2 W. Va. 187.

Papers Negligently Misplaced by Movant.—Where a continuance is asked on the ground of the absence of certain bills and invoices, which were alleged to be material to the defense, and without which the movants could not safely go into the trial, if the bills and invoices were in possession of the defendants, and had been in their possession for six months previous to the trial, and if they had been mislaid or overlooked, it was owing to the carelessness or negligence of the movants, the motion for a continuance will be overruled. In the exercise of ordinary diligence they ought to have remembered that the papers in question had been sent to them by the plaintiff, and they ought to have made diligent search for them if they desired to use them as evidence on the trial. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

Failure to Take Depositions.

Harmless Error.—It is not error to overrule a motion for continuance on the ground of absence of a material witness, when the witness lived more than one hundred miles from the place of trial, and the summons was not issued until eight days before the day set for trial. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901, distinguishing *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348; *Myers v. Trice*, 86 Va. 835, 11 S. E. 428.

It is sometimes difficult to procure the attendance of witnesses, by the exercise of proper diligence, and sometimes it is very expensive to do so. To meet and obviate these difficulties and obstacles, the law has provided, in civil cases, that where the witness is not a resident of the state, or resides within the state, more than one hundred miles from the place of trial, and even in a different county from the place of trial, that the deposition of the witness may be taken and read as evidence, and, ordinarily, though perhaps not universally, in actions of account, the deposition of the witness

accomplishes every purpose to be attained by his personal presence. *Davis v. Walker*, 7 W. Va. 447.

In *Mendum v. Com.*, 6 Rand. 704, the motion for a continuance was overruled because there had been several continuances and though prisoner had had ample time to do so, he had not taken the depositions of the absent witness.

In *Deans v. Scriba*, 2 Call 415, it was held, that since the commissioner had indulged the appellants from 1792 to 1797, and during that time they had taken no steps to secure the depositions of the absent witness who was a seafaring man, though they had ample opportunity by his return from time to time, the continuance was properly denied.

Reversible Error.—In *Higginbotham v. Chamberlayne*, 4 Munf. 547, it was held, that in the absence of material witnesses for whom a summons had been delivered to the sheriff in due time, a continuance should have been allowed, though the cause had been continued before, and though an order for taking depositions *de bene esse* had not been complied with by taking the deposition of said witness. See *Hook v. Nanny*, 4 Hen. & M. 157.

In *Fiott v. Com.*, 12 Gratt. 564, it was held, that though a mistake had been made in the taking of depositions, yet since it did not appear that the commonwealth could be subjected to any inconvenience by a delay of a term, a continuance should have been granted to obtain material evidence.

Failure to Send Summons to Officer.—After two continuances had been granted to defendant on account of the absence of a witness, it was held, no error to refuse further continuance when it appeared that the summons had been sent to the witness and not to an officer for service on him and when no deposition had been taken though the witness was more than one hundred miles distant and there had been ample time to take such deposition. The court says: "He must, generally, have exer-

cised such diligence in the use of the process of the court, as will authorize the court, if the witness is not in attendance when the cause is called for trial, to take the legal course to compel the attendance of the witness. * * * He must not simply rely upon the witness as to his attendance, * * * but he can only safely rely upon the diligent and proper use of the process of the court in proper time." *Davis v. Walker*, 7 W. Va. 447, 451; *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 32-48. See Va. Code, 1887, § 3365; *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425-433, 18 S. E. 901.

10. Admissibility and Materiality of Evidence.

a. Admissibility.

It is not error for the trial court to refuse a continuance for the production of evidence, when such evidence would be inadmissible if produced. *Massey v. King*, 1 Va. Dec. 63.

It is not error to refuse a continuance on account of the absence of evidence, such as papers, etc., where it is admitted that if such evidence were present, it could not be used as evidence. *Williams v. Baltimore, etc., R. Co.*, 9 W. Va. 33.

When the cause was called for trial, in January, 1874, the defendant moved the court for a continuance of the cause on the ground that the chief counsel had been furnished by the defendant with certain papers, called "tracers," in his lifetime; but who had departed this life on the eighteenth day of November, 1873, and that these papers could not be obtained by the counsel present for their guidance in the trial of the cause; but it was admitted that if the papers were present, they could not be used as evidence. Held, no error to refuse a continuance. *Williams v. Baltimore, etc., R. Co.*, 9 W. Va. 33.

Criminal Cases.—The circuit court "not perceiving the importance or even admissibility of the testimony expected

to be given by the prisoner's father, for any other purpose than as tending to diminish his punishment, if it could legally have that effect, and doubting whether the commonwealth could ever be as well prepared at a future time for the trial of the case, and above all whether the prisoner, who had been confined in Scott jail on this charge for nearly twelve months, had used such diligence in endeavoring to procure the attendance of his witness, as, under the circumstances of the case, entitled him to the continuance asked for," overruled his motion and refused to continue the case. *Moore v. Com.*, 9 Leigh 645.

On the trial of an indictment for felonious shooting, it is not reversible error to overrule a motion for a continuance on the ground of the absence of the prisoner's wife, her materiality not being shown, but to the contrary it appearing from her own affidavit that the facts to which she would have deposed were not relevant to any issue in the case, and her testimony, if objected to, would not have been admissible. *Andrews v. Com.*, 100 Va. 801, 40 S. E. 935.

b. Materiality.

To warrant a continuance it is not only necessary to show the use of due diligence to procure the attendance of the witness, but also the materiality and importance of his evidence to the issues to be tried. *Williams v. Freeland*, 2 W. Va. 306; *Moore v. Com.*, 9 Leigh 639.

Where the evidence fails to show the materiality of an absent witness, it is not error to refuse a continuance on account of such absence. *Andrews v. Com.*, 100 Va. 801, 40 S. E. 935.

After several continuances it was held, no error to refuse a continuance because of absence of an unsummoned witness when accused did not swear to the materiality of the witness. *Schönberger v. Com.*, 86 Va. 489, 10 S. E. 713.

Depositions.—"Upon the motion for

a continuance of the case, the deposition of the defendant, which was rejected when offered in evidence on the trial because of insufficient notice to take it, was used in support of the motion in order to show the materiality of his testimony, and was made a part of the bill of exceptions to the refusal of the court to continue the case. Upon an inspection of the deposition, it is seen that the facts that he relates refer wholly to the transactions between the payee and himself in reference to giving the note, and that he did not undertake to prove that the plaintiff had notice before or at the time the note was transferred to him of any fact tending to invalidate it. So that if the deposition had been admitted in evidence on the trial, it contained nothing that could have changed the result." *Payne v. Zell*, 98 Va. 298, 36 S. E. 379.

Denial of Partnership.—In the case of *Manufacturers, etc.*, *Bank v. Mathews*, 3 W. Va. 26, defendant filed an affidavit denying partnership and plaintiff moved for continuance to get proof of it. Defendant then withdrew his affidavit and court refused a continuance. The judgment was overruled for refusal to continue.

Opinion Evidence.—Overruling motion for continuance of a long-delayed suit set for trial by consent, on ground of absence of witness summoned only two days before to testify to his opinion as to the value of the race horse whose value was in the issue; held, no error. *Barbour v. Melendy*, 88 Va. 595, 14 S. E. 326.

Affidavit Held Insufficient.—In an early West Virginia case the defendant by his attorney moved for a continuance on the ground of the sickness of the defendant, J. V. Williams, and his not being able to attend the trial, and that one Parson M. Taylor, a material witness, was absent. In support of this motion he tendered a letter written by the defendant to one of his attorneys, dated four days before the

calling of the cause, stating his inability, from sickness, to be present; and he proved by a witness that he saw the defendant at New Creek station the day before the calling of the cause, and that he looked as if he had been sick, and he said that he was then sick, but would try and get to court if he felt well enough. The subpoena for the witness, Taylor, duly served, was also produced, and a certificate of a physician showing that he was unable to leave home by reason of a severe attack of bronchitis. It was held, that the action of the trial court in refusing a continuance was not reversible error. To have a subpoena issued and the witness summoned and show his absence may constitute due diligence, but this is not enough; the party must be willing to make oath to the materiality of the witness, nor is it excused by the absence of the party from sickness or otherwise. For it is not to be presumed that the witness would prove the case if present, nor that the client would prove his materiality if present. *Williams v. Freeland*, 2 W. Va. 306.

11. Cumulative Evidence.

See also, the title NEW TRIALS.

The absence of a witness whose evidence is merely cumulative, generally affords no ground for a continuance. *Norfolk, etc., R. Co. v. Shott*, 92 Va. 35, 22 S. E. 811; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918.

A continuance will not be granted to procure the evidence of an absent witness, when the evidence to be shown by him is only cumulative, unless it be shown there will be a conflict of evidence. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982.

The absence of a witness whose evidence is merely cumulative is generally no ground for a continuance, and if a continuance has been granted on the ground of the absence of a material witness, and it is afterwards discovered, during the term, that the same facts can be proved by another witness who is present, it is not error

to set aside the order of continuance and proceed with the trial of the case. *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918.

It is not error to overrule a motion for a continuance on account of the absence from sickness of a material witness that has been properly summoned, when such motion was not made until the case was called for trial, and where the movant does not state anything by which the court could be informed that the witness could or was expected to give any evidence which would not be merely cumulative upon the testimony already given. *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304.

12. Evidence in Rebuttal.

A refusal to grant plaintiff a continuance will not be disturbed where the record shows that the application was made at the close of defendant's evidence to obtain evidence to rebut alleged new matter, and on an affidavit which did not specify the facts he wished to rebut, the evidence he intended to adduce, or name the witnesses who would give it, and that on the hearing, affidavits of plaintiff and a witness, whom he presumably wished to introduce, was allowed in evidence. *Gaines v. Wilson*, 2 Va. Dec. 368.

13. Postponement to Future Day of Term.

A motion for a continuance on account of the absence of witnesses is properly overruled, where the court intimated its willingness to postpone the trial to a future day of the then term, which the movant refused, insisting upon the continuance to the next term, unless a more distant day of the then term should be fixed upon as the day of postponement. *M'Whirt v. Com.*, 3 Gratt. 594, 46 Am. Dec. 196.

The absence of a material witness is not ground for continuance, where the affiant only the day before the trial learned accidentally of his materiality, although a subpoena for him had at once been sued out, and it had not been served, and the witness was then ab-

sent, if the bill of exceptions states that the court in overruling the motion directed the witness to be summoned to attend the court the next day to which the case was adjourned, and it does not appear that the witness did not attend in obedience to the summons, or that any further question concerning him was raised. *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

14. Conditions—Payment of Costs.

When a witness for either party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or that a subpoena was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the commencement of the term, and shall swear that the witness is material, and that he can not safely go to trial without his testimony, the court will generally grant a continuance to the party at his costs. *Davis v. Walker*, 7 W. Va. 447.

J. REVIVAL OF SUITS AND ACTIONS.

See generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Where a case is revived at rules under § 3309, Va. Code, 1904, providing that "the clerk of the court in which the case is, may issue such scire facias at any time, and an order may be entered at rules for a case to proceed against the proper party, although the case be on the court docket," its revival constitutes no ground for a continuance. *Stearns v. Richmond Paper Mfg. Co.*, 86 Va. 1034, 11 S. E. 1057.

K. SURPRISE AND MISTAKE.

See ante, "Amendments," III, C.

Where a receiver has been appointed to collect an insurance policy, with directions to institute, in his own name, such proceedings thereon as he may be advised is proper, the insurance company has the right to expect

that an independent suit will be instituted thereon in the name of the receiver, and it is error to force the company into a trial on the merits against its will, in the suit in which the receiver was appointed, where the order directing suit by the receiver in his own name remains unrevoked, and it appears that such a proceeding is a surprise to the company, and will probably deprive it of making a bona fide defense on the merits. *New York Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. 941.

The fact that counsel believed that a case had been removed from the county to the circuit court, and was, therefore, taken by surprise, and had not prepared himself by examining the papers and the law of the case, the original counsel being present and prepared, is not cause for a continuance. *Hogshead v. Baylor*, 16 Gratt. 99. See *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405.

The defendant's only ground for a continuance, and also ground of defense is an order, made by the county court at a term set apart exclusively for police and fiscal affairs of the county, except business within the general jurisdiction, which said order stayed the execution of the fi. fa. in his hands as sheriff; plaintiff claims that said order is a nullity, and therefore not ground for continuance or defense. Held, that as a ground of continuance it was addressed to the sound discretion of the judge under the circumstances; and as the legality and effect of the order entered into the merits of the case, and had not been determined by the court below, the case not having been submitted on the merits by the parties to the court in lieu of a jury, the appellate court will not now consider the question on the merits. *Smith v. Knight*, 14 W. Va. 749.

Mistake.—When it appears in the progress of a trial that a cause, if required to proceed, will suffer from the honest mistake of the party or his

counsel, a continuance should be granted. But the mistaken advice of counsel not to prepare for trial is insufficient. *Myers v. Trice*, 86 Va. 835, 11 S. E. 428; *Price v. Fuqua*, 4 Munf. 68.

The wrong witness having been summoned, and the mistake being discovered too late to secure the presence of the right one, whose testimony was material, and the leading counsel being absent by reason of sickness; held, the refusal to grant a continuance was error, each being sufficient ground for it. *Myers v. Trice*, 86 Va. 835, 11 S. E. 428.

L. EXCEPTIONS TO MASTER'S REPORT.

See the title REFERENCE.

In *Johnson v. White*, 1 Hen. & M. 201, it was held, that no continuance will be granted because of exceptions to a commissioner's report, unless they be filed as required by a rule of court and good cause shown; but they will be received at any time provided they do not delay the hearing of the cause.

IV. The Motion.

A. NECESSITY OF FORMAL MOTION.

A formal motion for a continuance is required, accompanied by proper affidavit. *Bank v. Ralphsnyder*, 54 W. Va. 237, 46 S. E. 206; *Dillard v. Dillard*, 2 Va. Dec. 28; *Aiken v. Connelley*, 2 Va. Dec. 383.

It is not error to proceed with a hearing where no motion is made, nor cause shown for a continuance. *Aiken v. Connelley*, 2 Va. Dec. 383, citing *Dillard v. Dillard*, 2 Va. Dec. 28.

If the case is called for trial during the term, a party wishing a continuance must make a motion for it. *Southall v. Exchange Bank*, 12 Gratt. 312-316.

Where a defendant, after the overruling of his demurrer, has failed for four days to plead the time allowed him upon the amendment of his declaration,

had two continuances, and merely procures the filing of affidavits showing illness and necessary absence, without pleading, or, in any way, disclosing a defense, and without making a formal motion for a continuance, there is no error in failing to continue the case and rendering judgment. *Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206.

If there was any ground to believe that other testimony could have been procured, the plaintiff should have moved the district court for a continuance of the cause; and not have waited until verdict was rendered against him; and then bring it forward as a ground for a new trial, after having taken his chance with the jury. *Gordon v. Harvey*, 4 Call 450; *Hook v. Nanny*, 4 Hen. & M. 157.

In *Gaines v. Wilson*, 2 Va. Dec. 368, the movant presented a written motion for a continuance.

B. TIME FOR MAKING MOTION.

At What Stage of Proceedings.—In *Thompson v. Com.*, 88 Va. 45-48, 13 S. E. 304, defendant made a motion to adjourn the court until the next day to secure the attendance of a material witness who was then ill. The motion was properly overruled partly because the trial had progressed so far.

Test Oath.—A party obtaining a rule or order nisi for the opposite party to file his affidavit under the statute of February 28th, 1865 (in relation to suits by rebels), can not thereby work a continuance, by delaying the motion until the time limited for the response of the opposite party which would be subsequent to the time of hearing the cause on its merits. *Nadenbousch v. Sharer*, 2 W. Va. 71.

After a case is set for trial by consent of defendant, he is not entitled to a continuance on the ground that the sheriff's return did not show, before amendment, a valid service of the writ. *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

In case of *Barbour v. Melendy*, 88 Va. 595, 14 S. E. 326, the motion for continuance was held properly overruled, partly because the cause had been set for the argument by consent, and also because the evidence was irrelevant.

After Evidence Has Gone to Jury.—

It is not error for the court to refuse to grant a continuance after the evidence has gone to the jury. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Gaines v. Wilson*, 2 Va. Dec. 368.

After Verdict.—In *Gordon v. Harvey*, 4 Call 450, it was said that the plaintiff should not have waited until verdict was rendered against him before making a motion for continuance.

V. The Affidavit.

A. NECESSITY OF AFFIDAVIT.

A motion for a continuance must be supported by a sufficient affidavit. *Herrington v. Harkins*, 1 Rob. 591; *Davis v. Walker*, 7 W. Va. 449; *Schonberger v. Com.*, 86 Va. 489, 10 S. E. 713.

B. SUFFICIENCY OF AFFIDAVIT.

An affidavit merely stating "that the defendants have a proper defense to said suit" is not sufficient. *Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206.

A refusal to grant plaintiff a continuance will not be disturbed, where the record shows that the application was made at the close of defendant's evidence, to obtain evidence to rebut alleged new matter, and on an affidavit which did not specify the facts he wished to rebut, the evidence he intended to adduce, or name the witnesses who would give it, and that on the hearing, affidavits of the plaintiff and a witness, whom he presumably wished to introduce, were allowed in evidence. *Gaines v. Wilson*, 2 Va. Dec. 368.

It was held, that the circuit court did not err in refusing to grant a continuance of a case on the motion of the attorney for the commonwealth, sup-

ported only by the following affidavit, viz: "That this is the first term of the circuit court of Mathews since the decision of the court of appeals was certified to this court, and was received by the clerk of this court on the 8th day of January, 1883 (three months before the term at which the cases were tried); that no legal notice had been given to the attorney for the commonwealth that this case had been decided by the court of appeals, and that a trial would be asked for at this time; that the allegations in the petition of the plaintiff filed in the county court could be controverted, if at all, by witnesses residing elsewhere than in Mathews county; that the custom house at which the schooner of the plaintiff was said to have been enrolled was located at Onancock, Accomac county, Virginia, and that it was important to examine the records of the said custom house to investigate the title to the vessel of the plaintiff, and that the attorney for the commonwealth had not had the opportunity or time to make such an investigation." "But," the bill of exceptions further states, "it not appearing to the court from the statements of the commonwealth's attorney that he knew of or had summoned any witnesses whose evidence would be material, or that the records in the said custom house would afford material evidence for the commonwealth, or that he had made any effort to prepare for trial, or that he had been prevented by sufficient cause from making such effort, the court overruled said motion; and the attorney for the commonwealth further stated that he had not been able to obtain the opinion of the court of appeals in the case." *Com. v. Mister*, 79 Va. 5.

C. ABSENCE OF EVIDENCE OR WITNESSES.

1. Sufficiency of Affidavit.

"The affidavit does not disclose the extent of the defense, but evidently

avoids doing so, and it is therefore evasive and insufficient. Nor does it show, except impliedly and evasively, that the affiant could not be ready for immediate trial of the issue, or even give any sufficient reason for postponement. There is no claim of the absence of any necessary witness or paper, or any just reason given or surprise. The insincerity and concealment of the affidavit are too apparent to need comment. It is skillfully drafted, so as to reveal nothing to the court except the mere opinion of the affiant that he has a just defense to part of the demand, and, if given time, he will be able to present and sustain it. It was, therefore, properly disregarded by the court." *Bank of Ravenwood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

An affidavit, to support a continuance of a prosecution for stealing a slave, that absent witnesses would prove him a man of good general character as to honesty, which he can not prove here he being a stranger here; that material evidence as to the ownership of the slave can be produced if a continuance is granted; and that he expects to prove an alibi; all of which facts he is unable now to prove, was held insufficient. *Bledsoe v. Com.*, 6 Rand. 673.

2. Necessity of Showing Due Diligence.

Where the movant in his affidavit for a continuance, does not show such due diligence and preparation for trial as would entitle him to a continuance, the motion will be overruled. *State v. Lane*, 44 W. Va. 730, 29 S. E. 1020; *Wilson v. Wheeling*, 19 W. Va. 323; *Buster v. Holland*, 27 W. Va. 510; *Hurd v. Com.*, 5 Leigh 715.

To entitle a party to a continuance of a cause for the absence of a witness, he must show that he has used due diligence to procure the attendance of such witness or his deposition, where the attendance can not be had, and an affidavit stating that a material witness had been discovered re-

cently, without showing any other reason for not procuring the evidence, is not a sufficient compliance with the rule. *Handley v. Chesapeake, etc.*, R. R., 9 W. Va. 474.

An affidavit filed in support of a motion for a continuance on the ground of the absence of witnesses, which states that the affiant did not know that the said witnesses were absent from the city until informed by the sheriff on the Friday before the trial, is insufficient. *Wilson v. Wheeling*, 19 W. Va. 323.

Failure to Take Depositions.—See ante, "Necessity of Exercising Due Diligence," III, I, 9.

The following affidavit was held sufficient to entitle the appellants to a continuance, and that it was reversible error to refuse such a continuance. "The appellants asked a continuance, upon an affidavit, stating that they had summoned two witnesses whom they deemed material, and who they believed were then in attendance, but that another material witness, one Lee, whom they had not summoned, but who had promised to attend, was absent. The court postponed the hearing till the third day of the term, to give the appellants an opportunity to take Lee's deposition. It was taken accordingly. On the third day, the motion for a continuance was renewed, on the ground of the absence of one of the first-mentioned witnesses, named Graves, who had been regularly summoned, and who was material; and it was stated on oath, that, when the motion was made on the first day, Graves was one of the witnesses then alluded to and supposed to be in attendance, but that it was afterwards ascertained that he had been prevented from attending by the illness of his wife. The circuit court denied the continuance, because on the first motion, Lee's affidavit was agreed to be taken by consent, as removing all objections to a trial during the term, and it was not disclosed by the ap-

pellants that they might not be ready after they should obtain the same." *Anthony v. Lawhorne*, 1 Leigh 1.

3. Necessity of Stating Names of Witnesses.

Where there has been a lack of diligence a motion for continuance on the ground of the absence of witnesses will be overruled, especially where the affidavit does not state the names of the witnesses to be examined, or that their evidence is believed to be material. *Mull v. Com.*, 8 Gratt. 695; *Ingles v. Straus*, 91 Va. 209, 21 S. E. 490; *Buster v. Holland*, 27 W. Va. 510.

In *Hurd v. Com.*, 5 Leigh 715, it was held, that though the affidavit of the movant stated that the witnesses were material, yet since it did not state their names or show any effort to procure their attendance, or that he would be able to procure their attendance, they being nonresidents, it was no error to refuse a continuance.

In *Buster v. Holland*, 27 W. Va. 510, 535, it was held, proper to refuse a continuance since no due diligence had been shown and the names of the absent witnesses were not stated.

4. Necessity of Showing Materiality of Evidence.

On a motion for a continuance because of the absence of a witness, the affidavit should show that his evidence is material. *Wilson v. Kochnein*, 1 W. Va. 145; *Williams v. Freeland*, 2 W. Va. 306; *Tompkins v. Burgess*, 2 W. Va. 187; *McDonald v. Peacemaker*, 5 W. Va. 439; *Williams v. Baltimore, etc.*, R. Co., 9 W. Va. 33; *Deford v. Hayes*, 6 Munf. 390; *Bledsoe v. Com.*, 6 Rand. 673; *Harris v. Harris*, 2 Leigh 584; *Moore v. Com.*, 9 Leigh 639-645; *Clements v. Powell*, 9 Leigh 1; *Nash v. Upper Appomattox Co.*, 5 Gratt. 332; *Myers v. Com.*, 90 Va. 705, 19 S. E. 881; *Logie v. Black*, 24 W. Va. 1; *Schonberger v. Com.*, 86 Va. 489, 10 S. E. 713.

The action of the criminal court in refusing a continuance on account of

the absence of a witness, was held not to be reversible error, where the affidavit on which such motion is based, does not show that, if such evidence were given, it would materially affect the case. *State v. Emblem*, 46 W. Va. 326, 33 S. E. 223.

Where the affidavit for a continuance does not state that the supposed witness is material, but that the affiant had that day heard facts which would make the witness important, and it is not stated that the same facts could not be proved by other witnesses, or that the defendant could not safely go to trial without the testimony, a motion for a continuance for the absence of a witness who had not been summoned, but of whose materiality the defendants were not informed until the day of trial, will be overruled. For aught that appears to the contrary, other witnesses in attendance might have proved the same facts; therefore, whether the absent witness would turn out to be material, depended upon some occurrence or contingency not then disclosed. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

5. Inability to Prove Facts by Another Witness.

Not only should the evidence be material but the affidavit should show that the party can not safely go to trial in the absence of such witness, i. e., that he can not prove the same facts by another witness. *Wilson v. Kochnein*, 1 W. Va. 145; *Tompkins v. Burgess*, 2 W. Va. 187; *Mull's Case*, 8 Gratt. 695; *Gwatkin v. Com.*, 10 Leigh 690; *Roussell v. Com.*, 28 Gratt. 930-937; *Wilson v. Wheeling*, 19 W. Va. 323; *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304.

An affidavit filed in support of a motion for a continuance on the ground of the absence of witnesses, which does not show that the same fact or facts could not be proved by any other witness in attendance, is

insufficient. *Wilson v. Wheeling*, 19 W. Va. 323.

A day before trial a summons was issued and delivered to the sheriff for a witness residing in the same town. The summons was returned "not found." Defendant made affidavit to his materiality and that he could not safely go to trial without him. Trial court overruled the motion for continuance on the sole ground that the statements of the defendant under oath were not to be credited. Held, error. *Welch v. Com.*, 90 Va. 318, 18 S. E. 273.

6. Nonresident Witnesses.

Expectation That Attendance Can Be Procured.—An affidavit for a continuance on the ground of absent witnesses, especially if they be nonresidents, must state that the affiant has reasonable ground to believe he can procure their attendance at a subsequent term. *Hurd v. Com.*, 5 Leigh 715; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982.

D. ABSENCE OF COUNSEL.

An affidavit for a continuance because of the absence of counsel, which sets forth that by reason of the prevalence of small pox and quarantine regulations along the line of railway where counsel resided, together with sickness in the families of counsel, it was impossible for the parties to prepare for trial, is sufficient. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

E. ABSENCE OF PARTIES.

An affidavit to support a motion for a continuance on the ground of the absence of parties, must show that such absence was unavoidable so as to convince the court that the motion is not made merely to delay and evade the trial, and that his presence is material. But where it is shown that parties were prevented from attending or preparing for trial by circumstances beyond their control, it is error to refuse a continuance. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817;

Payne v. Zell, 98 Va. 294, 36 S. E. 379; *M'Alexander v. Hairston*, 10 Leigh 486; *Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206.

F. NEWLY-DISCOVERED EVIDENCE.

An affidavit for a continuance of a cause in chancery on the ground of newly-discovered evidence, is not sufficient if it does not show that the evidence could not have been discovered sooner by the use of due diligence; nor where it does not disclose the nature of the evidence so that it may be seen whether it is material or not. *Rosset v. Greer*, 3 W. Va. 1.

G. PREJUDICE AGAINST ACCUSED.

Affidavits of the prevalence of bitter and general prejudice against the accused, do not of themselves constitute good ground for a continuance. *Joyce v. Com.*, 78 Va. 287.

H. WANT OF PREPARATION.

An affidavit for a continuance on the ground of want of preparation, which sets forth that parties, counsel and witnesses were absent because of the prevalence of small pox and consequent quarantine regulations along the line of railway, where the parties, their counsel and witnesses resided, together with the personal sickness of parties, or of sickness in the families of counsel or of witnesses from time to time, rendering it practically impossible for the parties to finish taking their depositions and be ready for trial, is sufficient, because it appears that the parties were diligent in their efforts to be ready for trial, but were prevented by circumstances beyond their control. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

I. CONCLUSIVENESS OF AFFIDAVIT.

In a criminal case where the defendant files an affidavit upon which he bases his motion for a continuance, it is not improper for the court to require the defendant to be sworn at

the bar of the court, and to examine him upon oath as to the matters stated in the affidavit; and if on such examination he shows that he is not entitled to a continuance, the court should refuse it, although the affidavit itself showed legal ground for a continuance. *State v. Betsall*, 11 W. Va. 703.

Under particular circumstances, a court may require that the affidavit of an absent witness, setting forth his testimony, shall be produced as the ground work of a continuance; and the refusal to grant a continuance (even though the prisoner swears to the materiality of the witness, and specifies what he expects to prove by that witness, and due diligence has been used, and the witness is too sick to attend), will be justified by the appellate court under those circumstances. *Mendum v. Com.*, 6 Rand. 704.

J. AFFIDAVIT NOT PART OF RECORD.

In the case of *Garland v. Bugg*, 1 Hen. & M. 374, Judge Tucker said: "It would be a dangerous precedent to allow affidavits to be a part of the record; unless made so by an exception." See the title APPEAL AND ERROR, vol. 1, p. 505.

VI. Continuance as Waiver of Defects.

See the title APPEARANCES, vol. 1, p. 667.

Appearing to an action even for the purpose of taking or accepting a continuance, is a waiver of all defects in the service of the writ. *New River Mineral Co. v. Painter*, 100 Va. 507, 42 S. E. 300; *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123; *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489.

By appearing and pleading to the action, or by taking or consenting to a continuance, the defendant waives all defects in the process and the service thereof. *Harvey v. Skipwith*, 16 Gratt. 410.

A defendant in a motion appearing and moving its continuance, thereby waives all advantage which he might take of the error which had been committed by the plaintiff in failing to prove the service of the notice, and to have the motion docketed on the return day. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

If process be illegally issued or executed, the validity of such process or return may be raised by a motion to quash, as well as a plea in abatement, but if such motion be not made and disposed of before appearing to the action, or before taking or assenting to a continuance, the party is taken to have waived all defects in the process, and the return thereon. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

Noncompliance with Statute by Clerk.—A party who obtains a continuance can not afterwards say that he was not regularly brought into court on account of a noncompliance with Va. Code 1904, § 3318, requiring the clerk of a circuit court, where a suit is begun, to transmit to the clerk of the circuit court to which the cause is removed, not only the original papers in the cause, but copies of all rules and orders made therein, and a statement of the costs incurred by each party. *Carnahan v. Ashworth*, 2 Va. Dec. 608. See the title REMOVAL OF CAUSES.

In a proceeding against trustees of a church for the removal of certain of their body and the appointment of others, if the defendants appear and move for a continuance of the hearing to a certain day, without objecting to the notice to them of the application of the court for removal, they must be considered as waiving any objection thereto for want of reasonable notice, or if it was otherwise insufficient. *Venable v. Coffman*, 2 W. Va. 310.

Upon indictment for carrying on a lottery business, accused "appears and

pleads to the charge" and moves for a continuance. Held, not error to deny the motion. Code, § 4010. "The first ground assigned as error is that the court refused to grant to the plaintiff in error a continuance of his case; that the matter of continuances is one within the discretion of the trial court, but that discretion must be exercised soundly, and not arbitrarily, and that the exercise of that discretion in this case operated to the disadvantage of the plaintiff in error, as the refusal of the court to grant his motion for a continuance forced him into an instantaneous trial and deprived him of all opportunity to prepare for his defense. This assignment of error is sufficiently answered by § 4010 of chapter 196 of the Code of Virginia, which is as follows: Section 4010. On any indictment or presentment not embraced in the preceeding section (which is as to petty fines), founded on any provision of chapter one hundred and eighty-seven (gaming act), or on a violation of any provisions of the laws relating to the public revenue, process shall be issued immediately. If the accused appear and plead to the charge, the trial shall proceed without delay.' In this case the accused appeared and pleaded to the charge, and the trial did proceed without delay. The law was complied with, and the continuance asked for was properly refused, and there is no error in this assignment." *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

Nonsuit.—If a declaration is not filed, and the defendant consents to a continuance, he is presumed to waive his right to a nonsuit, and the cause remains in court. *Pickett v. Claiborne*, 4 Call 99. See the title DISMISSAL, DISCONTINUANCE AND NON-SUIT.

VII. Rule Where One or More Continuances Already Granted.

Harmless Error.—In *Logie v. Black*,

24 W. Va. 2, 21, Judge Green says: "It may be regarded as settled law in Virginia and in this state, that where a party has obtained one or more continuances at prior terms of court, and the court in the exercise of its discretion refuses to again continue his case, even when he has apparently brought himself within the general rule, which ordinarily entitles a party to a continuance, the appellate court will not reverse such case because of the refusal of the circuit court to grant such continuance, unless the party complaining makes out a very strong case, and the appellate court sees, that the party has suffered from an abuse by the circuit court of its legal discretion. Some appellate courts have gone further than ours and have held, that they would not review the exercise of such discretion by the inferior court, whose opportunities of exercising its discretion in such case must greatly exceed that of the appellate court. We have, however, determined that the exercise of such discretion is reviewable; but under such circumstances the leaning of the court will be strong to support the action of the circuit court." *Bank v. Ralphsnyder*, 54 W. Va. 239, 46 S. E. 206. See *Davis v. Walker*, 7 W. Va. 447.

In *Milstead v. Redman*, 3 Munf. 219, one continuance was granted defendant, and after a new trial another continuance was allowed him. Held, not error to refuse a motion for third continuance though absent witness had been summoned and was material.

In *Wilson v. Kochnlein*, 1 W. Va. 145, after three successive continuances no deposition having been taken and no summons returned executed, the motion for a fourth continuance was denied properly.

In *Davis v. Walker*, 7 W. Va. 447, after two continuances had been granted on motion of defendant, it was held, no error to refuse a third, especially as no deposition had been taken, though there was ample time.

In *Brooks v. Calloway*, 12 Leigh 466, there had been three successive continuances granted to defendant and leave to take depositions. Held, not error to refuse another.

In *Spengler v. Davy*, 15 Gratt. 381-5, it is said: "When we take into consideration the further fact that the plaintiff in error had already been indulged with two continuances of the cause, the fair conclusion is that if he has lost the benefit of any important fact on the trial of his case, such loss is due, not to any injustice or harshness in the ruling of the court, but to his own culpable negligence."

In *Schonberger v. Com.*, 86 Va. 489, 10 S. E. 713, it was held, no error to refuse another continuance after several had been granted to accused, and that the court exercised only a sound discretion in denying the motion for a further continuance, when the accused had not brought himself within the rule of due diligence.

In *Payne v. Zell*, 98 Va. 294, 36 S. E. 379, one continuance, because of the absence of the party to the case, had been granted, and the court refused a second continuance. See also, *Holt v. Com.*, 2 Va. Cas. 156.

Reversible Error.—Although one continuance has already been granted, yet it is reversible error to refuse a second or further continuance, where it appears that the absent witness is material, that the application was made in good faith, and that the affiant used reasonable diligence on various occasions, at considerable expense, to take the depositions of such witness, but that by reason of irregularities over which the affiant had no control, such as insufficient notice of the time and place of taking, etc., the depositions were rejected. And this is especially true where it appears that the other party would not be subjected to any inconvenience or damages by a delay for a term. *Fiott v. Com.*, 12 Gratt. 564. See *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

VIII. Continuances of Chancery Suits.

A. IN GENERAL.

A motion for a continuance of a chancery cause, on the ground that only one of the three defendants to a bill filed against joint defendants had appeared and answered; that the bill was taken for confessed as to other defendants; that no testimony had been taken to establish the allegations of the bill; and that a rule prevailed in the circuit court not to try a case at the first term after it was brought, in the absence of counsel, unless both parties consented, is properly overruled where there is no evidence that there was such rule of court as is relied on, where it does not appear that counsel was absent, and where the record shows no motion for a continuance. *Aiken v. Connelley*, 2 Va. Dec. 383, citing *Dillard v. Dillard*, 2 Va. Dec. 28.

B. DIVORCE CASES.

See the title **DIVORCE**.

"Mr. Bishop, in his work on *Marriage and Divorce*, vol. II, § 673, says: 'In proper circumstances, where justice requires, the courts in divorce causes are liberal in allowing continuances and suspensions of the hearing, to supply defects in the evidence or pleadings. The public is not interested to interpose technical obstructions. Of all causes there are none wherein more than these the exact and real truth should on every account be made to appear.' The doctrine stated by this learned author, and supported by ample authority cited, is peculiarly applicable to the case at bar." *Willard v. Willard*, 98 Va. 465, 469, 36 S. E. 518.

C. NEWLY-DISCOVERED EVIDENCE.

See also, the title **NEW TRIALS**.

A continuance ought not to be granted at law, on the ground that the party, a few days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defense at law, unless he make affidavit

that the usury therein charged had recently come to his knowledge. *Ross v. Norvell*, 3 Munf. 170.

Affidavit.—In *Rosset v. Greer*, 3 W. Va. 1, it was held no error in a chancery case, to refuse a continuance when the affidavit did not show that the newly discovered evidence which furnished the ground of the motion could not have been discovered before by due diligence and also because it did not disclose the nature of the evidence so that it might be seen whether it was material or not.

What Bill of Exceptions Must Show.

—In *Ross v. Norvell*, 3 Munf. 182, there was newly-discovered evidence a few days before trial and a motion was made for a continuance. It was held, that since the bill of exceptions did not show that this evidence was recently discovered, it would be presumed that appellant knew of it when the trial began, and knowing of it, he was negligent in not bringing it forward sooner.

D. REHEARING.

See the title REHEARING.

Refusal to continue a chancery suit, in a proper case for a continuance, is good ground for a motion to rehear an interlocutory decree, but the decree should, as a general rule, show that a motion for a continuance was made and overruled. If, however, the decree fails to show that the motion was made, but it is averred in the petition for rehearing and not denied, this is sufficient. *Spilman v. Gilpin*, 93 Va. 698, 25 S. E. 1004.

IX. Continuances in Criminal Cases.

See generally, the title CRIMINAL LAW.

Introductory.—Under this section only such matters relating to continuances as are peculiar to criminal cases will be treated. The rules applicable to continuances are, in the main, the same in civil and criminal cases, and, therefore, a separate treatment of such

grounds as are common to both civil and criminal proceedings would involve needless repetition. So reference is here specifically made to the other sections of this title.

A. TIME OF MAKING MOTION.

Joyce v. Com., 78 Va. 287, decides it competent for the prisoner to move for a continuance before his formal arraignment.

On indictment for capital felony it was held, error not to entertain a motion for continuance before arraignment. The court says, "As well might it be contended that a motion for a continuance can not be made until after trial, as that it can not be entertained before arraignment." Such refusal in this case was held to deprive the prisoner of his statutory right to elect the forum in which he should be tried. *Anderson v. Com.*, 84 Va. 77, 3 S. E. 803.

In *Boswell v. Com.*, 20 Gratt. 860, the case was thrice continued before arraignment.

On indictment for a capital offense the prisoner, in the exercise of his statutory privileges, elected to be tried in the circuit court. Though it appeared by the certified record that the county court had erroneously refused to entertain a motion for continuance before arraignment, yet it was held, the circuit court had no power to correct this error. *Howell v. Com.*, 86 Va. 817, 11 S. E. 238.

B. PRESENCE OF ACCUSED.

See generally, the title CRIMINAL LAW, and references given.

1. Before Arraignment.

Before arraignment the prisoner need not be present when his case is continued. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858. See also, *Anderson v. Com.*, 84 Va. 77, 3 S. E. 803. *Jackson v. Com.*, 19 Gratt. 656.

It is assigned as error that the prisoner was never present in court at any of the terms at which the case was continued; that all the continuances were

taken while he was confined in the jail of Warren county and that, therefore, these continuances were erroneous and wrongful as to him, and the four terms should be counted in his favor. This position is also untenable. A case may properly be continued in the absence of the prisoner before his arraignment, and in this case the arraignment did not take place until the term at which he was tried. See *Boswell's Case*, 20 Gratt. 860. *Kibler v. Com.*, 94 Va. 804, 812, 26 S. E. 858.

2. After Arraignment.

But after arraignment, on indictment for felony, if a continuance is granted, it should appear by the record that the prisoner was present at the time of the granting of the continuance. *Shelton v. Com.*, 89 Va. 450, 16 S. E. 355; *Sperry v. Com.*, 9 Leigh 623; *Jackson v. Com.*, 19 Gratt. 668; *Bond v. Com.*, 83 Va. 581, 3 S. E. 149; *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238; *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

A report being made to the circuit court of Henrico by the superintendent of the penitentiary, pursuant to the statute, 1 Rev. Va. Code, ch. 171, § 16, that a convict received into the penitentiary is the same person mentioned in the record of a former conviction, and that he has not been sentenced to the punishment prescribed by law for his second offense, the court continues the case at several successive terms, in the absence and without the consent of the convict; after which he is brought into court for the first time, and his identity being duly ascertained, he is sentenced to the proper punishment for his second offense; held, such continuance of the case furnishes no ground of objection to the judgment. *Brooks v. Com.*, 2 Rob. 845.

Record Must Show Presence of Accused.—While it is necessary that one indicted for felony shall be personally present when a motion is made by his counsel for a continuance of his cause, and that the record shall show that; yet, if anything appears in the record

from which his presence must be necessarily inferred, it is all that the law requires; and the fact that he appears by counsel does not show that he was not personally present in court. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

Continuance "On Motion of the Defendant."—In *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238; *Benton v. Com.*, 91 Va. 782, 21 S. E. 95, it was claimed that it did not sufficiently appear from the record that the accused was personally present in court when his case was continued. But it was held, otherwise, on the ground that in each case the record stated that, "on motion of the defendant" the case was continued. It was said that from this it was to be reasonably inferred that the accused was present when the order was made. The whole record may be looked to, and if anything appears in it from which the presence must be necessarily inferred, it is all that the law requires. Citing *Lawrence v. Com.*, 30 Gratt. 851; *Sperry v. Com.*, 9 Leigh 623; *Cluverius v. Com.*, 81 Va. 787; *Bond v. Com.*, 83 Va. 581, 3 S. E. 149; *Shelton v. Com.*, 89 Va. 450, 16 S. E. 355.

In *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238, the following order was entered: "On the motion of the defendant the foregoing cause is continued for the defendant." It was claimed that the judgment must be reversed because the order does not show that the prisoner was personally present when it was made. The objection was overruled because the record showed affirmatively that the accused was present and not absent, when this order was entered.

Harmless Error.—Where the prisoner is not prejudiced, it is not error to continue an indictment against him for a felony in his absence. *O'Boyle v. Com.*, 100 Va. 785, 40 S. E. 121.

C. PENDENCY OF ANOTHER CASE.

On an indictment, when accused asks a continuance on the ground that

another case involving the same question is pending in the court of appeals on writ of error, it is error for the court to deny a continuance. *White v. Com.*, 79 Va. 611.

In *Taylor v. Com.*, 29 Gratt. 780, on an indictment for obstructing the street, it was held the fact that an injunction suit was pending in the same court was no ground for continuing the prosecution under the indictment, especially as the questions to be decided in the injunction suit must be decided in the trial under the indictment.

D. INSANITY OF ACCUSED.

If there is a reasonable ground to doubt the sanity of the accused at the time of the trial, and after a jury is impanelled, it is the duty of the court to suspend the trial and to impanel another jury to inquire into the fact of such sanity. *Gruber v. State*, 3 W. Va. 699.

E. CONTINUANCE TO APPLY FOR PARDON.

See the title PARDON.

Though a particeps criminis, called as a witness for the commonwealth on the trial of his accomplice, voluntarily gives evidence, and fully, candidly and impartially discloses all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt, and therefore no right to demand a continuance of his cause until he can have an opportunity to apply to the executive for such pardon. *Com. v. Dabney*, 1 Rob. 696, 40 Am. Dec. 717.

F. PREJUDICE.

Known prejudice and ill feeling towards a prisoner on trial for murder, extending over a large portion of a county, furnish good grounds for a continuance. *State v. Manns*, 48 W. Va. 480, 37 S. E. 613.

But in *Smith v. Com.*, 2 Va. Cas. 6, it was decided that a motion for continuance on the sole ground of preju-

dice against the prisoner, was properly refused. There did not appear any proof of undue means used to prejudice the public mind.

So also, in *Joyce v. Com.*, 78 Va. 287, it was held, that though a motion for continuance could be made before arraignment, yet affidavit of general prejudice is not sufficient ground to sustain such motion.

X. The Order—Necessity of.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT; JUSTICES OF THE PEACE.

All causes upon the docket of any court, and all other matters ready for its decision which shall not have been determined before the end of a term, whether regular, adjourned or special, shall, without any order of continuance, stand continued until the next term. Code, W. Va., ch. 114, § 12; Va. Code, 1904, § 3124.

If a cause is not tried at the appointed time, or within one hour, as a general rule it stands continued by operation of law, unless the justice at the time is engaged in the trial of another action. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. 935.

A case stands continued without any order, and a failure to enter order of continuance, works no discontinuance. *Harrison v. Com.*, 81 Va. 491, explaining *Amis v. Koger*, 7 Leigh 223.

Consent of Parties.—In *Amis v. Koger*, 7 Leigh 221, the court without consent of defendant continued the case over a period of two terms. Held, this was a discontinuance of the cause.

But in *Hale v. Burwell*, 2 Pat. & H. 608, the cause was continued regularly from term to term except that, at the April term, it was continued to the June term, and at the November term to the March term and at the July term no notice was taken of it, either by continuance or otherwise. It was held, that the cause was not discontinued by reason of the failure to note on record its continuance, and this more es-

pecially as after the several miscon-
tinuances or failure to continue, the
cause was regularly continued subse-
quently by consent of the parties. See
Va. Code, 1850, § 16, p. 627; Va. Code,
1904 §§ 3124 and 4013. But §§ 3123,
3124, would not authorize the court to
continue the cause for two terms pass-
ing over an intervening one without
consent of accused. See *Bolanz v.*
Com., 24 Gratt. 39, which is decided
under Va. Code, 1860, ch. 161, §§ 15
and 16 which are identical with the
sections supra.

If a justice fail to attend to try a case
pending before him at the hour set,
and no other justice appears to try the
case at that time, when the hour has
elapsed the case stands continued, by
operation of law, for one week. After
such continuance has become consum-
mated by the necessary lapse of time,
one of the parties to the suit, in the
absence of and without the consent
of the other, can not call in another
justice to proceed with the trial of the
case. If he does so, his judgment is
without jurisdiction, and void, and may
be set aside by the original justice, in
custody of the docket and papers on
motion, after notice to the opposing
party. *Parsons v. Aultman*, 45 W. Va.
473, 31 S. E. 935.

XI. Review.

See ante, "Discretion of Court," I.

A. GRANTING OR REFUSING CONTINUANCE.

1. Discretion of Court.

A motion for a continuance is ad-
dressed to the sound discretion of the
trial court under all the circumstances
of the case, and though its action in
granting or refusing to grant a contin-
uance is subject to review by an appel-
late court, it will not be reversed un-
less plainly erroneous. *M'Alexander v.*
Hairston, 10 Leigh 486; *Anthony v.*
Lawhorne, 1 Leigh 1; *Smith v. Com.*,
2 Va. Cas. 6; *Trevelyan v. Lofft*, 83 Va.
141, 1 S. E. 901; *Com. v. Mister*, 79

Va. 5; *Hite v. Com.*, 96 Va. 489, 31 S.
E. 895; *Early v. Com.*, 86 Va. 921, 11
S. E. 795; *Norfolk, etc., R. Co. v. Shoot*,
92 Va. 45, 22 S. E. 811; *Clinch River*
Mineral Co. v. Harrison, 91 Va. 122,
21 S. E. 660; *Goodell v. Gibbons*, 91
Va. 680, 22 S. E. 504; *Norfolk, etc., R.*
Co. v. Wade, 10 Va. 140, 45 S. E. 915;
Carter v. Wharton, 82 Va. 264; *Kinzie*
v. Riely, 100 Va. 709, 42 S. E. 672;
Scott v. Boyd, 101 Va. 28, 42 S. E.
918; *Kelly v. Lehigh Mining, etc., Co.*,
98 Va. 405, 36 S. E. 511; *Payne v.*
Zell, 98 Va. 294, 36 S. E. 379; *Phillips*
v. Com., 90 Va. 401, 18 S. E. 841;
Wytheville Insurance, etc., Co. v.
Teiger, 90 Va. 277, 18 S. E. 195; *Keesee*
v. Border Grange Bank, 77 Va. 129;
Hewitt v. Com., 17 Gratt. 627; *Vide*
Commonwealth v. Mister, 8 V. L. J.
50; *Harman v. Howe*, 27 Gratt. 676;
Matthews v. Warner, 29 Gratt. 580;
Fiott v. Com., 12 Gratt. 576; *Roussell*
v. Com., 28 Gratt. 930; *Apperson v.*
Cabell, 1 Va. Dec. 557; *Manufactures,*
etc., Bank v. Mathews, 3 W. Va. 26;
Marmet v. Archibald, 37 W. Va. 778, 17
S. E. 299; *Buster v. Holland*, 27 W.
Va. 511; *Logie v. Black*, 24 W. Va. 21;
Riddle v. McGinnis, 22 W. Va. 253;
State v. Betsall, 11 W. Va. 703; *Empire*
Coal, etc., Co. v. Hull Coal, etc., Co.,
51 W. Va. 474, 41 S. E. 917; *State v.*
Jones, 53 W. Va. 613, 45 S. E. 916;
State v. Roberts, 50 W. Va. 422, 40 S.
E. 484; *Davis v. Walker*, 7 W. Va. 447;
Bank of Ravenswood v. Hamilton, 43 W.
Va. 75, 27 S. E. 296; *Bank v. Ralph-*
snyder, 54 W. Va. 231, 46 S. E. 206;
State v. Lane, 44 W. Va. 730, 29 S. E.
1020; *State v. Harrison*, 36 W. Va. 730,
15 S. E. 982; *State v. Emblem*, 46 W.
Va. 326, 33 S. E. 223; *Amos v. Stockert*,
47 W. Va. 109, 34 S. E. 821; *State v.*
Madison, 49 W. Va. 96, 38 S. E. 492;
Hannum v. Hill, 52 W. Va. 166, 43 S.
E. 223; *Smith v. Knight*, 14 W. Va.
749; *Wilson v. Wheeling*, 19 W. Va.
323; *Dimmey v. Wheeling, etc., R. Co.*,
27 W. Va. 32.

Applications for continuances are ad-
dressed to the discretion of the trial

court, and a judgment will not be reversed for the refusal of a continuance, when it appears that the defendant has unreasonably delayed the disclosure of any defense, and sets up none at the time of the motion, and the facts and circumstances are such as may have satisfied the court that he is merely seeking delay. *Bank v. Ralphsnyder*, 54 W. Va. 232, 46 S. E. 206.

"The court in which a trial takes place is in a position to determine better than any one else can do the sufficiency of grounds relied on for a continuance. Hence it is that an appellate court does not interfere unless the judgment of the court below on such a motion is plainly erroneous. * * * And, though an appellate court will supervise the action of the lower court on such a motion, it will not reverse a judgment on that ground, unless plainly erroneous." *Gaines v. Wilson*, 2 Va. Dec. 372, citing *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 812.

"It is claimed by the defendants here that the action of the court below in refusing to grant continuance is conclusive of that question, and that it can not be reviewed in this court as an appellate tribunal. Such is the uniform and well established rule in the supreme court of the United States, and I have not found that a different practice prevails in the supreme court of any state, except in the supreme court of the state of Virginia and of this state. It seems to me that the action of a court below in the matter of a continuance is as necessary a subject of review in an appellate court as its action in any other matter. But whatever I might think of the question as an original one, I think this court ought to follow the practice prevailing in the supreme court of appeals of Virginia at the time of the formation of this state. Of the numerous cases before the court of appeals of Virginia from time to time, in the action of the courts below in refusing continuances, that

have been under review, no two of them have been alike, and each one has depended on its own peculiar facts." *Tompkins v. Burgess*, 2 W. Va. 187.

2. Granting Continuance.

a. Harmless Error.

It is only where a party is ruled into trial improperly, that an error of the court in deciding on a motion for a continuance can be corrected by a superior court. If the error be in continuing the case improperly, the only effect of it is the delay of the case; it is not a discontinuance; nor could it be a good reason for setting aside a judgment at a subsequent term, when a full and fair trial had been given to the prisoner. This objection, therefore, affords no ground for reversal of the judgment. *Brooks v. Com.*, 2 Rob. 849.

A commissioner properly has much latitude of discretion in granting continuances of proceedings before him; and the court whose order he is executing will not overrule his action in that respect, unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause. *Fant v. Miller*, 17 Gratt. 187.

b. Reversible Error.

Right of Accused to Speedy Trial.—

A motion for a continuance is always within the sound discretion of the court, to be exercised fairly with due regard to the circumstances and the law enacted pursuant to art. 1, § 10, of the constitution, declaring that, "in all criminal prosecutions a man hath a right to a speedy trial." Code, § 4016. Defendant, in jail since September, 1892, all the time ready for trial, demanded trial on February 15, 1893, his case being set for trial on that day. Commonwealth announced that it had made no preparation for trial on that day, and had recalled processes for witnesses and could offer no evidence at that term. The court then continued the case until March 16th, the day of expiration of sentence of common-

wealth's witness, B, who was then in jail for a felony, and incompetent to testify. Held, such continuance was a reversible error. *Benton v. Com.*, 90 Va. 328, 18 S. E. 282. See also, *Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364.

3. Refusal to Grant Continuance.

a. Harmless Error.

In General.—This court will never reverse the judgment of an inferior court for refusing to grant a continuance, unless the refusal was plainly erroneous. *Carter v. Wharton*, 82 Va. 267.

A motion to postpone until another day the submission of the case to the jury is addressed to the sound discretion of the trial court under all the circumstances, and the appellate court will not reverse a judgment on the ground of a refusal to postpone, unless such refusal plainly appears to have been an abuse of such discretion. *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953.

Failure to Ask for Continuance.—Where the record fails to show that complainant asked for further time to prepare his case, an assignment of error on this ground will be overruled. *Dillard v. Dillard*, 2 Va. Dec. 28; *Aiken v. Connelley*, 2 Va. Dec. 383.

Criminal Cases.—The judgment of a criminal court, refusing a continuance, will not be reversed, unless plainly erroneous. *State v. Lane*, 44 W. Va. 730, 29 S. E. 1020; *State v. Emblem*, 46 W. Va. 326, 33 S. E. 223.

Prejudice against Accused.—See ante, "Prejudice," IX, F.

It is only in a case where the discretion of the lower court is manifestly abused, that an appellate court will grant a writ of error on the ground that the lower court overruled a motion of the accused for a continuance on the ground of local prejudice, especially where there is no proof of any undue means used to prejudice the public mind, and there is only the single affidavit of the counsel for the prisoner

stating his belief of the existence of such prejudice. It is easy for the judge who sat on the trial to ascertain whether that belief is well founded, and very difficult for the appellate court to say that he ought to have been satisfied with the affidavit. *Smith v. Com.*, 2 Va. Cas. 6; *Joyce v. Com.*, 78 Va. 287.

To Enable Party to Find Evidence.

To reverse a conviction because of refusal to delay or continue the trial to enable the accused to learn whether evidence exists material to the defense, it must appear clearly that the court abused its discretion, and that its action is plainly erroneous. It must appear that such material evidence existed, and would likely be produced, and the witness expected to give it must be named, and some reasonable ground must appear for the expectation that the evidence exists and will be produced. A mere hope of finding such evidence, based on no tangible substantial ground, will not do. *State v. Madison*, 49 W. Va. 96, 38 S. E. 492.

Refusal to Grant Second or Further Continuance.—An appellate court will never reverse the lower court in refusing to grant a second or further continuance of a case, unless the party complaining makes out a very strong case, and the appellate court sees that the party has suffered from an abuse by such court of its legal discretion. *Milstead v. Redman*, 3 Munf. 219; *Brooks v. Calloway*, 12 Leigh 466; *Holt v. Com.*, 2 Va. Cas. 156; *Spengler v. Davy*, 15 Gratt. 381; *Schonberger v. Com.*, 86 Va. 489, 10 S. E. 713; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Wilson v. Kochnelein*, 1 W. Va. 145; *Davis v. Walker*, 7 W. Va. 447; *Logie v. Black*, 24 W. Va. 2; *Bank v. Ralphsnyder*, 54 W. Va. 239, 46 S. E. 206.

Dismissal of Witness by Prosecuting Attorney.—It is not reversible error to overrule a motion for a continuance upon the ground that the prosecuting attorney had discharged a witness summoned for the state, which he knew was material for the defense, and sent

him away from the court surreptitiously, without the knowledge or consent of the court, prisoner or his attorney. If the prisoner wished such witnesses, he should have had them summoned. *State v. Lane*, 4 W. Va. 730, 29 S. E. 1020.

To Allow Administrators to Defend.

—In *Clements v. Powell*, 9 Leigh 1, it was held, no error to refuse a continuance on the ground "that the administrators desired to defend themselves by showing there were no assets in their hands to which plaintiff was entitled in due course of administration," but the defendants tendered no such plea as was pleaded in *Chisholm v. Anthony*, 1 Hen. & M. 27, of any other defense; they did not file affidavit nor even suggest that there were no assets to satisfy the claim. There was, therefore, no good cause for continuance.

Partition Suits.—The owners of an equity of redemption may have partition, and it is not error to refuse a continuance of the suit because one of the coparceners has a claim against the ancestor, especially when there is a suit pending in the same court for the purpose of ascertaining the debts against such ancestor, and having the same paid. *Martin v. Martin*, 95 Va. 26, 27 S. E. 810.

Absence of Witness.—The refusal of the court to continue a case until a succeeding term on account of the absence of a witness who had testified at a former trial, and who had removed from the commonwealth, the defendants stating that they believed that her presence would be secured if the continuance should be granted, is not reversible error, it appearing that her deposition had been taken in anticipation of her removal from the state. *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504.

b. Reversible Error.

A motion for continuance is generally addressed to the sound discretion of the court, under all the circumstances of the case, and although an

appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground unless such action was plainly erroneous. But when a continuance has been improperly refused, and any party aggrieved thereby brings the case to this court upon appeal, the case will be for that cause reversed. *Hewitt v. Com.*, 17 Gratt. 627; *Taylor v. Peck*, 21 Gratt. 11; *Roussell's Case*, 28 Gratt. 930; *Bland and Giles County Judge Case*, 33 Gratt. 443; *Fiott v. Com.*, 12 Gratt. 564; *Apperson v. Cabell*, 1 Va. Dec. 557, 559; *Higginbotham v. Chamberlayne*, 4 Munf. 547; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431-647; *Pairo v. Bethell*, 75 Va. 825-28; *Keesee v. Border Grange Bank*, 77 Va. 129; *Com. v. Mister*, 79 Va. 5; *Phillips v. Com.*, 90 Va. 401, 18 S. E. 841; *Welch v. Com.*, 90 Va. 321, 18 S. E. 273; *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Gaines v. Wilson*, 2 Va. Dec. 368; *Fiott v. Com.*, 12 Gratt. 564-576; *Buster v. Holland*, 27 W. Va. 510-534; *State v. Maier*, 36 W. Va. 757, 15 S. E. 991; *Shelton v. Com.*, 89 Va. 450-453, 16 S. E. 355.

A motion for a continuance is addressed to the sound discretion of the court, in view of all the circumstances of the case; and an appellate court will review and reverse the action of an inferior court, if, in the exercise of its discretion, it has harshly or unjustly refused a continuance, and especially where there is nothing in the circumstances to warrant the conclusion that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it. *Myers v. Trice*, 86 Va. 835, 11 S. E. 428.

Failure to Give Security for Costs.

It is reversible error to rule a defendant to trial on a motion for a continuance on the ground that the plaintiff has failed until the term at which the motion is made to give security for costs, after a rule to do so. *Jacobs v. Sale*, Gilm. 123, cited in *Manufacturers, etc., Bank v. Mathews*, 3 W. Va. 26.

Absence of Witness.

In General.—Where a witness fails to appear, and it is shown that a subpoena for him was duly returned executed, or if not so returned, was delivered to the proper officer, a reasonable time before the trial, and that the witness is material, and that trial can not be safely gone into without his testimony, a continuance should be granted, if there be reasonable ground to believe that his attendance at the next term can be secured; and it matters not that the witness is the plaintiff or the defendant in the case. *Carter v. Wharton*, 82 Va. 264.

Under what circumstances a continuance ought to be granted, on the ground of the absence of witnesses, without positive proof, that the subpoenas were delivered to the sheriff of the county, or sent to the sheriff of any other county, see *Deans v. Scriba*, 2 Call 415; *Hook v. Nanny*, 4 Hen. & M. 157; *Syme v. Montague*, 4 Hen. & M. 180; *Ross v. Norvell*, 3 Munf. 170; *Milstead v. Redman*, 3 Munf. 219; *Higginbotham v. Chamberlayne*, 4 Munf. 547; *Deford v. Hayes*, 6 Munf. 390.

Criminal Cases.—In *Gwatkin v. Com.*, 9 Leigh 678, the denial of the accused, indicted for a felony, of a continuance on the ground of the absence of a witness, was held error for which judgment of conviction must be reversed. Cited in *Walton v. Com.*, 32 Gratt. 865; *Welch v. Com.*, 90 Va. 321, 18 S. E. 273; *Phillips v. Com.*, 90 Va. 403, 18 S. E. 841.

After a former conviction set aside on appeal, defendant moved for a continuance for absence of a material witness from sickness, but convalescent and able to attend (in defendant's opinion), at the term to which he moved the case to be continued, though the physician stated there was but little chance of his recovery; held, refusal to grant the continuance was a reversible error. *Phillips v. Com.*, 90 Va. 401, 18 S. E. 841.

W., indicted for larceny in the county

court of F., sends, in reasonable time, a subpoena for two witnesses living in an adjoining county; and the sheriff of that county makes return upon it not executed for want of fees. When the case is called W. asks for a continuance, on the ground of their absence, and makes affidavit as to their materiality. The court refuses to continue the case, but sends for the witnesses, and says that they may be examined if they come before the trial is ended. One comes, but not till the trial is ended, when there is a motion for a new trial. There being nothing to indicate that W. was not acting in good faith; held, it was error not to continue the case, upon the application of W. *Walton v. Com.*, 32 Gratt. 855.

Notice of Judicial Sale.—On motion to dissolve injunction to sale, it is error to deny a continuance asked for by plaintiff to enable him to obtain additional material evidence to prove that the notice of sale was defective, which he had been unable to obtain by use of due diligence. *Vaught v. Rider*, 83 Va. 659, 3 S. E. 293.

Sickness of Defendant.—An action of slander is commenced on the 21st of July in a circuit court; but the judge of that court being related to one of the parties, an order is entered on the 27th of September, by consent of the parties, sending the case to the county court. On the 20th of November, a motion is made to the county court for a continuance, on the ground that the defendant had been confined to his bed by sickness for some time previous, and was still so confined, so that he could not attend to the case in person and prepare himself for trial; and it is admitted by the plaintiff's counsel that such had been and still is the situation of the defendant. But a trial being nevertheless urged, the court is divided on the motion for a continuance, and the same being overruled, a verdict and judgment are rendered against the defendant. Held, the county court erred in so ruling the defendant to

trial, at the term next after the cause had been transferred to that court, and at which it was docketed in that court for the first time. *M'Alexander v. Hairston*, 10 Leigh 486. See *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

4. Relief against Refusal to Continue.
a. Refusal to Continue in Examining Court.

Refusal to continue in the examining court is no ground for motion in arrest of judgment in the circuit court, for it suggests matter making no part of the record. If such error can be taken advantage of in the circuit court it is only by a motion to quash or a plea in abatement. *Morris v. Com.*, 9 Leigh 636.

b. At Law or in Chancery.

The relief for a defendant at law, in case of improper refusal to continue the cause, is at law and not in chancery. *Syme v. Montague*, 4 Hen. & M. 180.

B. TAXING COSTS OF CONTINUANCE.

This court will not reverse a case, because at some term of the court during the pendency of the case in the circuit court, it improperly required the plaintiff in error to pay the costs of a continuance. *Kemble v. Herndon*, 28 W. Va. 524.

C. FAILURE TO CALL DEFENDANT.

In a judgment on a forthcoming bond, if the record states that the cause was continued until the next day, but does not mention that the defendant was called, it is not error, if the defendant, on the day of the judgment, prays an appeal, and gives bond, in court, to prosecute it. *Wilkinson v. Hendrick*, 5 Call 12.

Where notices are given to any particular day in the district court, the practice has invariably been considered as requiring that the defendant should be called before any continuance is made. *Wilkinson v. Hendrick*, 5 Call 12. And this calling should ap-

pear by the record. *Parker v. Pitts*, 1 Hen. & M. 4.

D. EXCEPTIONS AND OBJECTIONS.

See the titles APPEAL AND ERROR, vol. 1, p. 547; EXCEPTIONS, BILL OF.

1. In General.

There must be a motion for a continuance and an exception taken to the action of the court in refusing to allow it, or the higher court can take no cognizance of such refusal; and this is true though the party be entitled to continuance as a matter of right. The maxim omnia rite esse acta præsumentur applies in such case. *Southall v. Exchange Bank*, 12 Gratt. 312-316; *Early v. Com.*, 86 Va. 925, 11 S. E. 795.

2. Assignment of Errors.

"This court has repeatedly held, that upon questions of the continuance of a cause, very large discretion must of necessity be vested in the trial court. It is only in a clear case, where this discretion has been abused, and injustice has been done, that the appellate court will interfere. Especially it ought not to interfere, I think, in a case where the failure to grant a continuance is not even assigned as ground of error in the appellate court." *Matthews v. Warner*, 29 Gratt. 580; *Dillard v. Dillard*, 2 Va. Dec. 28.

3. Bill of Exceptions.

What Bill Must Show.—Where no error in overruling a motion for a continuance is apparent from the record, the higher court will refuse to reverse. The bill of exceptions must show error. *Ross v. Norvell*, 3 Munf. 170; *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

In *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901, it was held, no ground of continuance could be taken advantage of in the higher court unless properly put on the record by a bill of exceptions.

On a bill of exceptions to the opin-

ion of the court below refusing to grant a continuance, the appellate court ought not to reverse the judgment, for a ground of continuance not stated in such exceptions. *Ross v. Norvell*, 3 Munf. 170.

4. Presumptions on Appeal.

The presumption is always that the judgment or decree of the trial court is right until the error is made to appear, and enough must be presented in the record to enable the appellate court to see that error has been committed before it will undertake to review and reverse the decree appealed from; and this is especially true as to the action of the trial court in granting or refusing a continuance. *Gaines v. Wilson*, 2 Va. Dec. 372.

In *Early v. Com.*, 86 Va. 921-925, 11

S. E. 795, it is said: "The circumstances under which the motion was made are not set out in the bill of exceptions with sufficient fullness as to enable us to do otherwise than to disregard the exception. Certainly the error, if any was committed, is not apparent, and nothing is better settled than that everything is to be presumed in favor of the correctness of the rulings of a court of competent jurisdiction, when brought under review in an appellate tribunal, until the contrary is shown."

E. RECORD.

An affidavit filed in support of a motion for a continuance which was overruled, is not a part of the record, unless it be made so by a bill of exceptions. *Garland v. Bugg*, 1 Hen. & M. 374.

Continuing Warranty.

See the title WARRANTY.

CONTINUOUS EASEMENTS.—See APPARENT EASEMENTS, vol. 1, p. 417. And see the title EASEMENTS.

CONTRACT OF MARRIAGE.—See the titles BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613; MARRIAGE.

In *Burke v. Shaver*, 92 Va. 347, 23 S. E. 749, it is said: "A contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must."

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As to contracts of service, see the title MASTER AND SERVANT. As to

impairment of obligation of contracts, see the title CONSTITUTIONAL LAW. As to lobbying contracts, see the title ILLEGAL CONTRACTS. As to contracts to make provision for another by will, see the title WILLS. As to contracts of hazard, see the title MORE OR LESS. As to contracts exempting from liability for negligence, see the titles CARRIERS, vol. 2, p. 671; ILLEGAL CONTRACTS. As to contracts for construction of railroads, see the titles RAILROADS; WORKING CONTRACTS. As to merger of simple contract in specialty, see the title MERGER. As to options for the purchase of land, see the title VENDOR AND PURCHASER. As to confederate contracts, see the title ILLEGAL CONTRACTS. As to dependent and independent covenants, see the title COVENANTS. As to equitable defenses in actions on contracts, see the title ACTIONS, vol. 1, p. 122. As to admissibility of parol evidence to explain written contracts, see the title PAROL EVIDENCE. As to time as essence of contracts of affreightment or charter parties, see the titles CARRIERS, vol. 2, p. 671; SHIPS AND SHIPPING. As to construction of oil and gas leases, see the titles GAS; MINES AND MINERALS. As to contracts by corporations, see the titles CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. As to contract to give injured employee employment in consideration that the latter release his claim for damages for the injury, see the title RELEASE. As to effect of signing contract without knowing or understanding its import and effect, see the title FRAUD AND DECEIT. As to construction of powers of attorney, see the title POWERS. As to consideration for orders, see the title ORDERS. As to construction of marriage contracts, see the title MARRIAGE CONTRACTS AND SETTLEMENTS. As to contracts between master and slave, see the title SLAVES. As to what constitutes such consideration for an agreement for indulgence as will release a surety from his obligations, see the title SURETYSHIP.

I. Definitions.

A. IN GENERAL.

A contract is the agreement of minds upon a sufficient consideration that something shall be done, or shall not be done. *Peerce v. Kitzmiller*, 19 W. Va. 564.

B. DEBT OF RECORD.

Blackstone, in his commentaries, divides contracts of debt into three classes: Debts of record, debts by specialty and debts by simple contract. "A debt of record is a sum of money, which appears to be due by the evidence of a court of record. Thus when any specific sum is adjudged to be due from the defendant to the plaintiff in action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature." *Roberts v. Cocke*, 28 Gratt. 222. See post, "Judgments," I, H.

C. CHARTERS.

See generally, the titles CONSTI-

TUTIONAL LAW; ante, p. 140; CORPORATIONS, and references given. See post, "Franchises," I, F; "Privileges to Do Business," I, K.

A charter of incorporation is not a contract between the corporate body on the one hand and individuals whose rights and interests may be affected by the exercise of its powers on the other, but it is a compact between the corporation and the government from which they derive their powers. Individuals, therefore, can not take it upon themselves, in the assertion of private rights, to insist on breaches of the contract by the corporation as a ground for resisting or denying the exercise of a corporate power. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

Municipal charters are not contracts, but are granted for public purposes, and amended or repealed at the discretion of the legislature. *Probasco v. Moundsville*, 11 W. Va. 501. See the

title MUNICIPAL CORPORATIONS.

A city charter is not a contract between the state and the city, securing to the city the absolute power of taxation beyond the control or modification of the legislature. *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. 604.

D. ENLISTMENTS.

"The error in the argument of the appellee's counsel consists in treating the enlistment in question merely as a contract, and as subject exclusively to the principles affecting the validity of contracts. A contract it undoubtedly is in a certain sense, inasmuch as it is an engagement between the parties, for a service to be rendered by one of them, in consideration of a compensation to be yielded therefor by the other. But it wants one of the usual requisites of contracts, a reciprocal obligation in regard to the subject matter. On the one hand, the recruit is bound to serve during the full term of his enlistment; but on the other, the government is not bound to continue him in service for a single day, but may dismiss him at the very first moment, or at any subsequent period, whether with or without cause for so doing. It has, moreover, a feature not to be found in most contracts; namely, a power in one of the parties to compel specific performance from the other by the exercise of physical force." *United States v. Cottingham*, 1 Rob. 630.

E. EXEMPTIONS.

Exemption from Taxation.—See the titles CONSTITUTIONAL LAW, ante, p. 140; TAXATION.

It is settled law that an exemption from taxation granted in the charter of a railroad company, constitutes a contract which is protected by the federal constitution, and is irrepealable, unless the power of repeal has been reserved, or subsequently acquired. *Com. v. Richmond, etc., R. Co.*, 81 Va. 355.

Exemption from Military Service.—
Exemption from future liability on the

part of a citizen to render military service at the call of the country, is not a subject matter of contract, within the meaning of the clause of the constitution prohibiting the passage of any law impairing the obligation of contracts. By the term "contracts" in that clause it is not meant to include rights and interests growing out of measures of public policy. Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired under them, those rights and interests can not be considered as violated by subsequent legislative changes which may destroy them. *Burroughs v. Peyton*, 16 Gratt. 490.

F. FRANCHISES.

See ante, "Charters," I, C; post, "Privileges to Do Business," I, K.

Irrevocable grants of franchises to corporations, which impair the supreme authority of the state to make laws for the right government of the state, must be regarded as mere licenses and not as contracts, which bind future legislatures; for no legislature can give away or sell the discretion of subsequent legislatures in respect to matters, the government of which, from the very nature of things, must vary in varying circumstances. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

It is beyond question that a grant by a municipal corporation, under authority of the statute of a state, to a private corporation to supply a city or town with electricity for the public use, or any similar franchise, constitutes a contract, when accepted and carried out by the corporation, which is under the protection of both the state and national constitutions. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

G. INSURANCE POLICIES.

See the title INSURANCE.

An insurance policy is a contract, and

is to be governed by the same principles as govern other contracts. Its language is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded; full legal effect should always be given to it, for the purpose of guarding the company against fraud and imposture. "Beyond this we would be sacrificing substance to form, following words rather than ideas." *United States Mut., etc., Ass'n v. Newman*, 84 Va. 58, 3 S. E. 805; *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209.

H. JUDGMENTS.

See the title JUDGMENTS AND DECREES.

In General.—In the definition of contracts the books include as contracts, contracts of record, "such as judgments, recognizances, and statutes staple." *Marsteller v. Ward*, 52 W. Va. 82, 43 S. E. 178; *Roberts v. Cocke*, 28 Gratt. 222.

"When any specific sum is adjudged to be due from the defendant to the plaintiff on an action or suit at law, this is a contract of the highest nature." *Bl. Com.*, book 2, p. 465. Under this authority we can readily say that in the construction of § 46 "contract" includes a judgment. *Marsteller v. Ward*, 52 W. Va. 82, 43 S. E. 178.

Judgments and decrees for money being contracts of the highest character, to abate any portion of the interest included in them would necessarily impair their obligation. Moreover, by such judgments and decrees the rights of the parties, in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become vested, and can not be divested, as provided by the act of the general assembly. *Griffin v. Cunningham*, 20 Gratt. 31; *Roberts v. Cocke*, 28 Gratt. 222.

A judgment founded on a tort is in no sense a contract. "It is clear, that a judgment founded upon a tort can in no case be regarded as a contract.

There is no agreement of the parties; and there is no consideration. It is founded upon no agreement of the parties, and there could have been no consideration moving the parties in such case. Instead of harmony there was discord; instead of agreement there was disagreement; and it would be absurd to say, that under such circumstances there could be a contract between the parties." *Peerce v. Kitzmiller*, 19 W. Va. 564.

A judgment founded on a tort is in no sense a contract; therefore, § 35 of article 8 of our constitution, as it only applies to judgments founded on torts, is not inhibited by § 10 of article 1 of the constitution of the United States, as it does not impair the obligation of a contract. *White v. Crump*, 19 W. Va. 583.

Illinois Statute of Set-Off.—A judgment is not a contract within the meaning of the statute of set-off in Illinois, providing that a defendant "in an action brought upon any contract or agreement, express or implied, having claims of demands against the plaintiff, may set up the same, and have them allowed him upon trial." *Rae v. Halbert*, 17 Ill. 572, quoted in *Allen v. Hart*, 18 Gratt. 728.

The words, "for the recovery of money arising out of contract," in § 46, ch. 125, W. Va. Code, 1899, include all actions in form *ex contractu*, but not those *ex delicto*, and thus include an action or *scire facias* upon a judgment, and therefore the plaintiff may, in such action or *scire facias* upon a judgment, file the affidavit of the amount due him prescribed in that section. "Counsel for Ward presents the point that § 46 only allows the plaintiff to get judgment on affidavit in actions 'for the recovery of money arising out of the contract,' and this action being one on a judgment is not one for recovery of money arising out of contract, as a judgment is not a 'contract,' and therefore the plaintiff had no right to file any affidavit, or ask judgment by force

of it. Like the words 'final judgment' mentioned above, that depends upon the sense in which, or the purpose for which, the statute uses the word 'contract.' Sometimes the word 'contract' would include a judgment, sometimes not. Generally, it does not include a judgment." *Marsteller v. Ward*, 52 W. Va. 75, 43 S. E. 178.

I. MARRIAGE.

See the titles **BREACH OF PROMISE OF MARRIAGE**, vol. 2, p. 613; **MARRIAGE**.

Marriage is undoubtedly a civil contract, because consent is necessary to its legal validity; but in its nature, attributes, and distinguishing features it is sui generis. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word "contract" employed in the common law or statutes. It may be entered into by persons during their minority and can not, when consummated, be dissolved by the parties. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community. The relation of the parties is essentially personal. Neither the rights, duties, nor obligations created by or flowing from it can be transferred, and an action for a breach of promise to marry, has very little resemblance to other contracts. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 35.

A contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

J. OFFICERS.

See the title **PUBLIC OFFICERS**. Appointment to office is not a con-

tract, and vests no rights in the appointee to the salary or emoluments thereto attached. *Frazier v. Virginia Military Institute*, 81 Va. 59.

K. PRIVILEGES TO DO BUSINESS.

See ante, "Franchises," I, F.

Bridges.—Act of February 9th, 1882, empowering supervisors of Stafford county to build a bridge across Rappahannock river, and commissioners appointed by the county judge to manage it after its erection, is simply a grant by the state of certain privileges for public purposes, and contains none of the elements of a contract. "The act is simply a grant by the state of certain privileges for public purposes, containing none of the elements of a contract, and therefore subject to be changed or repealed altogether as the legislature may see fit." *Supervisors v. Luck*, 80 Va. 223.

A privilege to sell liquor is not a contract protected by the constitutional prohibition against the impairment of the obligations of contracts. *Justice v. Com.*, 81 Va. 209.

The privilege to conduct a lottery is not a contract, but a matter of police; and the repeal of such privilege impairs the obligation of no contract, and is constitutional. *Justice v. Com.*, 81 Va. 209.

Section 4, act of 1816, conferring certain lottery privileges upon the D. S. C. Co. was, by implication, repealed by §§ 11, 12, acts, 1883-'84, p. 268, and those privileges were revoked. The bestowal of those privileges was not matter of contract, and their revocation was no impairment of the obligation of contract, and was constitutional. *Justice v. Com.*, 81 Va. 209; *Dismal Swamp Canal Co. v. Com.*, 81 Va. 220.

Electricity.—Under the general statute law of West Virginia governing cities and towns, a grant by a municipal corporation of the privilege, not exclusive, of occupying its streets for the conveyance of electricity for public

use therein, confers a valid franchise, and is a contract protected by the provisions in state and federal constitutions prohibiting the passage of any law impairing the obligations of contracts. (The question of the reasonableness of the term of such grant not considered.) *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

L. RECOGNIZANCE.

A recognizance is a contract of record. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930. See the title BAIL AND RECOGNIZANCE, vol. 2, p. 196.

M. SEALED CONTRACTS.

See the title SEALS AND SEALED INSTRUMENTS.

An instrument concluding "witness our hands," with a scroll annexed to the signature, and the word "seal" written therein, is only a simple contract. *Jenkins v. Hurt*, 2 Rand. 446; *Cromwell v. Tate*, 7 Leigh 301; *Lewis v. Overby*, 28 Gratt. 627. See *Bradley Salt Co. v. Norfolk, etc., Co.*, 95 Va. 461, 28 S. E. 567.

Writing not mentioning "seal" in its body, but having scroll attached to the signature, is only a simple contract. *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174.

One seal will be sufficient for both parties to an agreement, if each adopts it as his own. *Norvell v. Walker*, 9 W. Va. 447; *Keller v. McHuffman*, 15 W. Va. 69.

N. TRANSACTIONS WITH DECEDENTS.

A contract is a transaction within the meaning of the statutes rendering the surviving party incompetent as a witness as to transactions with the decedent. *Fouse v. Gilfillan*, 45 W. Va. 213, 32 S. E. 178, citing *Owens v. Owens*, 14 W. Va. 88. See the title WITNESSES.

O. WILLS.

See the title WILLS.

A will is not a contract and an executor or legatee is not a party to it in

the sense of the statute providing for the incompetency of the survivor to testify when the other party to the transaction is dead. *Martz v. Martz*, 25 Gratt. 361.

Wills or Contract.—An executor filed his bill to have his testator's will construed, and submitted a writing executed by the latter, to wit: "\$1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888. (Signed) Henry E. Smith. (Seal.)" Afterwards the testator made a will, dated December 2, 1889, disposing of his entire estate, and containing no reference to said writing or to Elliott Smith, which was duly probated. Held, said writing was not a contract, but was a will. *Swann v. Housman*, 90 Va. 816, 20 S. E. 830.

The rule of construction for determining whether an instrument is a will or testamentary paper or a deed is that, if it passes a present interest, though the right to possession or enjoyment does not accrue till the death of the maker, it is a deed or contract, but if it does not pass any interest or title whatever till his death, it is a will or testamentary paper, not a valid deed or contract. Section 5, ch. 71, W. Va. Code, 1891, does not change this rule. *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986.

In determining whether an instrument is testamentary or deed or contract, courts do not allow language peculiar to either class of instrument, nor even the belief of the maker as to the character of the instrument, nor the name he gives it, to control inflexibly its construction; but, giving due weight to these circumstances, courts look further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention

of its maker. *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986.

II. Formation and Essential Elements.

A. FORMATION AND EXECUTION.

1. In General.

In order to constitute an agreement, it is not necessary that the parties should use words of contract, as "we covenant," "we promise," "we agree." It is sufficient if what they have done amounts in law to an agreement. "It is not necessary, therefore, that we should find in this power of attorney, an agreement in so many words, that they would share equally any loss which the proposed endorsement of Steenbergen's paper might occasion. It is enough if it appears that the transaction to which they are parties, imposed that obligation." *Bank of United States v. Beirne*, 1 Gratt. 269.

"One who receives the benefit of a contract can not deny that he made it, or assert its invalidity, whether on the ground that it was ultra vires, or that it was made by an unauthorized agent, or that it was not executed as required by law; nor on any other ground." *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

2. Offer and Acceptance.

a. In General.

An offer on one side accepted by the other makes a mutual contract binding both. *Rowan v. Hull*, 55 W. Va. 340, 47 S. E. 92; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692; *McCully v. Phoenix Mut. Ins. Co.*, 18 W. Va. 782.

If one makes to another an offer, verbal or written, direct, by letter or telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract; and the question of the sufficiency of the transaction to work this

result is of law for the court. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

b. Necessity of Acceptance.

(1) In General.

An offer, to become a binding contract between the parties, must be accepted. *Haskin v. Agricultural Ins. Co.*, 78 Va. 700; *McCully v. Phoenix Mut. Ins. Co.*, 18 W. Va. 782; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692; *Rowan v. Hull*, 55 W. Va. 340, 47 S. E. 92; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

(2) Particular Contracts Considered.

An offer by an executor to pay a debt of his testator, which does not appear to have been accepted, is not obligatory. *Taliaferro v. Robb*, 2 Call 258.

Options.—See the title **VENDOR AND PURCHASER**.

A proposal by A. to sell land to B. called an option, is no sale until accepted by B. and such acceptance is made known to A. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Barratt v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Watson v. Coast*, 35 W. Va. 462, 14 S. E. 249; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

Under the general law of contracts touching a proposal, an option to purchase must be accepted. A mere option to purchase vests no right until accepted. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 541, citing *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Barratt v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

There is nothing peculiar in a unilateral contract or a proposal on one side offering property for sale, if accepted within a given time, from other contracts. Where parties do not meet, and at once both consent to the contract, an offer runs for a reasonable time, unless limited, and when accepted it is performed like any other contract which leaves anything undone. So with such option. When the proposal is accepted,

it becomes a contract just like any other contract. So far as relates to those acts which are by the proposal made acts of acceptance, or are to be done within the limited time as part of its terms, they must be done within it; but, wherein they are not so required to be done within the limit, they do not concern the making, but only the carrying out, of the contract. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Payment as Condition Precedent.—Where there is a proposal in the form of an option to sell land, an acceptance of such proposal will make a contract, and a purchaser need not pay until he receives a deed, unless payment is made a condition precedent to the birth of the contract. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540.

Payment as Act of Acceptance.—Where payment is not in a proposal for the sale of land made an act of acceptance, or required to be made within the time fixed for acceptance, payment or tender within the time is not essential to the formation of a contract, but only an element in the performance of it. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Notice of Acceptance.—A mere proposal to sell land does not become a sale until the proposal has been accepted, and notice of acceptance has been given to the proposer. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540. See post, "Communication of Acceptance," II, A, 2, c.

Time of Acceptance.—In the case of an option to purchase, if a proposal is not accepted within a reasonable time, time will cancel and withdraw the proposal as effectually as express withdrawal with notice. As, for example, where it appears that the vendee is waiting to buy in the event he can find a purchaser. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Where a written proposal for the sale of land, sometimes called an "option," is dependent merely on acceptance within a fixed time, upon such

acceptance and notice of it to the proposer within the time an executory contract is thus formed, with mutual obligations on the parties, as in other contracts. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Relation.—Where there is an offer under seal to sell and convey land in which a particular time is specified in which such acceptance may be made, upon notice to the vendor by the vendee of his election to accept, the vendee's interest in the tract of land relates back to the date of the contract. *Donnelly v. Parker*, 5 W. Va. 301.

The burden of proof that a proposal to sell land has been accepted, rests upon the party claiming to have accepted the same. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Subscriptions.—See the title SUBSCRIPTIONS.

To make a subscription binding, it must be acceded to, and the party must be apprised that his offer is accepted, and this must be done in a reasonable time. *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311.

If a subscription be acceded to on the terms in which it is made, and labor or money is expended on the faith thereof, the party making the subscription is bound thereby. *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311.

Corporations.—A subscription paper, by which the signers bind themselves to pay for the shares opposite their names, is not a contract enforceable by the corporation until it is accepted by it. *Stuart v. Valley R. Co.*, 32 Gratt. 146.

Subscriptions to a company are in the nature of a continuing offer to the proposed company, which, upon acceptance by it after its formation, becomes, as to each subscriber, a contract between him and the corporation. *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897.

Loans.—See the title LOANS.

"A party of whom a loan is asked, in the nature of the case, has a right to

refuse a loan, for his own reasons, just as much as one has to buy or refuse to buy, or sell or refuse to sell, a given thing, for his own reasons. A contract, whether a loan or sale, must be made and completed by a proposal on one side accepted on the other. Never was a contract to make a loan consummated in this case. Imperfect negotiation for a loan there was, but it was rejected, and the rejection communicated to the other party." *Wells v. Michigan Mut. Life Ins. Co.*, 41 W. Va. 131, 23 S. E. 527.

Insurance Contracts.—See the title INSURANCE.

Proof of an insurance contract may be by parol, but it must be full and clear. Proof of a mere offer, on the one hand, without acceptance, on the other, or of an incomplete contract; that is, when anything is left open for future adjustment, either as to the amount of the risk, the premium to be paid, or the duration of the risk, no obligation exists. *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700.

The fact that an application has been made for insurance, and a long time has elapsed, and the rejection of the risk has not been signified, does not warrant a presumption of its acceptance. In such cases, there must be actual acceptance or there is no contract. *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700.

c. Assignment of Right to Accept.

The right to accept an offer to sell land is personal to the purchaser, and therefore such right is not assignable because there is no contract until acceptance. It may well be that the vendor was willing to rely on the integrity of the purchaser, which reliance would not extend to his assignee. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, citing *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 736, 11 S. E. 220; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

d. How Acceptance to Be Made.

In General.—A plain, enforceable

proposal, followed by a plain, unconditional acceptance, neither narrower nor broader than that proposal, generally constitutes a contract. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Where the defendant by letter accompanied by his circular of memoranda for his agents, and his second letter fixing time for his agent to commence, left nothing to be implied and nothing to be done but to accept, to which the agent replied by accepting the defendant's offer unconditionally and without qualification, such written offer and acceptance constitutes a written contract. *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

Acceptance on Terms Varying from Offer.—A proposal to accept, or an acceptance, on terms varying from those offered, is a rejection of the offer, and a subsequent acceptance upon the terms offered does not make a contract. *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. 641, 13 S. E. 100; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888.

Contracts by Correspondence.—Where an agreement is sought to be established by means of letters, such letters will not constitute an agreement, unless the answer be a simple acceptance of the proposal, without the introduction of any new term. If the original offer leaves anything to be settled by future arrangement, it is merely a proposal to enter into an agreement. The agreement is not complete until there is upon the face of the correspondence a clear accession on both sides to one and the same set of terms. 1 Chit. Cont. (11 Am. Ed.) p. 15; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888. See also, *Cox v. Cox*, 5 W. Va. 335.

Payment to Be Made at Certain Time.—If the offer be upon payments at certain times, and the party selling requires a shorter time, there is no contract, and the party making the proposal is not bound. Story on Contracts, § 85; *Edichal Bullion Co. v.*

Columbia Gold Mining Co., 87 Va. 641, 13 S. E. 100.

Counter Offer.—Where a defendant offered to pay a certain sum for the assignment of claims against his brother, in the hands of the attorneys, who made a counter offer that, if the defendant would pay a larger sum, his offer should be accepted, subject, however, to their client's approval, to which the defendant agreed, but withdrew his offer before the clients had approved the same, it was held, that he was not liable thereon, since his obligation was executory merely until approved by the clients; and hence there was no mutuality of obligation between the parties. *Cady v. Straus*, 97 Va. 701, 34 S. E. 615.

Options.—See the title **VENDOR AND PURCHASER**.

To convert an option into a valid contract of sale, it is essential that the acceptance thereof be unconditional. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

In order to convert a proposal to sell land into a contract, it must be accepted by the other party, and the assent of the parties to the terms thereof must be mutual, and intended to bind both sides, and must coexist in the minds of both parties at the same moment of time. The acceptance must be unconditional, and as broad and comprehensive as the proposal itself, and must include all of its terms and conditions without modification or change. If to the acceptance a condition be affixed, or any modification or change in the offer be requested by the party to whom the offer is made, this, in law, constitutes a rejection of the offer. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

A person disposed to purchase a tract of land, wrote to the owner inquiring whether it was for sale and what were his terms by the acre; stating also the payments it would be convenient for him to make; the answer to

this letter stated the price the owner was willing to take, but that he wished the purchaser to take upon himself the responsibility of establishing the lines of the tract; he also acceded to the offered terms of the payment and required the purchaser's answer as soon as possible in case he was disposed to accede to these terms. The purchaser's reply stated that he would take the land on the terms proposed, and would have the lines ascertained; though it went on to express his wish that the owner's agent should attend to the settlement of a part of the boundaries, through motives of delicacy in relation to one of the coterminous tenants; saying nothing, however, of waiving or abandoning his acceptance of terms. The court held, that this amounted to a complete and concluded contract for the sale and purchase of the land. *Fitzhugh v. Jones*, 6 Munf. 83.

By Telegram.—Where a proposal requires acceptance "by wire or otherwise," the sending of a telegram of acceptance to the proposer by the other party, or personal verbal acceptance, is acceptance. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Ferguson v. Grottoes Co.*, 92 Va. 316, 23 S. E. 761.

"The first question I shall consider is, do the written offer or option made by Watson and the telegram sent to him by coast constitute a contract? Looking at this offer, it conveys a clear, distinct proposition; looking at the telegram, it conveys an equally clear and distinct acceptance of that proposition. From this proposition on the one side, and its unqualified acceptance on the other, results a complete contract, according to the well-established law of contracts. 'If one makes to another an offer, verbal or written, direct, by letter or by telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the

same time; in other words, a contract; and the question of the sufficiency of the transaction to work this result is of law for the court.' *Bish. Cont.*, § 322. See *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Pom. Cont.*, § 169; 3 *Amer. & Eng. Ency. Law* 841." *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 251.

Acceptance by Agent.—A written proposition to employ one as agent to sell land, signed by the proposer, accepted by the agent, though not signed by him, makes a binding contract of agency between them, and is a bilateral mutual contract and enforceable against both. *Rowan v. Hull*, 45 W. Va. 335, 47 S. E. 92.

Where the proposal is made to the principal and the acceptance is made by the agent over his individual signature, the agent incurs no personal responsibility, where evidently, on the entire face of the instrument, he was understood as acting merely for his principal. *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585, citing *Smith v. Bond*, 25 W. Va. 387.

By Parol.—Where the offer is in writing, the acceptance may be by parol. It need not be in writing to constitute a valid contract, capable of being enforced in a court of equity, or for the recovery of damages for its breach at law. *Capehart v. Hale*, 6 W. Va. 547; *Creigh v. Boggs*, 19 W. Va. 240.

e. Communication of Acceptance.

In General.—A contract can not bind the party proposing it, until the acceptance of the other party is in some way actually or constructively communicated to him. *McCully v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782.

Options.—See the title **VENDOR AND PURCHASER**.

Under the general law of contracts touching a proposal, an option to purchase, the acceptance of the proposal

must be made known, and within a reasonable time. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 541; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

In order to convert a proposal to sell land into a valid contract of sale, it is essential that notice of such acceptance be communicated to the proposer within the time limited, or that within that time some act be done by the other party which he has expressly or impliedly agreed to treat as notice of such acceptance. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Where a written proposal for the sale of land, sometimes called an "option," is dependent merely on acceptance within a fixed time, upon such acceptance and notice of it to the proposer within the time, an executory contract is thus formed, with mutual obligations on the parties, as in other contracts. *Watson v. Coast*, 35 W. Va. 468, 14 S. E. 249.

Contracts by Correspondence.—Where a proposal to sell land within a limited time, and upon specified terms, has been made to a party who has unconditionally accepted the same, it is nevertheless essential, to convert such proposal into a valid contract, that such acceptance be communicated within the time limited to the proposer, or that within that time some act be done by the party accepting the proposal which the other party has expressly or impliedly offered to treat as a communication; as, for example, in contracts made by correspondence, by posting the letter of acceptance, or such assent may be inferred from subsequent conduct; but an assent which is neither communicated to the other party, nor followed by action, is insufficient. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

But this modification of the general rule in favor of parties thus compelled to treat by correspondence through the

post does not apply to cases where the offer to sell was made to the other party personally. In such case the proposer is entitled to personal notice that his offer has been accepted, and in the absence of proof of any agreement on his part that such notice might be sent to him by mail, or that such notice so sent has been actually received by him within the time limited, there has been no notice of such acceptance, and, unless the acceptance of the offer has been communicated to the person making it, it is of no avail. And, even in cases where notices of acceptance may be sent by mail, it must appear that the letter of acceptance was actually placed in the postoffice, and directed to the party making the offer, at the proper place. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Communication by Agent.—The acceptance of a proposal to sell land, communicated to the proposer by an agent, is sufficient in law to convert the proposal into a valid and binding contract. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

The burden of proof that notice of the acceptance of a proposal to sell land has been communicated to the proposer within the time limited, rests upon the party claiming to have accepted the same. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

f. Evidence of Acceptance.

An acceptance may be inferred from the acts and conduct of the promisee. *Colgin v. Henley*, 6 Leigh 85.

Offer and acceptance of contracts evidenced by letters of parties. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

Telegrams.—Where a proposal requires acceptance "by wire or otherwise," the sending of a telegram of acceptance to the proposer by the other party, or personal verbal acceptance, is acceptance. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

g. Revocation of Offer.

(1) Before Acceptance.

(a) In General.

It is settled law that an offer may be withdrawn at any time before its acceptance. In other words, an offer unaccepted creates no rights, and is not binding upon the party making it, hence it follows that it may be revoked at any time before acceptance. *Cady v. Straus*, 97 Va. 701, 34 S. E. 615, citing *Clark on Contracts*, p. 47.

"An offer may be withdrawn at any time before its acceptance is settled law, and is, we think, not disputed. Since an offer unaccepted creates no rights, and is not binding upon the party making it, it follows that it may be revoked at any time before acceptance. *Cady v. Straus*, 97 Va. 707, 34 S. E. 617." *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891.

Wharton on Contracts, § 10, lays down the rule as follows: "Before acceptance, a proposal is 'but an offer to contract, and the parties making the offer might undoubtedly withdraw it at any time before acceptance.' The right to revoke before acceptance is one which prior conditions can not limit. Thus, at an auction sale, the bidder may at any time recall his bid before the hammer falls, though the conditions of sale are that no bidding shall be retracted, and the seller may retract, though the sale was to be without reserve. It would be a *petitio principii* to say that the party retracting was bound by contract not to retract, since it is to this very contract not to retract that his retracting applies." *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Mr. Bishop in his work on contracts (§ 325) says: "Since an offer is not a contract, the party making it may withdraw it any time before acceptance. Even though it is in writing, and by its terms is to stand open for a specified period, the result is the same. With no money consideration, and no corresponding promise from the per-

son to whom it is made, the promise not to withdraw it has no binding force. If a consideration for the undertaking to leave the offer open is given and accepted, this of itself constitutes a contract, and the offer can not be withdrawn." *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

If an attorney to collect a claim accept a proposition to purchase it at a discount, subject to the approval of his client, such acceptance is merely an undertaking to communicate the proposition to the client, and the proposition may be withdrawn at any time before acceptance by him. *Cady v. Straus*, 97 Va. 701, 34 S. E. 615.

Pleading.—See post, "Pleading and Practice," VIII.

An averment in a declaration that an offer of the defendant was accepted by the plaintiff, necessarily implies that the offer has not been withdrawn. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

Options.—See the title **VENDOR AND PURCHASER**.

The distinction between an option given without a consideration and an option given for a valuable consideration, is that in the first case it is simply an offer to sell and can be withdrawn at any time before acceptance, upon notice to the vendee, but in the second, where a consideration is paid for the option, it can not be withdrawn by the vendor before the expiration of the time specified in the option. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891.

If a party making a proposal to sell land recalls it before acceptance, although the other party was prepared to accept at once, the offer is effectually withdrawn. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Where an offer to sell land is made in the form of a promise under seal, in which a limited time is specified in which such acceptance may be made, such paper is not only a proposition itself, but a covenant that such proposition shall remain open for acceptance

until the time specified in it, and it would seem that such proposition can not be withdrawn until the expiration of the time specified. But in the case at bar whether the proposition could have been withdrawn or not did not arise as it was not in fact withdrawn, nor was any attempt made to withdraw it. *Donnally v. Parker*, 5 W. Va. 301.

When Offer Can Not Be Revoked.—

An option given without consideration may be withdrawn at any time before acceptance, upon giving notice to the other party thereto, but when founded upon a valuable consideration it can not be withdrawn before the expiration of the time specified therein. Although the consideration be not paid at the date of the option, but at a later date while the option is still current, the option may be enforced. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891.

When a party for a valuable consideration, moving from the party to whom the offer to sell is made, fixes a period within which his offer may be accepted, he will not be at liberty to withdraw the same until the time so limited by him for such consideration shall have expired. In such case, the party making the proposal has entered into a valid and binding contract, with the party to whom the offer is made, that for the consideration stipulated the offer shall not be withdrawn until the time within which it may be accepted has expired by its own limitation. This consideration need not be expressed in the proposal to sell, but may be proved aliunde, as in cases of a memorandum in writing signed by the party to be charged thereby or his agent, required by the statute of frauds, where the same may be enforced, although no consideration appears upon the face thereof. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

(b) Communication of Revocation.

The difference between an offer and an option. An offer is a mere proposal,

without any limitation as to time, and, unless accepted at the earliest practicable time, the law presumes it to be withdrawn; and a subsequent acceptance will impose no obligation on the proposer, although he has done no act and given no notice of its withdrawal. On the other hand, an option is a contract by which the one party agrees to do some specified act upon the assent or acceptance of the other party within a fixed time. The contract consists of the mutual assent of the two parties that the proposal shall remain open and continue to be binding upon the proposer for the time specified, or until the other party assents to or agrees to accept the proposal before the time fixed expires. In order to make such contract binding, it is not necessary that there should be any expressed consideration. It will be sufficient, whether any benefit accrues to the proposer or not, if the other party sustains any loss or prejudice as the necessary or implied consequence of the contract or agreement of the parties; that is, as expressed in the foregoing opinion, "it is sufficient if something flows from the person to whom it is made, and the promise is the inducement to the transaction." Upon the assent to or acceptance of the proposal within the time specified, the contract becomes absolute between the parties and their obligations mutual. The contract, then, ceases to be a mere proposal or option, but a contract mutually binding upon both parties, either of whom may compel its specific execution in a court of equity. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, dissenting opinion of Snyder, J.

An offer to sell land, if without consideration, may be withdrawn at any time, provided such retraction be communicated to the other party before he has accepted the same. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

If the party making the proposal instantly recalls it before acceptance, although the other party was prepared

to accept the next instant, the offer is effectually withdrawn. But acceptance before withdrawal binds the parties, if made while the offer continues, and, if not withdrawn, the offer does continue in all cases, either a reasonable time, and no longer, or during the time fixed by the party himself. Where parties living at different places are compelled to treat by correspondence through the post, there is a modification of the rule to this extent, that the party making the offer can not retract after the acceptance by his correspondent has been duly posted, although it may not have reached him, or may never reach him. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Options.—See the title **VENDOR AND PURCHASER**.

Notice of the withdrawal of an offer to sell land must be communicated to the other party in order to be effectual. But no particular form is required; such notice may be inferred from the acts of the vendor inconsistent with the continuance of the offer. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

(c) Promise to Continue Offer.

As a general rule the time of performance of a written agreement may be extended by parol, but to be binding it must be supported by some new and sufficient consideration. An option extended without any new consideration is revocable at any time before acceptance. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891.

Where an agreement or offer to sell land or other property, gives to the prospective purchaser the limited time within which he may purchase upon the term prescribed, the promise on the part of the proposer to continue the offer for a specified time is made without consideration, it is a nudum pactum, and may be withdrawn at any time provided such retraction be communicated to the other party before he has accepted the same; for, until

the proposal is accepted, there can be no contract, as there is nothing by which the proposer can be bound, and unless both be bound so that an action could be maintained against the other for a breach, neither will be bound. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

(2) After Acceptance.

A contract is complete and binding when the proposal of the one party has been accepted by the other. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

h. Conflict of Laws.

See the title CONFLICT OF LAWS. ante, p. 100.

Generally, the place of the acceptance of a proposal is the place of contract, because of the rule already stated that the contract is completed when the proposal of the one party has been accepted by the other. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

The place of acceptance, not delivery, decides where the contract is made as a general rule. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

i. Questions of Law and Fact.

See post, "Questions of Law and Fact," XI.

Whether an offer has been accepted in a reasonable time, is, in cases of doubt, a question for the jury. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

j. Exceptions and Objections.

See the title APPEAL AND ERROR, vol. 1, p. 547.

An objection can not be taken for the first time in the appellate court that it did not appear that the promisee accepted the proposal to enter into a contract. *Colgin v. Henley*, 6 Leigh 85.

3. Writing.

See the title FRAUDS, STATUTE OF.

In the absence of statute requiring that a contract between the parties

should be reduced to writing, it would seem that a contract, containing the other elements essential to the formation of a valid contract, is binding in the absence of writing, for the breach of which the plaintiff is entitled to recover damages. *Central Lunatic Asylum v. Flanagan*, 80 Va. 110.

Under Va. acts approved March 6th, 1882 (acts, 1881-82, pp. 246-249), authorizing the directors of the Central Lunatic Asylum to contract for the erection of suitable buildings for the accommodation of the colored insane of this state, no written and signed contract was required; and upon the acceptance by the board of the contractor's bonds, and the spreading upon the minutes of the articles of agreement between the parties, a contract was consummated, for any breach whereof the party aggrieved was entitled to recover damages. *Central Lunatic Asylum v. Flanagan*, 80 Va. 110.

4. Signing.

See the titles BILLS, NOTES AND CHECKS, vol. 1, p. 401; BONDS, vol. 2, p. 507; DEEDS.

Necessity for.—In the absence of statute requiring that a contract between the parties should be signed, a contract, containing the other essentials to its execution, is binding in the absence of a signing, for the breach of which the plaintiff is entitled to recover damages. *Central Lunatic Asylum v. Flanagan*, 80 Va. 110.

Signing by One of Several Parties.—

It is not necessary that all the parties to a contract should sign it to be bound thereby. The signing of an agreement by one party only is sufficient, provided that party be the one sought to be charged. For he is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party who sues for the performance. *Monongah Coal, etc., Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201; *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114;

Merchants' Coal Co. v. Billmeyer, 54 W. Va. 1, 46 S. E. 121.

"It is insisted by appellants that the failure of the lessees to sign the lease destroyed its mutuality. In *Coke Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201, the contract of sale of coal under the contract of the vendor, containing agreements of vendee as to the payment of the purchase money, and only signed by the vendor, is held to be binding on the seller, and was not required to be signed by the buyer, who had accepted it; and it is held, that no writing signed by the vendee was required to prove the vendee's obligation to pay the consideration price, or to make it binding upon him." *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

It is not necessary for the vendees of certain timber rights to sign and acknowledge the contract conveying the same to them to render them legally bound. Acceptance and operation thereunder binds them to all its conditions and stipulations. *Merchants' Coal Co. v. Billmeyer*, 54 W. Va. 1, 46 S. E. 121.

In *Beery v. Homan*, 8 Gratt. 51, it is said: "The court is of opinion, that to constitute a valid bond of the party, the intention to bind himself must appear on the face of the instrument; that the signature and seal form a part thereof, and furnish prima facie evidence that the person so signing and sealing the bond intended to make himself a party thereto, and to be bound by the stipulations thereof; although the name of the party so signing, sealing and delivering the bond, may not be inserted in the penalty or recited in the condition. The case of *Bell v. Allen's Adm'r*, 3 Munf. 118, does not actually decide that the bond there offered in evidence, was not the bond of the security because his name did not appear in the body of the instrument, but it was rejected when offered in evidence, on the ground of an alleged variance between it and the bond described in the declaration. If,

however, it is to be inferred that the case was decided upon the ground that the bond was invalid as to the surety for the cause aforesaid, the authority of the case is impaired by the decisions of this court in the cases of *Bartley v. Yates*, 2 Hen. & M. 398; *Beale v. Wilson*, 4 Munf. 380; *Raynolds v. Gore*, 4 Leigh 276; and was in effect overruled in *Crawford v. Jarrett*, 2 Leigh 630. In that case the name of one of the sureties, Shrewsberry, did not appear in the body of the writing; and there was no blank left for the insertion of other names; which has sometimes been supposed to show an intention not to exclude other parties who have signed the instrument. Yet the said security was held bound upon proof that he executed the instrument with the intention of becoming a party thereto. In the case of a sealed instrument declared upon, a proof of the execution thereof becomes necessary by the plea of non est factum at law (or the answer in chancery, if a case in equity), putting that fact in issue. The circumstance that the writing declared on in *Crawford v. Jarrett*, was not under seal, does not affect the principle involved in this question. The intention to become a party to, and be bound by the instrument, is the fact to be determined in either case." *Crawford v. Jarrett*, 2 Leigh 630.

5. Delivery.

See the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 422; **BONDS**, vol. 2, p. 520; **DEEDS**.

If delivery of a contract is important, a delivery to the mail, properly addressed, is a final delivery. Nothing more remains to be done to complete the contract. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969 (Insurance policy).

A deposit of a contract in a post-office addressed to the party to whom it is to be delivered, is a delivery at the postoffice. *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

6. Future Execution of Formal Contract.

Nothing is more common or natural than for parties unlearned in the law, when they enter into an important contract which they desire to be binding as soon as possible, and there is no lawyer near enough to be employed to draw the instrument immediately, to draw it, or have it drawn, as well as they can under the circumstances, to make it binding at and from the time of entering into such contract, with the understanding and agreement, however, that the instrument will be submitted to a lawyer agreed upon by them, at some convenient time afterwards, who is to rewrite it, so as to make it valid and binding if it be not already so, or put it in better form if deemed proper and desirable by him. *Mackey v. Mackey*, 29 Gratt. 167.

Sometimes a contract is to be construed that there shall be no binding agreement until a written contract is entered into and signed by the parties. In other words, that the transaction shall amount merely to a proposal for a contract, and that there is no binding contract until a written agreement has been signed. *Mackey v. Mackey*, 29 Gratt. 158.

Where a paper complete on its face, sets out an agreement between the parties to the contract, which is executed by both in duplicate, but there is an agreement to meet on a certain day at a lawyer's office to have the paper examined by him and put into proper form if necessary; which, however, the party of the first part is prevented from doing on the day named, and she subsequently dies, such agreement is nevertheless a complete and binding contract between the parties from the time of execution. *Mackey v. Mackey*, 29 Gratt. 158.

7. Stamps.

See the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 422; **BONDS**, vol. 2, p. 520; **CONFLICT OF LAWS**,

ante, p. 100; **DEEDS; REVENUE LAWS; SUMMONS AND PROCESS.**

Construction of Act of Congress.—The act of congress of June 30, 1864, requiring certain instruments, documents, and papers to be duly stamped with a United States revenue stamp, only declares invalid those instruments, documents and papers which were made, signed, issued, accepted or paid, without being duly stamped, with intent to evade the provisions of the act. *Weltner v. Riggs*, 3 W. Va. 445; *Hale v. Wilkinson*, 21 Gratt. 75. See *Hannon v. Batte*, 5 Munf. 490.

Unnecessary Number of Stamps.—A contract is not invalid because it is stamped with two five-cent revenue stamps when the act of congress requires only one stamp of five cents. *Weltner v. Riggs*, 3 W. Va. 445.

Time of Affixing Stamp.—Where a stamp is omitted from the instrument at the time of its execution by mistake and without any intention to evade the statute, a stamp may be affixed even after suit is brought. *Talley v. Robinson*, 22 Gratt. 888; *Hannon v. Batte*, 5 Munf. 490; *Hale v. Wilkinson*, 21 Gratt. 75; *Crews v. Farmers' Bank*, 31 Gratt. 348; *Logan v. Dils*, 4 W. Va. 397.

Stamping after Suit Brought.—Where a contract is not stamped when it is made, but is subsequently, after suit is brought to enforce it, stamped by the United States collector of internal revenue, and certified accordingly, this stamping relieves from the necessity of considering the question of the validity of the contract for want of a stamp. *Logan v. Dils*, 4 W. Va. 397.

Though the contract was not stamped until it had been filed as an exhibit with the bill, it was admissible in evidence; and it would have been admissible though not stamped at the time it was offered in evidence. *Talley v. Robinson*, 22 Gratt. 888.

Under the Virginia act of 1812, ch. 2, §§ 18, 19, 20, a note, negotiable at

bank, may be given in evidence, if duly stamped, before it became payable, though not so stamped when it was executed. *Hannon v. Batte*, 5 Munf. 490.

Rules of Evidence in State Courts.—Congress has no power to declare that contracts unstamped shall not be received as evidence in a state court. *Crews v. Farmers' Bank*, 31 Gratt. 348.

There was another ground of defense taken by Robinson, to-wit: that the contract and receipt for the purchase money were not duly stamped according to the laws of the United States when the suit was brought, and, therefore, could not have been used as evidence in the suit. There are two sufficient answers to this ground of defense: 1. That the said instruments were duly stamped in the progress of the cause, and before they were used as evidence therein; and 2. That the omission of a stamp required by the law of the United States, while it may be an offense punishable by the courts of the United States, does not affect the question of the admissibility of evidence in a state court. *Talley v. Robinson*, 22 Gratt. 896, citing *Hale v. Wilkinson*, 21 Gratt. 78.

The act of congress, entitled, "An act laying duties upon stamped vellum, parchment and paper," being enacted in pursuance of the constitutional power to levy and collect taxes, duties, imposts and excises, and being therefore constitutional, although changing the rules of evidence in state courts; held, in an action of debt, upon a bond, the bond, not being duly stamped, could not go in evidence to the jury. *Woodson v. Randolph*, 1 Va. Cas. 128.

The general court decided, that the bond in the said record mentioned ought not to be permitted to go in evidence to the jury on the trial of the cause, because the said bond is not stamped agreeably to the act of congress entitled "an act laying duties on stamped vellum, parchment, and paper." The question in this case was,

whether the act of congress was constitutional or not. Some persons had supposed, that congress had no power to change the rules of evidence in the state courts. The general courts, however, were of opinion that, as congress had power to lay and collect taxes, duties, imposts and excises, and to make all laws necessary and proper for carrying into execution the specified powers, the aforesaid act was within the limits of their chartered authority. *Woodson v. Randolph*, 1 Va. Cas. 129.

Conflict of Laws.—If the laws of a state where a contract is made declare that it shall be void unless it is stamped, it is void everywhere and an action can not be maintained upon it in another state. But if in such case the law only declares that the contract shall not be available as evidence, an action may be maintained upon it in another state. Because if by the laws of a country a contract is void, unless it is written on stamped paper, it ought to be held void everywhere, for unless it be good there, it can have no obligation in any other country. But where the question is one of the admissibility of evidence, it is well settled that the official laws of another state, prescribing the stamping of papers, do not prevail in our courts. *Fant v. Miller*, 17 Gratt. 47.

Mr. Robinson, in his new work on Practice, vol. 1, pp. 319 and 271, lays down the correct rule, and refers to authority in support of it, "that although a stamp be required by the revenue laws of a foreign state before a document can be received in evidence there, such document may nevertheless be admitted as evidence without the stamp in the country wherein the suit is brought." In *Holman v. Johnson*, 1 Cowp. 341, Lord Mansfield said: "No country takes notice of the revenue laws of another." *Lambert v. Jones*, 2 Pat. & H. 168.

Though a stamp may be required by the revenue laws of Maryland, on the endorsement of an overdue note, before the endorsement can be given in

evidence in a Maryland court; yet such endorsement, though made in Maryland, and unstamped, may, nevertheless, be given in evidence in the courts of Virginia, for the stamp law of Maryland is a local law, and can furnish no rule of evidence for the courts of this state. *Lambert v. Jones*, 2 Pat. & H. 144.

Exceptions and Objections.—No objection can be taken in the court of appeals, to an instrument of writing in the cause, because the same was not properly stamped by a United States revenue stamp, when no objection appears to have been made to its introduction in the court below, and the fact made the subject of a bill of exceptions or other specific notification. *Hawkins v. Wilson*, 1 W. Va. 117, citing *Johnson v. Jennings*, 10 Gratt. 1; *Hannon v. Batte*, 5 Munf. 490.

Presumptions on Appeal.—Where there is nothing in the record that indicates that the revenue stamp was placed upon the contract contrary to the act of congress, the supreme court will presume that it was properly and legally placed, in the absence of any proof to the contrary. *Myers v. McGraw*, 5 W. Va. 30.

A bond is offered in evidence, to which is affixed a United States internal revenue stamp. The defendant offers to prove that the bond was not stamped at the time of its execution, but since then a stamp had been affixed to it without his knowledge, consent or authority. The plaintiff objected to this offer of proof by the defendant, and the court below sustained the objection; which is held, to be a proper ruling. *Myers v. McGraw*, 5 W. Va. 30.

8. Questions of Law and Fact.

The fact of the execution of a contract is a question for the jury to determine. *Bowyer v. Knapp*, 15 W. Va. 277.

B. ESSENTIAL ELEMENTS.

1. Competent Parties.

a. In General.

It is elementary law that to consti-

tute a valid agreement it is essential that there shall not only be a good and sufficient consideration and something to be contracted for; there must be a person able to contract and a person able to be contracted with, and without such contracting parties there can be no agreement, for without them there could be no reciprocal or mutual assent. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143.

The law presumes that there is in everyone capacity to contract, and accordingly, where exemption from liability to fulfill an engagement is claimed by reason of the want of such capacity, this fact must be strictly established on the part of him who claims the exemption. Moreover, it is only in certain prescribed cases that this protection can be claimed; and therefore, weakness of mind short of insanity; or immaturity of reason in one who has attained full age; or the mere absence of experience or skill upon the subject of the particular contract, affords per se, no ground for relief at law or in equity. *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 94, 24 S. E. 916.

A contract fairly and voluntarily entered into between parties having capacity to act, can not be set aside, however unreasonable or imprudent it may seem to others. *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

Where a party to a contract has legal mental capacity to make it, and there is no fraud or undue influence moving him to the act, the contract can not be impeached simply because it is imprudent, unreasonable, or unequal. *Farnsworth v. Noffsinger*, 46 Va. 410, 33 S. E. 246.

b. Agents.

See the title AGENCY, vol. 1, p. 240.

c. Aliens.

See the title ALIENS, vol. 1, p. 293.

Alienage is not one of the causes of incompetency to contract. *United States v. Cottingham*, 1 Rob. 615, 40 Am. Dec. 710.

d. Corporations.

See the title CORPORATIONS, and references given.

e. Counties.

See the title COUNTIES.

f. Deaf and Dumb Persons.

See the title DEEDS.

A deaf and dumb person is not necessarily incompetent to execute a contract, even though illiteracy be added to his other incapacities. Accordingly, it has been held, that a deed executed by a deaf mute, though without education, is not invalid where the deed was explained to him, that he understood it, and there was no evidence of any fraud on the part of the grantee. *Morrison v. Morrison*, 27 Gratt. 190.

g. Drunken Persons.

See the title DRUNKENNESS.

h. Infants.

See the title INFANTS.

i. Insane Persons.

See the title INSANITY.

j. Married Women.

See the title HUSBAND AND WIFE.

k. Municipal Corporations.

See the title MUNICIPAL CORPORATIONS.

l. Old Age.

See the title INSANITY.

Old age is not of itself sufficient evidence of incapacity to make a contract. *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201.

"It is the province of courts to enforce valid, and set aside invalid, contracts, but not to vacate valid contracts, or to make or modify contracts made by competent persons on some supposed ground that no contract, or a better one, should have been made by the parties. But it is not certain that these contracts ought to be condemned as improvident. If all improper influences upon the conduct of these old people are withdrawn, they may return to their son, and receive

the full consideration of their contract, and live there in comfort and contentment." *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 23.

m. State.

See the title STATE.

2. The Subject Matter.

a. Legality.

See the title ILLEGAL CONTRACTS.

b. Continued Existence of Subject Matter.

In 7 Am. & Eng. Ency. Law (2d Ed.) 116, the law is stated to be: "When performance of a contract is dependent upon the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation." Quoted in *Griffith v. Blackwater, etc., Co.*, 46 W. Va. 56, 33 S. E. 126.

Dissolution and Winding Up of Corporations.—See the title CORPORATIONS.

Where an insolvent corporation is forced into liquidation and dissolution, all its executory contracts perish with it, for this is an implied condition of their execution. *Griffith v. Blackwater, etc., Co.*, 46 W. Va. 56, 33 S. E. 126.

When an executory contract with a corporation, necessitating in its execution, work, labor, and the expenditure of money for materials, machinery, tools and appliances, and the construction of roads, and other improvements, as well as in carrying on the work, is terminated by dissolution of the corporation in consequence of its insolvency, the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses as aforesaid, subject to a deduction of all sums paid to him by the corporation and of the value of such materials, machinery and other property on hand. *Griffith v.*

Blackwater, etc., Co., 55 W. Va. 604, 48 S. E. 442.

The effect of the dissolution of a corporation upon unexpired or executory contracts is to excuse further performance and render them nugatory as to so much as remains unperformed, but to entitle the obligee to damages for the breach of the contract to be paid out of the assets of the dissolved corporation. *Griffith v. Blackwater, etc., Co.*, 55 W. Va. 610, 48 S. E. 442.

3. Mutual Assent.

See post, "Mutuality," II, B, 5.

Assent is essential to a binding contract. *Price v. Winston*, 4 Munf. 63.

In order that a contract can exist there must be a consensus between the parties. They must agree to the same thing at the same time, and the assent must be to the precise terms offered. *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. 641, 13 S. E. 100.

Where there is a misunderstanding as regards the terms of a contract, neither party is liable, in law or equity. *Edichal Bullion Co. v. Gold Mining Co.*, 87 Va. 641, 13 S. E. 100.

"Nothing is more clear than the doctrine that a contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it." See *Irick v. Fulton*, 3 Gratt. 193. *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 496.

Limitation of Actions—New Promise.

—A promise, to be sufficient to take a case out of the statute of limitations, should be made directly or immediately to the creditor, or at least for his benefit, so that he may be able to maintain an action upon it. It is said that the declaration or admission to a third person is deemed insufficient, not so much because the acknowledgment is made to a stranger as because there is no sufficient evidence of an intention to contract. *Dinguid v. Schoolfield*, 32 Gratt. 811.

Lease.—Where it is made apparent that a lease was entered into under a mutual mistake as to the existence of

a workable vein of coal in the land, and that a timber contract was induced by the belief that such coal did so exist, and to aid the lessee in his mining operations, such contract should be rescinded, not only as to the coal, but as to the timber. *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493.

"It would be difficult to use language which would more accurately describe the mutual mistake which was made by the contracting parties with reference to the coal supposed to underlie this land, which acted as the moving cause and inducement to the contract for the timber. In the absence of the coal, the evidence shows there would have been no contract for the timber. This was the foundation on which the timber contract rested, and, the foundation having no real existence, the superstructure must fall." *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 496.

Contracts of Insurance.—See the title INSURANCE.

To constitute a complete oral contract, the minds of the insured and the insurer must come together in mutual agreement on every material point constituting a contract. *Bell v. Peabody Ins. Co.*, 49 W. Va. 437, 38 S. E. 541.

"But the defendant companies say there was no contract to sustain a suit, because the contract was vague, uncertain, and incomplete. Herein lies the turning point of the case. As to proof, there is nothing peculiar in contracts of insurance. As in other cases, the contract must be definite and certain, and the parties must have agreed upon all essential terms. The contract must be such as to bind both parties—the one to insure, the other to pay the premium. All elements must be agreed upon, and if anything is left open or undetermined, so that the minds of the parties have not met, no contract exists, and there is no liability for a loss; as, where the rate of premium is left undetermined, or the time when the

policy shall attach, or the apportionment of the risk has not been agreed upon, or the insured retains control over the premium note or any papers the delivery of which is a condition precedent, or if anything remains to be done by the insured as a condition precedent, as the payment of premium, or if the duration of the risk is not agreed upon, or any condition precedent has not been complied with. The aggregatio mentium (union of minds) must be fully established, and nothing must remain to be done but to deliver the policy. The details of the contract must be fixed, and, if the agreement or understanding of the parties in reference thereto is not mutual—that is, if one party understands the matter one way, the other another—the minds of the parties have not met, and there is no contract in law or equity. Of course, the burden of proof to show such a contract as is enforceable is on the plaintiff. *Wood, Ins., § 6.*" *Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 855.*

Though the assured understands the term to be covered by the insurance to be one year, and the agent of the insurance company understands it to be three years, costing in either case the same premium, this does not render the contract incomplete, so as not to warrant recovery for loss by fire occurring within one year. "But the insured asked and understood that the insurance was to be one year, while the agent understood it to be three years. What effect can this have? The defense would use it to show there was no finished agreement, under that principle of law, stated above, that all elements must be agreed, and time is an essential element, and that when one party understands an essential element of the contract in one way, and the other in another way, the minds of the parties have not met on that essential element. But what practical harm can this circumstance do the companies? The fire oc-

curred within one year. The plaintiff says to the companies: 'You are liable to me. You agreed to insure me for one year, and the fire occurred within one year.' The companies plead in reply: 'We are not liable, because we agreed to insure you for three years.' The plea is not good." *Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 854.*

4. Certainty and Completeness.

A contract, to be valid, must be so certain and complete that each party may have an action upon it. *Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 855; Burdine v. Burdine, 98 Va. 515, 36 S. E. 992.*

"It is insisted by counsel for the defendant in error that no action can be maintained on the contract sued on, because the same is void for uncertainty. It can not be denied that the contract is to some extent uncertain and ambiguous; but, under the authorities, we may read it in the light of surrounding circumstances, and if, reading it thus, its meaning may be gathered, the same will be enforced." *Scraggs v. Hill, 37 W. Va. 706, 17 S. E. 188.*

"There was no uncertainty in the contract as to what Boyd Bros. and Malarky & McMillen were to furnish and to do, nor as to what the consideration was to be for such furnishing and doing. They went to the work with the distinct understanding that all the owners present when the contract was made were parties to the contract, consenting thereto, and were permitted to go on and complete the whole work, with no notice that a single one of them did not so understand it, or did not acquiesce in it. Mr. Brown gave them no notice that he did not intend to stand by the contract." *Boyd v. Brown, 47 W. Va. 238, 34 S. E. 910.*

Building Contracts.—See the title WORKING CONTRACTS.

Where plaintiff contracted to fur-

nish brick at agreed price per thousand, he can not be required to estimate the number by measurement of the cubic feet and allowance of a certain number to the cubic foot. "Their contract was for '\$10.50 per thousand for actual count of brick in said walls,'—'for the amount of brick in said building.' This agreement is plain and distinct, and is in no way uncertain, and the terms of the contract have been enforced in court below, and in that there was no error." *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703.

5. Mutuality.

See ante, "Mutual Assent," II, B, 3. See the titles SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

Statement of Rule.—A contract to be binding must be mutual. In general terms it may be said that unless the contract binds all the parties, it will be enforced against none of them. But this rule governs such contracts only as are executory, for when the party who is not bound has performed his part under the contract, even though not legally bound to such performance, the plea of want of mutuality can not be made. A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee. *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907; *Moore v. Randolph*, 6 Leigh 175; *Hoover v. Calhoun*, 16 Gratt. 112; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Cheatham v. Cheatham*, 81 Va. 395; *Ford v. Euker*, 86 Va. 75, 9 S. E. 500; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Edichal Bullion Co. v. Columbia Gold Min. Co.*, 87 Va. 651, 13 S. E. 100; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894; *Wood v. Dickey*, 90 Va. 160, 17 S. E. 818; *Ayres v. Robins*, 30 Gratt. 105, 116; *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892. See also, *Weaver v. Burr*, 31 W. Va. 736,

8 S. E. 743, and *Henley v. Hefferron*, 2 Va. Dec. 303; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891. See the title SPECIFIC PERFORMANCE.

Mutuality of obligation is of the essence of a contract, and it is binding upon neither until a point is reached where the minds of the parties accede to one and the same set of terms. Still a contract is not invalid for want of mutuality, because one party has an option, which the other has not. *Cady v. Straus*, 97 Va. 701, 34 S. E. 615; *Innis v. Roane*, 4 Call 379; *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239. See the title SPECIFIC PERFORMANCE.

If one party to a contract is not bound to do the act which forms the consideration for the promise, undertaking, or agreement of the other, the contract is void for want of mutuality. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

"Where two parties to an instrument enter into mutual covenants which are interchangeable considerations for each other, if either party neglects or refuses to bind himself he thus renders the instrument void for want of mutuality, and he can not avail himself of it as obligatory upon the other, nor can he render it obligatory upon the other by any subsequent act of his own, without the latter's assent." *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

An action of covenant is brought on the following paper: "In consideration of the confidence I have in, and the regard I have for, my nephews, Andrew B. Hogue and William P. Hogue, I hereby give them one-fourth part of my personal estate, consisting of debts and money due me in my several mercantile concerns, as well as some private debts, requiring, however, of them, the said A. B. Hogue and Wm. P. Hogue, their attention and assistance with me in settling up, securing and collecting the debts,

claims, etc., due and coming to me as aforesaid, etc." If the first and second clauses of the deed be construed in connection so that the gift is to take effect when the money is collected on the various debts, then it ceases to be a gift and becomes an executory contract, which would be void for want of consideration, as well as want of mutuality. *Hogue v. Bierne*, 4 W. Va. 659.

"Where an employee, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages, said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim, the employee has paid in advance for an optional contract, and he has the right to have it remain optional." *Rhodes v. Chesapeake, etc., R. Co.*, 49 W. Va. 499, 39 S. E. 209. See the title RELEASE.

An unsealed contract for the sale of goods to be delivered in the future, signed by the property seller and buyer, but which contains a reservation on the part of the seller of the right to cancel at any time, is void for want of mutuality. Where the consideration of a contract is a promise for a promise, there must be absolute mutuality of engagement. Both parties must be bound, or neither is. *American Agricultural, etc., Co. v. Kennedy*, 103 Va. 171, 48 S. E. 868. See the title SALES.

Where a contract for the sale of goods is void for want of mutuality in its inception, by reason of the vendor's reserving a right to cancel at any time, the subsequent offer of the vendor to deliver the goods, which he had never bound himself to sell, can not impose a liability on the vendee. The vendee never having had the right to tender the price and compel the vendor to deliver the goods, the vendor can not by his own act make it the duty of the vendee to receive them,

nor impose any liability upon him. The vendee, in such case, does not make a continuing offer to purchase. *American Agricultural, etc., Co. v. Kennedy*, 103 Va. 171, 48 S. E. 868.

Options.—See the title VENDOR AND PURCHASER.

To constitute a binding proposal to sell land, unless both are bound so that an action could be maintained against the other for a breach, neither will be bound, and according to well settled principles specific performance of such a contract will be denied. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255.

An option contract for the sale of land, founded on a nominal consideration, will be specifically enforced in equity against the party signing it, though not signed by the other party. The institution of a suit for its enforcement by the other party is a sufficient consent in writing to it, and makes the remedy as well as the right mutual. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891.

The contract is not valid for want of mutuality, because one party has an option which the other has not. *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326.

Where a bill in chancery is exhibited by A. against B. alleging a contract in writing with B. by which he agreed to sell to A. his interest in a certain tract of land, and that by such agreement A. agreed to pay to B. a certain sum of money, and that B. agreed to accept the same therefor, and that B. violated his agreement, it was held, that in order to entitle A. to a decree, that he must show that there was a contract, not a mere treaty for a contract; not a mere option, but such as clearly demonstrated a proposal met by that sort of acceptance which made it no longer the act of one party, but of both; for it is essential to the validity of a contract that reciprocity of

obligation should exist. *Cox v. Cox*, 5 W. Va. 335.

How Want of Mutuality Remedied.

—But a promise lacking mutuality at its inception becomes binding upon the promisor after the performance by the promisee. *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907.

“Want of mutuality in the inception of the contract may be remedied by the subsequent contract of the parties, or by the execution of the agreement.” 7 Am. & Eng. Ency. Law (2d Ed.) 114, 115. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

“The contract must be mutual, and the one party can not be bound without the other. If, however, anything has been given or done as the consideration for the promise—if, for instance, the party to whom it is made has agreed to incur any expense or labor in consideration of the offer being continued or kept open for a certain time—then the party making the offer is not at liberty to retract it.” *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

In *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907, it is held: “Lack of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within the terms thereof.” 2 Beach Cont., § 889, and cases there cited; 7 Am. & Eng. Ency. Law (2d Ed.) 114; *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 668. *Friend v. Mallory*, 52 W. Va. 63, 43 S. E. 118.

“The obligation must be mutual. In general terms it may be said that, unless the contract binds all the parties, it will be enforced against none of them.” One modification of this rule is that the rule governs such contracts only as are executory, for, when the party who is not bound has performed his part under the contract, even though not legally bound to such

performance, the plea of want of mutuality can not be made. *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 911.

Lack of mutuality is no defense, even in a suit for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within the terms thereof. *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907.

6. Consideration.

a. Definitions.

Benefit and Detriment.—Anything which confers benefit on the party to whom the promise is made, or loss or inconvenience on the party promising, is a valuable and sufficient consideration to support any promise. It is a matter of no sort of importance what is the amount of inconvenience on the one side and of advantage on the other. It is sufficient in such case that one or the other existed in any degree however slight. *Hornbrooks v. Lucas*, 24 W. Va. 499.

Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation, will constitute a good consideration for a promise. *Halsey v. Peters*, 79 Va. 68; *Colgin v. Henley*, 6 Leigh 104; *Sturm v. Parish*, 1 W. Va. 144; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

A valuable consideration is “a benefit to the party promising, or to a third person at his request, or an injury, loss, charge, or inconvenience, or the risk thereof to the party promised.” *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240.

A gain to the promisor is a sufficient consideration to support a contract as much as a loss to the promisee. *Price v. Winston*, 4 Munf. 63.

“There was benefit to be derived on each side from the contract, and that fills in the fullest the demand of the law as to consideration. *Sturm v. Parish*, 1 W. Va. 125. “Where mutual promises are made, the one furnishes

sufficient consideration for the other." 9 Cyc. 323. Bilateral contracts furnish both the required consideration and mutuality. 6 Am. & Eng. Ency. of Law (2d Ed.) 727." Rowan v. Hull, 55 W. Va. 340, 47 S. E. 92.

Trouble of the party to whom the promise is made, and benefit to the party making it, will make a binding consideration. Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575.

Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking. Bank v. Lockwood, 13 W. Va. 428.

b. Necessity of Consideration.

(1) In General.

It is a fundamental principle of the law of contracts that every simple promise or agreement, in order to be enforceable, must have a consideration to support it, for, however strongly a man may be bound in conscience to fulfill his engagements, the law recognizes not their sanctity, nor supplies any means to compel their performance, except when founded upon a sufficient consideration. Southern R. Co. v. Wilcox, 98 Va. 224, 35 S. E. 355; Sturm v. Parish, 1 W. Va. 144; Hogue v. Beirne, 4 W. Va. 659.

It is said in Stephens v. White, 2 Wash. 206, that a promise without a consideration of some sort imposes no legal obligation upon the party who makes it.

"By the rules of the common law no promise, which is not made for a consideration, can be enforced. This consideration may be either a gain, or benefit of any kind, to him who makes the promise, or a loss or injury of any kind, suffered by him to whom it is made; such gain being the cause of, or inducement to, the promise, and the promise being the cause of, or the inducement to, such loss." Bank v. Lockwood, 13 W. Va. 425.

Void or Voidable.—See VOID AND VOIDABLE and references given.

A promise or contract where there is no valuable consideration, and where there is no benefit moving to the promisor, or damage or injury to the promisee, is void. Sturm v. Parish, 1 W. Va. 125.

It is **reversible error** to allow a recovery on a contract without any consideration. Sturm v. Parish, 1 W. Va. 125.

(2) Particular Contracts Considered.

(a) Guaranty.

See the title GUARANTY.

(aa) Necessity of Consideration.

A promise in writing not sealed to pay the debt of another, to be binding must be supported by a sufficient consideration. Chandler v. Hill, 2 Hen. & M. 124; Hopkins v. Richardson, 9 Gratt. 485; Beers v. Spooner, 9 Leigh 153; Wolverton v. Davis, 85 Va. 64, 6 S. E. 619.

A. by a contract in writing not sealed, guaranties payment to B. of a debt due him from a third person; no consideration for the guaranty is expressed in the contract, and none is shown in proof: Held, A. is not bound by such guaranty. Beers v. Spooner, 9 Leigh 153.

A promise in writing, not under seal, by a son to pay a debt for his father, must be considered a nudum pactum, unless some consideration moving from the creditor to the son, or some agreement binding the creditor to forbearance, or the like, in the event of the assumption by the son, be proved. Parker v. Carter, 4 Munf. 273; Beverleys v. Holmes, 4 Munf. 95, cited in Winkler v. Chesapeake, etc., R. Co., 12 W. Va. 699.

A promise of one person to pay the debt of another, though in writing, must be founded on a consideration to make it binding. Winkler v. Chesapeake, etc., R. Co., 12 W. Va. 707, citing Colgin v. Henley, 6 Leigh 85; Moseley v. Jones, 5 Munf. 23.

Partnership Agreements—Individual Debts.—Partnership effects may be applied, by the concurrence of the partners, to pay an individual debt of one of them, if the other receives a sufficient consideration therefor, though they may be unable to pay all their partnership debts. *Marks v. Hill*, 15 Gratt. 400. See *Millhiser v. McKinley*, 98 Va. 207, 35 S. E. 446.

Rule in Equity.—A promise in writing by a son to pay a debt of his father, founded on no consideration, is a mere nudum pactum and will not be enforced, even in equity. *Chandler v. Hill*, 2 Hen. & M. 124; *Parker v. Carter*, 4 Munf. 273.

Conditions Precedent.—Where A. held liens on two lots of B., and C. bought the two lots, and, in consideration that A. would release the liens, C. paid A. 300 in cash, and accepted an order drawn by B. on himself for \$400, to be paid out of the funds that might be due on a certain contract, and A. made the release, and accepted the money and the conditional order, and the contract failed, and no money was due on the contract, and C. afterwards promised to pay the \$400, held, that there was no consideration for such promise, and, the order being conditional, and the condition having failed, no recovery could be had on the order. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

"The acceptance was verbal, and if made without other consideration than the debt, default, or misdoing of another, it was void under the statute of frauds, and, if conditional, it would not be binding until the condition was fulfilled, even if on good consideration. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104." *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, 27 S. E. 209.

(bb) Sufficiency of Consideration.

A promise in writing, not under seal, by a son to pay a debt for his father, must be considered nudum pactum, un-

less some consideration moving from the creditor to the son, or some agreement binding the creditor to forbearance, or the like. in the event of the assumption by the son, be proved. *Parker v. Carter*, 4 Munf. 273.

R. assigns the bond of G. to K. without consideration, and K. transfers it to H. as collateral security for goods purchased of H. on credit, upon the understanding that if R. does not acknowledge his liability as assignor of said bond, H. may return it and look out for other security. R. being called on by H. to know if he was responsible as assignor of the bond, assured H. in writing that he was aware of no offset or objection to said bond, nor of anything to affect his liability as assignor thereof. H., therefore, did not return the bond and apply for other security. When the time for payment for the goods arrived, G. was insolvent. This was not a sufficient consideration to support an action of assumpsit by H. against R. *Hopkins v. Richardson*, 9 Gratt. 485. See also, *Hale v. Crow*, 9 Gratt. 263.

If a railroad company let a contract to construct a road to a firm, and that firm sublets the contract to another firm, which does a large amount of work, and the first firm fails and does not pay the subcontractors, and the railroad company, to induce the subcontractors to go on with the work, agrees to pay them the debt of the contractors, such agreement is founded on a valid consideration and is binding. *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184, citing *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699.

(cc) Knowledge or Request of Parties.

A promise founded on sufficient consideration will be binding, though not made at the request or even with the knowledge of the person whose debt the promisor assumes, nor at the request of the creditor. *Colgin v. Henley*, 6 Leigh 104.

(dd) Statute of Frauds

See the title FRAUDS, STATUTE OF.

Where the consideration of a defendant's undertaking or promise is money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral, and under the statute of frauds will not bind the defendant, unless it be in writing. *Radcliff v. Poundstone*, 23 W. Va. 724; *Waggoner v. Gray*, 2 Hen. & M. 603; *Cutler v. Hinton*, 6 Rand. 509; *Ware v. Stephenson*, 10 Leigh 155; *Noyes v. Humphreys*, 11 Gratt 636; *William & Mary College v. Powell*, 12 Gratt. 387. See W. Va. Code, 1899, ch. 98, § 1.

A promise of one person to pay the debt of another, though in writing, must be founded on consideration to make it binding, but under the statute of frauds in Virginia the consideration need not be set forth in writing. *Colgin v. Henley*, 6 Leigh 85.

Where the promise to pay the debt of another arises out of some new and original consideration, it is not within the statute of frauds, and is binding, though not in writing. *Wright v. Smith*, 81 Va. 777; *Hopkins v. Richardson*, 9 Gratt. 494. See *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619.

An unconditional verbal promise to pay a written order is an acceptance of such order, and, if founded on a sufficient legal consideration, is binding on the acceptor. The debt, default, or misdoing of another is not a sufficient consideration to exempt such promise from the operation of the statute of frauds. *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, 27 S. E. 209.

(ee) Pleading.

See post, "Pleading and Practice," VIII.

The promise of one person to pay the debt of another, though in writing, must be founded on a consideration to make it binding; and if there is an attempt made to declare upon it specially, the count, or counts, must set forth the consideration. *Winkler v. Chesapeake, etc.*, R. Co., 12 W. Va. 699, citing *Parker v. Carter*, 4 Munf. 273; *Colgin v. Henley*, 6 Leigh 85; *Beers v. Spooner*, 9 Leigh 153; *Moseley v. Jones*, 5 Munf. 23.

Parker v. Carter, 4 Munf. 273, is cited in *Winkler v. Chesapeake, etc.*, R. Co., 12 W. Va. 708, to the point that though a special count shows a consideration for the contract of one person to guarantee payment of the debt of another, yet, if it does not allege that the other has not paid the debt, it is fatally defective.

A promise of one person to pay the debt of another, though in writing, must be founded on a consideration to make it binding. *Winkler v. Chesapeake, etc.*, R. Co., 12 W. Va. 707, citing *Beers v. Spooner*, 9 Leigh 153; *Colgin v. Henley*, 6 Leigh 85; *Moseley v. Jones*, 5 Munf. 23. *Beers v. Spooner*, 9 Leigh 153; *Parker v. Carter*, 4 Munf. 273, and *Colgin v. Henley*, 6 Leigh 85, were also cited in *Winkler v. Chesapeake, etc.*, R. Co., 12 W. Va. 707, 708, as authority for the proposition that, though a special count shows a consideration for the contract of one person to guarantee payment of the debt of another, yet, if it does not allege that the other has not paid the debt, it is fatally defective. *Chapman v. Pittsburg, etc.*, R. Co., 18 W. Va. 199.

(b) Indemnity.

See the title INDEMNITY.

Necessity of Consideration.—A contract of indemnity must be supported by a sufficient consideration. *Scott v. Osborne*, 2 Munf. 413; *Chapman v. Ross*, 12 Leigh 565.

Sufficiency of Consideration.—Inconvenience to the promisee is suffi-

cient consideration to sustain a contract to indemnify. *Scott v. Osborne*, 2 Munf. 413; *Chapman v. Ross*, 12 Leigh 565.

"This brings the case to the question decided in this court between Hite, executor of Smith, and Fielding Lewis's executors, October term, 1804. That was an action founded upon a promise in writing in these words: 'I hereby oblige myself, my heirs, executors and administrators, to indemnify Mrs. Smith (who was executrix of Charles Smith), for the said Charles Smith's becoming security for my son, F. S., from any demand which E. D., etc., may have against the executors of Captain Smith on that account, provided the sum does not exceed two hundred pounds,' to which he subscribed his name in the presence of a witness. And a majority of this court, consisting then of five judges decided it to be a nudum pactum. And though I was not one of that majority, I consider the question as settled by that decision, and as deciding this case; there being no equitable circumstances in the record, that I can discover, to make such a promise, as this is alleged to have been, binding upon either of the parties who are said to have subscribed it." *Chandle v. Hill*, 2 Hen. & M. 129.

Auctions and Auctioneers.—The plaintiff being employed by A and B to sell land at public auction, cries it out to C as the highest bidder. A considering the sale as unfair, directs the plaintiff to cry it again. B promises to indemnify the plaintiff if he will not comply with the request, to which he accedes; in consequence of which he is sued by A and B, and damages are recovered against him. The consideration of the promise made by B is both legal and sufficient to support an action against him upon his promise of indemnity. *Carr v. Gooch*, 1 Wash. 260; *Field v. Spotswood*, 1 Wash. 280. See *Long v. Israel*, 9 Leigh 556; *Chichester v. Vass*,

1 Call 83; *Price v. Winston*, 4 Munf. 63. See also, *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

A constable levies sundry executions sued out by A on property of the debtors; the removal and sale of the property is forbidden by the landlords of the debtors, claiming that it was liable for the rents; and A, the creditor, and B enter into a written agreement, to indemnify the constable "agreeably to law;" which agreement is signed by A and B and by C also, though C's name is not in the body of the instrument; and this agreement is delivered to the officer, on the day and at the place of sale; A, B and C all acknowledging it as their act, and B and C declaring verbally that they are A's sureties; held, this is the joint assumpsit of A, B and C to indemnify the constable, for removing and selling the property under A's executions and paying the proceeds to him, and the sale of it by the constable is a consideration to support the assumpsit as to them all. *Crawford v. Jarrett*, 2 Leigh 630.

Mills and Milldams.—One Alexander devised land and a mill seat to Ross, on condition that he should pay Chapman 250 dollars; Ross, apprehending the mill seat would be overflowed by a dam 11 feet, 6 inches, high which Summers claimed right to build on the stream below, refused to accept the land and mill seat devised to him and to pay the 250 dollars, unless Chapman would indemnify him against injury to mills he proposed to build, from the erection by Summers of such a dam below; and this being communicated to Chapman, he said Summers had no right to erect such dam, and if Ross would accept the devise and pay the 250 dollars, he would indemnify Ross against all injury he should sustain from the erection of such dam by Summers; whereupon, Ross accepts the devise, pays the 250 dollars, and builds mills at the mill seat to him devised,

and then Summers builds his dam, and the waters overflow Ross's mill seat whereby his works are of no value. In assumpsit by Ross against Chapman, on the contract of indemnity; held, that the declaration setting out such a contract, shows sufficient consideration to support the promise to indemnity. *Chapman v. Ross*, 12 Leigh 565.

(c) Modified Contracts.

See post, "Modification and Ratification," V.

Where a written contract is modified by a subsequent oral agreement, it seems that such oral modification must be supported by a consideration. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

(d) Novation.

See the title NOVATION.

A discharge of the existing obligation of a party to a contract is a sufficient consideration for a contract of novation. *Bantz v. Basnett*, 12 W. Va. 772.

Where before a note is due, a part of the debt is paid, and a new note executed for the residue, by the debtor, and an express agreement made between the parties that the old note shall be surrendered, such agreement is founded upon a valuable consideration, and extinguishes the old note, and no suit can be maintained thereon. *Bantz v. Basnett*, 12 W. Va. 772.

Where there is an express agreement between the creditor and his partnership or joint debtor, whereby the creditors agrees to take and accept the individual note or obligation of the partner or joint debtor, in discharge of the partnership or joint debt, such agreement is founded upon a valid consideration, and will have the effect to discharge the joint or partnership debt. *Bantz v. Basnett*, 12 W. Va. 772; *Bowyer v. Knapp*, 15 W. Va. 296.

(e) Options.

See the title VENDOR AND PURCHASER.

(aa) Necessity of Consideration.

An option must be supported by a valuable consideration, unless it is under seal. *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. See post, "Presumption of Consideration," II, B, 6, c.

"Having examined these authorities, we feel that the learned author has said in their behalf all that the most critical examination thereof would justify when he says they tend to support his conclusion; for each and every one of them lays down the same legal proposition that a sufficient consideration for the promise is essential to bind the promisor." *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

(bb) Extension of Option.

"To the question propounded by Mr. Wharton, 'Can a proposer bind himself to keep open a proposal until a specific date, so that an acceptance any time within that date be good?' we answer: Yes; there is no doubt of it, provided only that there is a sufficient consideration for the promise to keep it open, flowing from the party to whom the promise is made. To constitute such a consideration, it is not necessary that a benefit should accrue to the person making the promise. It is sufficient if something flows from the person to whom it is made, and that the promise is the inducement to the transaction. It may consist of some benefit to the promisor; or some loss, injury, or inconvenience to the promisee; or of some money or other thing of value given, exchanged, or paid; or of some promise or undertaking of the promisee to pay, give, or exchange such thing of value; or to incur some trouble or expense; or to do, or to not do, some lawful act; or to surrender, abandon, or suspend the exercise of some legal right, in consideration of which acts and promises

on the part of the promisee the proposer promised that his offer should be left open for a specified time. In all these cases the party to whom the proposal was made and the proposer have entered into a valid contract, founded on their mutual promises, which are a sufficient consideration, whereby the proposer has bound himself to leave his offer open until the time limited has expired." *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

Whatever contrariety of judicial opinion may have heretofore existed in regard to such agreements or offers to sell land or other property, giving to the prospective purchaser a limited time within which he may purchase upon the terms prescribed, it is now well settled that, where the promise on the part of the proposer to continue the offer for a specified time is made without consideration, it is nudum pactum, and may be withdrawn at any time, provided such retraction be communicated to the other party before he has accepted the same; for, until the proposal is accepted, there can be no contract, as there is nothing by which the proposer can be bound, and, unless both are bound so that an action could be maintained against the other for a breach, neither will be bound. Mr. Bishop, in his work on Contracts, says: "This proposition is absolutely axiomatic, not admitting of being overthrown by authorities, so long as the law requires something of value as a consideration. * * * If there be any cases in seeming contradiction to this, they are not to be followed; and a contract by mutual promises between an adult and a minor is binding on the adult, because the promise of a minor is not void, but is only voidable, and his right to recede from his promise is a personal privilege." *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

As a general rule the time of performance of a written agreement may be extended by parol, but to be bind-

ing it must be supported by some new and sufficient consideration. An option extended without any new consideration is revocable at any time before acceptance. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

If a contract for an option based upon sufficient consideration is extended after the time limited, without any consideration, such extension is not an option but is a continuing offer and may be withdrawn at any time before acceptance. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

(f) Release.

See the title RELEASE.

(aa) Necessity of Consideration.

Written Release.—A release is an estoppel to the party making it, and imports a consideration from being sealed. *Bloss v. Plymale*, 3 W. Va. 405.

Agreement to Release Debt.—A creditor does not lose his right to collect a debt by simply declaring his intention not to collect it. If not actually released, or if the agreement to release is not based upon a valuable consideration, he may still collect it. *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455; *Southern R. Co. v. Glenn*, 98 Va. 309, 36 S. E. 395.

An assignment in consideration of the release of a debt, is for a valuable consideration, and can not be annulled by a creditor as voluntary. *Barton v. Brent*, 87 Va. 385, 13 S. E. 29.

Where a plaintiff releases a valid lien on logs, and the defendant receives the benefit of such release, such a consideration is sufficient to make an unconditional verbal promise to pay a written order binding. *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, 27 S. E. 209, citing *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

"The release by Arbogast was a good consideration for his promise and agreement to pay back all the money paid by Arbogast, who had no further

interest in the land, and derived no benefit from the survey made of the same." *Arbogast v. Mylius*, 55 W. Va. 107, 46 S. E. 809.

(bb) Release of Claim for Damages by Injured Employees.

A promise of employment given to an injured employee is sufficient consideration for the release by the employee of a claim for damages for injuries received through the negligence of the employer, and such employee can not be discharged without cause. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 211; *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 93, 24 S. E. 916; *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

If a person having received permanent injury in the service of his employer, and claiming the injury was caused by the negligence of the latter, in consideration of an agreement on the part of the employer to give him work so long as he gives satisfaction to the foreman or superintendent under whom he works, releases his claim for damages for the injury, and is then given employment in pursuance of the agreement at wages agreed upon between them, there is no lack of certainty or mutuality in the agreement, for all its terms are settled, and by releasing his claim for damages, the employee has paid in advance for the option to do such work for his employer as he is able to do, and he can not be discharged without cause. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

Mental Capacity.—See the title INSANITY.

Where a railroad employee, who has been seriously injured in an accident, releases all claims for damages suffered by him in that accident, pending his action for damages against the railroad company, in consideration of a certain sum per month until such a time as he should feel able to resume

his former duties, or if, after the expiration of that time, he did not feel able to resume his duties, the railroad company would furnish him less laborious labor until he did feel able to resume his former position, such release is valid and will not be set aside in chancery on the ground that such employee, at the time of executing the release, was mentally incompetent, and that the railroad company took advantage of his incapacity to procure the release, where the record does not raise a suspicion of fraud, advantage or undue influence on the part of the railroad company. *Chesapeake, etc., R. Co. v. Mosby*, 93 Va. 93, 24 S. E. 916.

Pleading.—A declaration in assumpsit based on a claim of plaintiff against a railroad company for personal injuries, which plaintiff claims was compromised by defendant agreeing to give plaintiff employment at a stipulated per diem as track walker, as long as defendant kept a track walker on the section designated, and from which service he was wrongfully discharged, which fails to allege a complete accord and satisfaction, is bad on demurrer. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

(g) Subscriptions.

See the title SUBSCRIPTIONS.

A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party making it, or of loss to the other party. *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311.

c. Presumption of Consideration.

See post, "Parol Evidence," II, B, 6, i.

(1) Sealed Instruments.

See the title SEALS AND SEALED INSTRUMENTS, and references given.

(a) In General.

In common-law securities under seal, a valuable consideration is conclusively presumed. *Harris v. Harris*,

23 Gratt. 751; *Watkins v. Hopkins*, 13 Gratt. 743; *Cunningham v. Smith*, 10 Gratt. 255; *Goodall v. Stuart*, 2 Hen. & M. 111.

"This voluntary bond was good and valid between the parties, for though a parol promise of such a nature would be nudum pactum, it is otherwise in relation to a sealed instrument, which, from the solemnity of its character, carries with it, as inherent therein, a consideration deemed valuable in the eye of the law." *Wells v. Cole*, 6 Gratt. 654.

The addition of a seal operates as an estoppel, and concludes the party from denying the consideration or questioning the facts set forth in the instrument. *Cromwell v. Tate*, 7 Leigh 301.

Release.—A release is an estoppel to the party making it, and imports a consideration from being sealed. *Bloss v. Plymale*, 3 W. Va. 405.

Assignment of Claim.—A written assignment of a claim does not necessarily import a valuable consideration; and if it be fairly inferrible, from the circumstances, that the assignment was a gift, the assignor can not be held responsible to make good the claim to the immediate assignee, or to his assignees for value. *Wood v. Duval*, 9 Leigh 6. See the title ASSIGNMENTS, vol. 1, p. 767.

(b) Options.

See the title VENDOR AND PURCHASER.

An option to sell, if under seal, imports a valuable consideration. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Donnelly v. Parker*, 5 W. Va. 301; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743. See ante, "Necessity of Consideration," II, B, 6, b.

Where the proposal is to sell to a party a tract of land at a stipulated price, and a period is fixed in the future within which such party may accept the same, if the instrument containing the proposal be a covenant

or other obligation, the seal itself imports a consideration for the time allowed for acceptance, which the party making the offer would be estopped from denying. This was in effect the ruling of this court in *Donnelly v. Parker*, 5 W. Va. 301, where the paper writing, giving to the purchaser a future day in which he might elect to purchase all or any part of the lands mentioned therein, was in the form of an article of agreement, signed, sealed, and acknowledged by all the parties thereto; and *Maxwell, J.*, delivering the opinion of the court, rests his conclusion upon the fact that the paper writing in that case was more than a mere proposition to sell, but was in fact a covenant that such proposition should remain open for acceptance during the time specified in it. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

(c) Rule in Equity.

"The fourth contention of the plaintiff is that its lease is not a nudum pactum, without consideration, and void by reason thereof. It insists that it is made under seal, which imports consideration, and that a party to it can not avoid it, for this reason. This would be true at law. 3 Am. & Eng. Ency. Law 827; *Harris v. Harris*, 23 Gratt. 738. It is not true in equity. 'It is a fundamental principle of equity to refuse aid to the enforcement of executory deeds, unless founded upon either a good or a valuable consideration. The presence of a seal does not, in equity, import a consideration.' It has no force. 6 Am. & Eng. Ency. Law (2d Ed.) 683." *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 929.

(2) Orders and Mercantile Securities.

Orders.—See the title ORDERS.

There is a prima facie presumption that there was a valuable consideration for drawing an order. *Carr v. Sumnerfield*, 47 W. Va. 155, 34 S. E. 804; *Averett v. Booker*, 15 Gratt. 163,

76 Am. Dec. 203; *Corbin v. Southgate*, 3 Hen. & M. 319.

Mercantile Securities.—See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 415.

A consideration need not be shown in mercantile securities; here there arises a presumption of consideration, *prima facie* between the parties and conclusive as to subsequent holders for value without notice. *McNiel v. Baird*, 6 Munf. 316.

"For Value Received."—The words "for value received," in a note *prima facie* establishes a valuable consideration, where it becomes necessary to prove such consideration. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Averett v. Booker*, 15 Gratt. 164; *Barksdale v. Fenwick*, 4 Call 492.

d. Sufficiency of Consideration.

(1) Valuable Consideration.

(a) Definitions.

See ante, "Definitions," II, B, 6, a.

A valuable consideration consists, ordinarily, in money or its equivalent, or marriage; but it is likewise held sufficient, to support such a contract or promise, if by making the promise the promisor is to receive some advantage or benefit, or the promisee may sustain some injury or damage. *Strum v. Parish*, 1 W. Va. 144.

A valuable consideration is the relinquishment by the promisee of some right which he may lawfully exercise or enforce, or the incurring of some risk or trouble at the instance of the promisor. *County Court v. Hall*, 51 W. Va. 269, 41 S. E. 119.

The definition of valuable consideration, given in 6 Am. & Eng. Ency. Law (2d Ed.) 704, is as follows: "In the abstract a valuable consideration may be defined to be the relinquishment by the promisee of some right which he may lawfully exercise or enforce. As applied to sales, it is the relinquishment of the right of property; in respect to bailments, it is the re-

linquishment of the right of possession; in considerations founded upon some act or forbearance, it is the relinquishment of a personal right, singly or in conjunction with others." *County Court v. Hall*, 51 W. Va. 270, 41 S. E. 119.

A conveyance in consideration of stock is for a valuable consideration as much as if the consideration had been money, and therefore can not be annulled by the creditors of the grantor as voluntary. *Baker v. Naglee*, 82 Va. 876, 1 S. E. 191.

(b) Advantage or Benefit to Promisor.

(aa) Statement of Rule.

A gain to the promisor is as adequate a consideration to support a contract as the loss by the promisee. *Price v. Winston*, 4 Munf. 63; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

Benefit to be derived by each party to a contract furnishes a sufficient consideration for it. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92.

(bb) Specific Applications of Rule.

Crossings—Gates.—Although a street railway company may have the right to cross a railroad at grade without the consent of the railroad company, yet the benefits derived from the increased safety to its passengers furnished a sufficient consideration for its contract with the railroad company to pay one-half the costs of the erection and maintenance of such gates and the salary of a watchman. *Richmond, etc., R. Co. v. Richmond, etc., R. Co.*, 96 Va. 670, 32 S. E. 787. See *Ocheltree v. McClung*, 7 W. Va. 232. See also, *Knott v. Seamands*, 25 W. Va. 99.

Services of Real Estate Agent.—The services and talent applied by A in finding a purchaser and effecting a sale of B's farm, is a sufficient consideration to support a promise by B to A. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

Agreement to Refund Purchase

Money.—S. sells a lot of land to D., who subdivides and sells to P. and S., and Parish; S. conveys by deed to P. and S., the vendees of D., without retaining vendor's lien; subsequently S., at the instance of Parish, conveyed to him the lot sold him by D., upon his paying him the balance of the purchase money due on the whole land by D., and executed to Parish a paper promising to refund the said balance of purchase money, if it should appear that the portions sold to P. and S. were liable for the payment of said balance. Held, that the paper so executed by S. to Parish, was a promise without a consideration. The court said: "The promisor, Sturm, instead of being benefitted by the promise (if bound by it), would have been injured; and the promisee, Parish, instead of being injured, would have been directly benefitted." *Sturm v. Parish*, 1 W. Va. 125.

Assumption of Debt.—K., an insolvent, held C.'s bond and assigned it to his mother. F., a creditor of K., agreed that if C. would assume K.'s debt to him, and pay interest annually to F.'s sister during her life, the principal should be deemed satisfied. C. procured the mother to assign the bond to F.; which bond was replaced by another payable to the sister, and surrendered to C. C. paid the annual interest to the sister during her life. Afterwards, T. got a judgment against F., and brought his suit in chancery to enforce the lien of his execution on the alleged indebtedness of C. to F. Held, the transaction between F. and C. being bona fide for a valuable consideration between parties *suri juris*, was valid, and satisfied the obligation of C. The promisor, F., was largely benefitted by the contract. *Terry v. Clark*, 84 Va. 221, 4 S. E. 372.

Contract between Sheriff and Jailor.

—Where a sheriff after a jailor had acted for some time as such, commanded that the jailor, for being al-

lowed to continue as such, should allow the sheriff to have the allowance made by the county to the jailor, else he, the sheriff, would remove the jailor, and then a contract in writing is made by which the sheriff was to have the allowance, and so to lift the orders made by the county court for the same, it was held, that such contract is not void because without consideration. The objection being that the sheriff had no power to remove a deputy without consent of the county court, such objection can not be sustained, because both the common law and the West Virginia statute vests in the sheriff the power to remove without cause. *Stephenson v. Salisbury*, 53 W. Va. 366, 44 S. E. 217.

Payment of Debt before Due.—"But in the case before us it appears that the \$600.00 was paid before the \$1,000.00 note was due, and the note for \$408.00, due four months after date, which was far beyond the time the \$1,000.00 note would become due, executed, and an express agreement made between the maker and payee of the \$1,000.00 note, that it should be extinguished by the new agreement, and surrendered to the maker. Is this agreement founded on a valuable consideration; and is it binding on the parties? We think it is; as the payment of the \$600.00 before it was due, was a benefit to the creditor, and an inconvenience to the debtor, and was therefore a valuable consideration for the new agreement, and the execution of the new note in extinguishment of the old." *Bantz v. Basnett*, 12 W. Va. 832, cited in *Hornbrooks v. Lucas*, 24 W. Va. 493.

Remittitur.—See the title REMITTITUR.

An agreement of a creditor to remit damages recovered upon the affirmance of a judgment, upon condition that the debtor pay the balance, with interest, by a certain time, is binding upon him, and will be enforced in equity. *Robertson v. Campbell*, 2 Call 421.

(c) Loss, Inconvenience or Damage to Promisee.

(aa) Statement of Rule.

The general rule is, that "any damage, or any suspension or forbearance of his right, or any possibility of a loss, occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party undertaking." *Cleaton v. Chambliss*, 6 Rand. 90; *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427, 450 (in this case the consideration was insufficient, because the plaintiff had neither compromised nor surrendered any right, nor had he suspended any right except momentarily).

Loss to the plaintiff, without any gain to the defendant, is a sufficient consideration to support a promise. *Corbin v. Southgate*, 3 Hen. & M. 319.

"And as to the consideration, it is perfectly clear, that it need not have any relation to the interest of the party making the promise; it is sufficient if it affect the interest of the person to whom it is made. Loss or disadvantage to the person to whom the promise is made, is as good a consideration, as benefit or advantage to the person making it. Thus, a forbearance to sue, or the surceasing of an action, is a good consideration, although that may operate exclusively for the benefit of the original debtor." *Colgin v. Henley*, 6 Leigh 104.

"If the promisee, at the instance of the promisor and moved by his promise, do any act which occasions him even the slightest trouble or inconvenience, or in doing which he incurs a risk, the act so performed constitutes a valuable consideration for the promise." *County Court v. Hall*, 51 W. Va. 276, 41 S. E. 119.

(bb) Specific Applications of Rule.

An agreement by a party to give priority to an attachment, is nudum pactum if the party making the promise

could have taken no steps which would have disappointed the attachment; therefore, the promisor gave up nothing, and the promisee on the other hand received no benefit by the transaction. It was, therefore, a bargain without consideration, and consequently not binding. *Mosby v. Leeds*, 3 Call 439.

Railroads—Right of Way—Switches.

—A right of way through land is granted to a railroad, and in consideration for such grant the railroad company covenants with the grantor, his heirs and assigns, to build and forever maintain a switch from the railroad to a mill on the land for the use of such mill, if an intermediate owner of the mill, had agreed to release the railroad company from the building and maintaining such switch, and the company in consideration thereof had agreed to stop at specified times its freight trains at the door of such mill, if the contract made by the plaintiff was that if the railroad company would so stop its trains, the plaintiff would dispense with the building and maintaining of the switch only so long as it pleased the plaintiff, he could not sue the railroad company on such contract to stop its trains, as it would not be supported by any consideration but be a nudum pactum. "If the promise of the defendant was such as is stated in this declaration, if it had been made first and directly to the plaintiff instead of being merely renewed, it would have been invalid and could not have sustained an action of assumpsit, because there was no consideration to sustain such promise. The promise made as stated in the declaration is, that the defendant would stop its train twice a week at the mill in consideration of the other side not insisting on the building and maintaining by the defendant of the switch at that moment; but it was expressly understood, that there was no abandonment by the other party of its right to demand the building and maintaining of this switch, whenever they pleased to make the demand. This

promise is based on no consideration and is therefore nudum pactum. The plaintiff has neither compromised nor surrendered any right, nor has he suspended any right except momentarily. He has by such a contract in no possible manner prejudiced himself or benefited the defendant. It is like the case when A. in consideration that B. would make to him an estate at will promises. This is no valuable consideration, for that he may presently after the estate made determine it." *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

Surrender of Right to Compel Railroad to Build Switch.—The surrender by the plaintiff of his right to compel in equity a defendant railroad company to build and maintain a switch to the plaintiff's land in consideration of a right of way through the plaintiff's land granted to such railroad company, is a sufficient consideration to sustain a contract on the part of the defendant to stop its trains near the plaintiff's place of business. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427. (Held not sufficient in this case, however, because surrendered only momentarily.)

Premature Delivery of Note.—Where an agreement to build a house stipulated that a note for part of the price should be delivered when a certain amount of the work had been completed, and a note was delivered before such time, but after the payee had expended in labor and material more than the amount of the note, it was held, that there was a valid and sufficient consideration to support the note, the delivery before the time, when, according to the agreement, it could be demanded, not making the note an accommodation note. *Ould v. Myers*, 23 Gratt. 383.

Purchase on Faith of Another's Promise.—See ante, "Indemnity," II, B, 6, b, (2), (b).

A father-in-law having promised his son-in-law that, if he would purchase a certain tract of land, he would assist

him in paying for it by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase, this promise was held to be upon sufficient consideration, and obligatory in law, the plaintiff having thereby sustained a great inconvenience; therefore, the promise to indemnify was valid and binding. *Scott v. Osborne*, 2 Munf. 413.

Parting with Goods on Faith of Indorsement.—In the case of *Hopkins v. Richardson*, 9 Gratt. 494, it was held, that the plaintiffs' parting with their goods to A, upon the faith of the defendant's indorsement made for that purpose, was ample consideration for his liability.

Bond Conditioned on Slave Service.—Emancipated slaves (mother and daughter) remained in the service of their former master until a short time before he gave them a bond conditioned that he would devise to them certain real and personal property, definitely described, "provided they would return and live and remain with" him and his wife during their natural lives. Held, in an action brought after his death to compel his personal representatives to convey and deliver the property, that the contract was on valuable consideration and sufficiently definite, both as to the property to be devised and the services to be performed. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992.

Giving Higher Security for Debt.—See post, "Change in Character of Obligation," II, B, 6, d. (1), (a).

"If instead of a bond the creditor had a judgment against the debtor, and the debtor gave to the creditor a negotiable note for the amount of the judgment payable at a future time and not bearing interest till it was payable, I presume that the creditor would nevertheless have a right before the negotiable note became payable to issue an execution on his judgment and to enforce its payment. For this implied

agreement on his part to give credit on his debt till the negotiable note was payable would, it seems to me, be a nudum pactum and therefore null and void. Its nullity, however, does not, as is claimed, result from the fact that a judgment is of higher dignity than a negotiable note, but it results from the fact that the giving of the negotiable note is of no possible benefit to the creditor and no injury or inconvenience to the debtor. For after the negotiable note becomes due all that the creditor could get would be a judgment for the amount against his debtor, and that he already has. Nor is the debtor inconvenienced, because, though he could not make any defense against the negotiable note, if assigned before it was payable, yet in this he loses nothing, as he could make no defense against a judgment already rendered." *Hornbrooks v. Lucas*, 24 W. Va. 500.

Surrender of Collateral Security.—The surrender of other instruments, although held as collateral security, is also a good consideration. *Bank v. Lockwood*, 13 W. Va. 429.

Surrender of Claim by Cestui Que Trust.—Trustees charged with the support of the testator's imbecile son invested his property in confederate bonds, which became worthless, and refused to furnish any further support for the son, whereupon the son, who was then of age, agreed to abate one-third of the principal which the trustees were ordered by the will to pay to him at the age of twenty-five. This agreement was held to be unenforceable, for want of consideration. *Knight v. Watts*, 26 W. Va. 175.

Joinder in Deed by Wife.—Where a husband sells a tract of land, and his wife refuses to join in the deed, and in consideration that she does execute the deed, he promises to buy her land and build on it, and have it conveyed in trust for her and her children, this contract is valid between them as against creditors, there having been no fraud in the arrangement between the

husband and his wife. *Payne v. Hutcherson*, 32 Gratt. 812.

Public Lands—Abandonment of Settlement.—W. having made a settlement on land within the limits of the Greenbrier Company's grant, and L. holding a survey under the company of other land in the neighborhood, it was verbally agreed between W. and L. in 1774, that if W. would abandon his settlement, so that L. might acquire the land so settled by W. for himself, L. would give him land of equal value, parcel of L.'s survey; W. accordingly abandoned his settlement to L. and with L.'s knowledge and consent took possession of the designated part of L.'s survey, and continued to hold the same ever since; but L. dying without conveying the right to W. or acquiring a grant upon his survey, his devisee obtained a grant for the whole of the land included in the survey. Upon a bill filed by W. against L.'s devisee in 1822, for a specific execution of L.'s agreement; held, that L.'s agreement to give W. part of his survey, if he would abandon his own settlement, was founded on valuable and sufficient consideration. *Williams v. Lewis*, 5 Leigh 686.

Foregoing Intention to Remove.—J. being wealthy and childless, verbally agrees with his brother C., who is poor and has a large family of children, that if C. will forego his intention to move to the West, and move to and settle on a tract of land of J. near his residence, J. will convey the land to him in fee; C. induced by this promise, executes the agreement on his part. Held, there was no consideration either meritorious or valuable to support the agreement, the plaintiff not having shown that he suffered any inconvenience or damage on account of the other party's promise, and equity can not decree specific execution against J.'s heirs. *Reed v. Vannorsdale*, 2 Leigh 569.

(d) Dismissal of Appeal.

If the appellant promise the appellee,

that if the latter will agree to have the appeal dismissed the appellant will pay him the full amount of the debt, damages and costs then due upon the appeal, and the appellee consents thereto and the appeal is dismissed agreed, this is a sufficient consideration, and the appellee may maintain assumpsit on this promise. *Spotswood v. Pendleton*, 2 Call. 209.

Forbearance to Appeal.—The mere statement of an appellant to an appellee that he did not intend to or would not appeal does not prevent an appeal, unless there was a consideration for the statement, or the appellee has acted on it to his prejudice. *Southern R. Co. v. Glenn*, 98 Va. 309, 36 S. E. 395.

(e) Dismissal of Pending Suit.

When a county court, in prosecuting a condemnation proceeding under chapters 42 and 43 of the West Virginia Code, has made costs, and upon the agreement of the landowner to pay the costs, dismisses the proceeding to take the particular parcel of land described and designated in its application, the relinquishment of its right to retain the advantages gained in such proceedings and the risk of future costs and trouble it incurs by dismissing, constitute a sufficient consideration for the promise to pay the costs and they may be recovered in an action of assumpsit. *County Court v. Hall*, 51 W. Va. 270, 41 S. E. 119.

(f) Foregoing Intention to Move.

J. being wealthy and childless, verbally agrees with his brother C., who is poor and has a large family of children, that if C. will forego his intention to move to the west, and move to and settle on a tract of land of J. near his residence, J. will convey the land to him in fee; C., induced by this promise, executes the agreement on his part, but without incurring any expense or loss in so doing. Held, there was neither a meritorious nor a valuable consideration to support the agreement,

and equity can not decree specific execution against J.'s heirs. "But I take occasion to say, that if it had appeared, that Charles Reed had incurred necessary expense or loss in executing his part of the agreement, I should be of opinion that specific execution of it, on the part of James Reed and his heirs ought to be enforced." *Reed v. Vannorsdale*, 2 Leigh 569.

(g) Withholding Competition.

Withholding competition, when not contrary to public policy, is a sufficient binding consideration for a contract. *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911, citing 6 Am. & Eng. Ency. Law (2d Ed.) p. 746.

"The consideration was the withdrawal from competitive purchasing, by which they were enabled to purchase all the lands cheaper than they might have otherwise done. This was in good faith fully carried out by the plaintiff. Withholding competition, when not opposed to public policy, is a sufficiently binding consideration. 6 Am. & Eng. Ency. Law (2d Ed.) 746." *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911.

(h) Relinquishment of Dower.

See post, "Marriage and Promise of Marriage," II, B, 6, d, (1), (q). See generally, the titles DOWER; FRAUDULENT AND VOLUNTARY CONVEYANCES.

Relinquishment of dower to the extent of its value, is a sufficient consideration for a postnuptial settlement as against the husband's creditors. *Strayer v. Long*, 86 Va. 559, 10 S. E. 574; *Cronie v. Hart*, 18 Gratt. 739; *William & Mary College v. Powell*, 12 Gratt. 372, 385; *Taylor v. Moore*, 2 Rand. 563; *Lee v. Bank*, 9 Leigh 200; *Harrison v. Carroll*, 11 Leigh 476, 484; *Burwell v. Lumsden*, 24 Gratt. 446; *Davis v. Davis*, 25 Gratt. 590; *Quarles v. Lacy*, 4 Munf. 251; *Blanton v. Taylor*, Gilmer 209; *Blow v. Maynard*, 2 Leigh 29; *Harvey v. Alexander*, 1 Rand. 219; *Johnston v. Gill*, 27 Gratt. 587. The settlement will be set aside as to the excess. *Davis v.*

Davis, 25 Gratt. 590; Taylor v. Moore, 2 Rand. 563; Harvey v. Alexander, 1 Rand. 219; Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilmer 209; Lee v. Bank, 9 Leigh 200; Harrison v. Carroll, 11 Leigh 484; William & Mary College v. Powell, 12 Gratt. 372; Burwell v. Lumsden, 24 Gratt. 443.

A wife parting with her dower right in real property, forms a sufficient consideration for a subsequent deed conveying other property for her benefit. Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; Payne v. Hutcheson, 32 Gratt. 812.

A wife parting with her dower right is a good consideration for a settlement on her as against creditors of the husband to the extent of the value of the dower. Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; Taylor v. Moore, 2 Rand. 563; Ficklin v. Rixey, 89 Va. 834, 17 S. E. 325; Glascock v. Brandon, 35 W. Va. 90, 12 S. E. 1104.

Even if the wife relinquish her dower on the mere promise that other property shall be settled on her, as a compensation for the interest so relinquished, in the absence of fraud, such settlement will not be disturbed unless it manifestly appears to be grossly excessive. Burwell v. Lumsden, 24 Gratt. 443; DeFarges v. Ryland, 87 Va. 404, 12 S. E. 805; Taylor v. Moore, 2 Rand. 563. Though the settlement on the wife is made fraudulent as to her husband's existing creditors, the fraud will not be imputed to her. Strayer v. Long, 86 Va. 557, 10 S. E. 574; William & Mary College v. Powell, 12 Gratt. 387; Blanton v. Taylor, Gilmer 209; Taylor v. Moore, 2 Rand. 563, 580; Quarles v. Lacy, 4 Munf. 251.

If a sum secured to a wife, in consideration of a release of her contingent right of dower be set aside as excessive, she will be restored, if practicable, to her former rights. Runkle v. Runkle, 98 Va. 663, 37 S. E. 279.

Examples.—Release of dower right in large farm by the wife is sufficient consideration for much smaller farm pur-

chased by the husband and conveyed to a trustee for the benefit of the wife and children. Payne v. Hutcheson, 32 Gratt. 812. See also, Harvey v. Alexander, 1 Rand. 219; Quarles v. Lacy, 4 Munf. 251; Gatewood v. Gatewood, 75 Va. 412; Lewis v. Caperton, 8 Gratt. 150.

By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. Held, this agreement barred her of her dower in her husband's real estate; but did not deprive her of her distributable share of his personal estate. Findley v. Findley, 11 Gratt. 434. See Faulkner v. Faulkner, 3 Leigh 255; Charles v. Charles, 8 Gratt. 486.

(i) Compensation for Services.

A promise of remuneration for services to be performed makes a valid consideration for a contract. If one employ another as agent for remuneration on performance, the contract is based on sufficient consideration, and is mutually binding. Rowan v. Hull, 55 W. Va. 335, 47 S. E. 92.

When a bill of particulars before a justice was for "toll on a county road" and was not objected to there or in the circuit court, where the case was tried on appeal, and evidence was given to show that the plaintiffs were entitled to recover on agreement for building a road for the benefit of defendant in part, and the evidence tended to show that defendant had agreed to pay a certain sum for building the road, and the verdict was for plaintiff; held, there was a sufficient consideration for such promise, and the court did not err in refusing to set aside the verdict. The court said: "Although the plaintiffs had no right to charge him toll, yet the work, which they (defendants) did on the road, was a sufficient consideration to support a promise to pay the money he agreed to pay." Graham v. Carroll, 27 W. Va. 791.

Promise of Legacy.—Though services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt, will not generally be the ground of an action, yet if performed at the request of the testator, or if he has promised to pay for the services either before or after they were performed, an action is maintainable. *Jincey v. Winfield*, 9 Gratt. 708.

(j) Mutual Promises.

A promise made by the plaintiff to the defendant is a sufficient consideration for the promise of the defendant to the plaintiff. *Davisson v. Ford*, 23 W. Va. 617; *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147; *Rowan v. Hull*, 55 W. Va. 30, 47 S. E. 92.

Mutuality of Promise.—The general rule of law is that where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound. 1 *Parsons on Contracts* (7th Ed.) 448-452; *Clark on Contracts* 165-171; *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355; *American Agricultural, etc., Co. v. Kennedy*, 103 Va. 176, 48 S. E. 868; *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

The liability of a bailee to his bailor for failure to exercise the care required, whereby the property bailed is lost or damaged, is a sufficient consideration to support a promise by the bailee to his bailor to pay the value of such property to avoid litigation, a dispute having arisen. *Davisson v. Ford*, 23 W. Va. 617.

Stock Subscriptions.—When an agreement to become stockholders in specified shares, in a partnership, and to pay the amounts subscribed, is signed by a number of persons with the number of shares and the aggregate amount thereof annexed to their names, though no promise is named in the agreement, in effect, each party promises to the others to pay the amount;

and the promises of the others are a consideration for the promise of each, and the parties are sufficiently definite. *Kimmins v. Wilson*, 8 W. Va. 584.

Promises between Heirs.—A testator having devised certain slaves to his sister, "during her life, and, after her decease, to the children which she shall leave at her death, to be equally divided among them, to them and their heirs forever;" a written agreement not under seal, entered into, in her lifetime, by all her children then living "to stand to a fair and equal division of said estate among the children who shall be living at her death, and the issue of such as have or may die before her," is not a nudum pactum, but founded on sufficient consideration, and therefore binding on the contracting parties. Such agreement enures, also, to the benefit of the issue of those children who died before the date thereof. But if any of the children, living at the date thereof, refuse to sign it, and there be no stipulation providing for that event, such agreement is thereby rendered null and void. *Price v. Winston*, 4 Munf. 63.

The mutual obligations of a shipper to ship, and of a carrier to carry, furnish sufficient consideration for a contract to carry at a specified rate, but if the shipper fails to accept the carrier's offer, and is not bound to furnish the goods for carriage, the carrier's offer or promise to carry for a particular rate becomes a mere nudum pactum, the breach of which will not support an action. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

(k) Inducements to Carry Out Contract.

If a railroad company let a contract to construct a road to a firm, and that firm sublets the contract to another firm, which does a large amount of work, and the first firm fails and does not pay the subcontractors, and the railroad company to induce the subcontractors to go on with the work agrees

to pay to them the debt of the contractors, such agreement is founded upon a valid consideration and is binding. *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184.

(l) Payment of Interest in Advance.

See post, "Extension of Time of Payment," II, B, 6, d, (1), (o), (cc). See the title SURETYSHIP.

Actual payment of usurious or legal interest in advance is a sufficient consideration to make valid a contract to extend payment of a debt, so as to discharge a surety, but a mere naked unexecuted agreement to pay such interest will not discharge a surety. *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

It seems to be the law that payment actually made in advance of usurious interest, under a contract for its payment, will discharge the surety, if he does not consent to it; but a mere naked, unexecuted promise to pay such usurious interest would not do so. 2 *Brandt, Sur.*, § 356; 5 *Rob. Prac.* 787. So, the actual payment of one year's interest, though usury, would constitute ground for the release of the surety. As to the payment of less than legal interest in advance for the second year, as the law is that payment in advance of lawful interest is a valid contract, and, if executed, binds the creditor from suing, that would release the surety; and, as the payment of a part of a year's lawful interest in advance goes to tie the hands of the creditor from suit up to the period to which such payment discharges interest, that partial payment would release such surety. *Glenn v. Morgan*, 23 W. Va. 467, 470; 5 *Rob. Prac.* 787; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

"The actual payment in advance of usurious interest by the principal to the creditor, where the whole interest so paid can not be recovered back, is a sufficient consideration for the extension of the time of payment; and such payment, if made without the consent of the surety, will release him. *Brandt*

on S. & G., § 309; *Armistead v. Ward*, 2 Pat. & H. 504." *Glenn v. Morgan*, 23 W. Va. 467, 470.

(m) Pre-Existing Debt.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

An antecedent debt is a valuable consideration to support a sale, conveyance, or transfer of property in satisfaction of or as security for it. *Johnson v. Shoe Co.*, 103 Va. 611, 50 S. E. 153; *Herold v. Barlow* (W. Va.), 36 S. E. 8; *McConville v. National Valley Bank*, 98 Va. 9, 34 S. E. 891.

And it is not necessary that the consideration should have passed at the time of the conveyance; the satisfaction of a pre-existing debt or claim is sufficient. *Colston v. Miller*, 55 W. Va. 502, 47 S. E. 268.

When persons organize a company and appoint a treasurer, and, by agreement of the parties, one makes a promissory note, payable to the person appointed treasurer, for his unpaid share, the previous liability and agreement constitute an adequate consideration for the note. *Kimmins v. Wilson*, 8 W. Va. 584.

Negotiable Paper.—A pre-existing debt is not such valuable consideration as will protect the holder of a negotiable note wrongfully pledged as collateral security by the payee. *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025.

Conveyance or Assignments.—The existence of antecedent debts is a valuable consideration for the conveyance or assignment of property to secure the payment of the debts, and the trustee and creditors are purchasers for a valuable consideration. Then, in such case, the trustee and creditors are not, in any manner, liable to the grantor in trust, on account of mistake in quantity, and the grantor has no right against them to rescission or compensation, to which his vendor may be substituted; and any right that, while the original purchaser owned the land,

his vendor may have had, to a rescission of the sale and conveyance, is extinguished, unless the trustee and creditors—or at any rate the latter—had notice of the mistake from which the right of the original vendor emanated. *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 409.

Fraudulent and Voluntary Conveyances.—A pre-existing debt by a husband to his wife may be a sufficient consideration to sustain a conveyance to the wife as against the husband's creditors. *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660. See *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748.

Though a bond and deed of trust is usurious and void, yet if part of the consideration of the bond is a pre-existing valid debt, which continues to be a valid debt, a court of equity will not compel the obligee to establish his claim at law before proceeding to enforce his security. *Bank v. Arthur*, 3 Gratt. 173.

The fact that a part of the consideration of the bond was a pre-existing valid debt, distinguishes *Bank v. Arthur*, 3 Gratt. 173, from that of *Marks v. Morris*, 2 Munf. 407; and forbids the relief given in that case.

Bank v. Arthur, 3 Gratt. 173, is cited in *White v. Freeman*, 79 Va. 599, for the proposition that though the notes be usurious and null, yet if part of their consideration was a pre-existing valid debt, which continues to be a valid debt, the decree should be for the principal of the new notes, with interest on the pre-existing debt from the time it was entitled to bear interest. It is also cited for this point in *Bank v. Hupp*, 10 Gratt. 57.

(n) Change in Character of Obligation.

See the title NOVATION.

"If a new bond is given for an old bond, the amount of the bond and the obligor or obligors in it being the same as in the old bond, and the new bond being payable on time and not bearing interest till it fell due, in such case, as

the obligor or obligors in the new bond would be the same and would be bound in the same manner, so that the giving of the new bond could not possibly prejudice the obligors in it nor benefit the obligee, the implied agreement to extend the credit on the old bond would, it seems to me, be a nudum pactum and void, and therefore the old bond or debt might be sued upon, before the new bond was payable. But this could not be successfully done, if the new bond bore interest from its date; for this would be a sufficient consideration for the agreement to extend the credit." *Hornbrooks v. Lucas*, 24 W. Va. 498.

Negotiable Note and Bond.—"If, however, we suppose, that instead of a new bond there was given a negotiable note executed by the obligor in the old bond and given for the same amount as the bond and at the time the bond fell due, payable at a future time without interest from its date, and no interest was paid in advance, still, it seems to me, the bond could not be sued on, till the negotiable note became payable and the maker failed to pay it. For the taking of the note would be an extension of credit to the obligor in the bond, and the implied agreement to extend this credit would be supported by a valuable consideration; namely, the change in the character of the obligation which would be produced by the taking the negotiable note of the obligor in the bond." *Hornbrooks v. Lucas*, 24 W. Va. 499.

The giving of a negotiable note in lieu of a bond is or may be a benefit to the creditor and a possible inconvenience to the debtor. It gives to the creditor a different obligation from the one he held, and the new obligation is a commercial one, upon which he may raise money. The debtor, too, by giving a negotiable note instead of a bond, may subject himself to inconvenience. If he fails to pay his negotiable note promptly, he renders himself liable to be protested, and may then lose his

credit to an extent that the nonpayment of his bond promptly would not produce. Moreover, if the negotiable note, should be negotiated before it falls due, all of the maker's defenses, if he had any, against the creditor would be forever gone; nor could he acquire any offsets against such negotiable note, though he could against the bond, even after it was due and payable. *Hornbrooks v. Lucas*, 24 W. Va. 499.

But if the claim of the creditor was a claim for rent, though it be a debt of higher dignity than a negotiable note, yet, it seems to me, the giving for such rent by the creditor of his negotiable note for the amount of the rent, the note being payable at a future day, though it would be no satisfaction of the rent, yet it would operate to suspend the party's right by distress or otherwise to enforce the rent, till the negotiable note should become due. "This was expressly decided in the case of *Judge & Dennis v. Fiske & Eager*, 2 Speers (S. C.) 436. That case was like the one before us excepting only that the interest on the rent till the negotiable note became due was added in the giving of the note. But this circumstance could make no difference, as the reasoning of the court was in no manner influenced or affected by this circumstance." *Hornbrooks v. Lucas*, 24 W. Va. 500.

(o) Forbearance.

(aa) Forbearance to Sue.

Loss or disadvantage to the person to whom the promise is made, is as good a consideration as benefit or advantage to the person making it. Thus, a forbearance to sue, or the surceasing of an action, is a good consideration, although that may operate exclusively for the benefit of the original debtor. *Colgin v. Henley*, 6 Leigh 104; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Hopkins v. Detwiler*, 25 W. Va. 734; *Taliaferro v. Robb*, 2 Call 258.

"If it were necessary to discuss the question of consideration here, it would be sufficient to say, that all admit it to be a well-settled principle of the common law, that to support every engagement not under seal, there must be a sufficient consideration. And I think there are more than one, to support this promise: 1. That stated in the declaration, the forbearance to proceed on the deed of trust, within the sixteen months, which, though not expressed, is strongly implied by the note itself, and made still more clear by the explanatory facts in the case; and 2. The direct interest in the promiser to redeem the mortgaged property for his own benefit." *Colgin v. Henley*, 6 Leigh 97.

A, executor of B, writes to C, a creditor of B, that as soon as he is able to dispose of his crops, he will pay the claim, or will let him have any property in his possession at moderate valuation. This will not bind A in his own right without an averment of assets, or a forbearance to sue, or of some other consideration. *Taliaferro v. Robb*, 2 Call 258.

The forbearance of a first mortgagee to foreclose his mortgage is a valuable consideration sufficient to support a promise of a second mortgagee to pay a certain sum upon the first mortgage within a given time. *Colgin v. Henley*, 6 Leigh 85.

Refraining from instituting proceedings to subject land to the payment of a judgment which is a lien thereon, on a written promise by the owner of the land to pay the judgment, constitutes a valuable consideration for the promise to pay the judgment, although the landowner was not previously liable for the judgment. *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. 56.

(bb) Forbearance of Interest.

Rent being payable quarterly, a landlord accepted the negotiable note of his tenant for the amount of the rent for the two previous quarters, not

including interest thereon to the time when the notes became due. Held, the acceptance of these negotiable notes by the landlord operated as an agreement to suspend the right of distress, until there should be a default in the payment of these notes respectively; and this implied agreement was sustained by a sufficient consideration. *Hornbrooks v. Lucas*, 24 W. Va. 493.

(cc) Extension of Time of Payment.

See ante, "Payment of Interest in Advance," II, B, 6, d, (1), (1).

(aaa) In General.

The implied agreement that the creditor will extend the time of payment of his debt from the mere acceptance of a note of a debtor payable at a future time, must be supported by a sufficient consideration to sustain the enforcement of such debt. *Hornbrooks v. Lucas*, 24 W. Va. 493, citing *Merchants' Nat. Bank v. Good*, 21 W. Va. 455.

Time given to another is a good consideration for any undertaking by any party on behalf of another. *Keckley v. Union Bank*, 79 Va. 438.

R. takes a conveyance from his son-in-law P. of the equity of redemption in certain land, and salt manufactories and implements thereon, which P. had derived from R., and which he had previously conveyed in trust to secure certain debts, for some of which R. was his surety, and among them two debts which were due to two of the sons of R.; and R. covenants with P. to pay the debts secured upon it. R. then enters into a covenant with his two sons, by which the property conveyed by P. to R., is put into their possession; and they covenant to manage the same, and apply the proceeds to the payment of the debts secured thereon, until said debts are paid out of the proceeds, or until the land should be sold under the deed of trust or otherwise, so as to discharge all of said debts out of the proceeds. And R. covenanted that he would not convey or encumber said

property, or any other property, of R., to, or for the benefit of, P., until said debts are paid; and that no bequest or devise by R. to P., or to P. and his wife, should take effect or accrue to his or their benefit, nor should any right of theirs as heirs at law of R. take effect for their benefit, until said debts should be fully discharged. R. afterwards by his will gave certain real estate to P., and he probably died intestate as to a part of his estate. The sons went on to manage the property, expended a large amount in repairing it; and one of them advanced a large sum to pay the two deferred debts upon the property. And it was doubtful if the property was a full security for the debts upon it. P., being about to sell a part of the real estate devised to him by R., the sons enjoined the sale on the ground that under their covenant with R., they had an equitable lien upon the property devised to him by R. "It only remains to inquire whether there are any other defects in the contract, which will prevent the court from giving it the effect intended. The principal if not the only objection in this aspect of the case, is the want of valuable consideration moving from Lewis Ruffner and Henry Ruffner. In reply it may be said that David Ruffner was under the obligation of his covenant to Putney to pay to the appellants a sum of money, with interest and costs, of about five thousand dollars. It was, therefore, perfectly competent for David Ruffner to make any arrangement with these creditors of Putney for the discharge of the debts; and it can not be said that David Ruffner's contract was merely voluntary. The appellants, instead of exacting payment directly of Putney, or indirectly of Ruffner through Putney, agreed to await the slow process of procuring payment by means of equitable charges on portions of Ruffner's estate. Thus David Ruffner had a double consideration from the appellants; one a large sum of money; the

other the forbearance to collect it." *Ruffners v. Putney*, 12 Gratt. 541.

(bbb) Suretyship.

See the title SURETYSHIP.

Extension of time, to have the effect of releasing the surety, must be shown to have been given in pursuance of a binding legal contract upon a valuable consideration, and without the consent of the surety. Mere forbearance, without consideration shown to the principal, with no contract for definite delay or postponement, does not release the surety. *Wells v. Hughes*, 89 Va. 543, 16 S. E. 689; *First National Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271; *Knight v. Charter*, 22 W. Va. 429; *Norris v. Crummey*, 2 Rand. 334; *Alcock v. Hill*, 4 Leigh 622.

An agreement between the creditor and the principal debtor to extend the time of payment of the debt for a definite period, if founded on a sufficient consideration and made without the surety's consent, will discharge the surety. *Glenn v. Morgan*, 23 W. Va. 467; *Shields v. Reynolds*, 9 W. Va. 483; *Knight v. Charter*, 22 W. Va. 422; *Hill v. Bull*, *Gilmer* 149; *Norris v. Crummey*, 2 Rand. 323, 2 Rob. Pr. 133; *Harnsberger v. Kinney*, 13 Gratt. 511.

It is well settled that though, to bind a surety, there must be some consideration, yet forbearance, postponement of payment, is sufficient consideration. 1 Brandt, Sur. § 16; 3 Am. & Eng. Ency. Law 836; Metc. Cont. 199; 1 Whart. Cont. § 532; Bish. Cont. § 1266. It is true, indulgence of one day is short, but even that is in many cases salvation to the business character and success of a business man. If a pressing creditor agrees to forbear suit for even a day, it may enable the debtor to dispose of property, or get the help of a friend, or in some way save himself from ruin. And though the consideration be small, or even nominal, if it be appreciably valuable, it will be sufficient, and the court will not enter into the work of nicely weighing how small or valuable it may in fact have

been. Parties have weighed these things themselves. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 921.

Forbearance to sue being valuable consideration, if a creditor takes from his debtor and a surety, a note giving further time for payment, that is sufficient consideration to bind the surety. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Bank v. Good*, 21 W. Va. 455; *Hopkins v. Detwiler*, 25 W. Va. 734.

Payment of Interest in Advance.—See ante, "Payment of Interest in Advance," II, B, 6, d, (1), (1).

An agreement between the creditor and the principal debtor to extend the time of payment of the debt for a definite period, if founded on a sufficient consideration and if made without the surety's consent, will discharge the surety. Payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. *Glenn v. Morgan*, 23 W. Va. 467.

Payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. *Armistead v. Ward*, 2 Pat. & H. 504. See also, *Hunter v. Jett*, 4 Rand. 104; *Alcock v. Hill*, 4 Leigh 622; *Ward v. Vass*, 7 Leigh 135; *Chichester v. Mason*, 7 Leigh 244.

Payment of Part of Debt.—The principal debtors paying a part or promising to pay the whole debt which he is already bound to pay, is no such consideration as will discharge the surety. *Wells v. Hughes*, 89 Va. 543, 16 S. E. 689.

But part payment of a debt, even one day before maturity, is sufficient consideration for an agreement to extend time of payment. *Bantz v. Basnett*, 12 W. Va. 773; *Hornbrooks v. Lucas*, 24 W. Va. 499.

Countermanding Execution.—If a creditor has obtained judgment against the principal debtor, sued out execution thereon, and placed the same in the hands of the proper officer to be executed, and before the return day thereof, and before the same was

levied, he directs such officer not to levy the execution, and to return the same without being levied, and the same is accordingly so returned, such indulgence does not release the sureties of such judgment debtor. A mere countermand of an execution by the creditor, after it goes into the hands of the sheriff, but before it is levied, does not release the surety of the execution debtor. "This allegation avers that the creditor entered into an agreement, whereby for a consideration paid, he suspended his right, but it wholly fails to aver, it was part of said contract or agreement, that he should suspend his right for any definite time, or that such suspension was the necessary result of said agreement, or whether such contract obliged the creditor to suspend his right, or whether he might not at any time have proceeded to enforce his right, notwithstanding said contract." *Knight v. Charter*, 22 W. Va. 422.

(dd) Forbearance of Assets by Executor.

A statement by an executor in a letter that it is not "in my power to discharge my father's bond in your possession * * * I have by me a considerable quantity of Indian corn, and the expectation of a fine crop of wheat; so soon as I shall be able to dispose of either of these crops you may rely on the payment of a great part, if not the whole of your claim." It was held, that this was a sufficient consideration to support an assumpsit. *Taliaferro v. Robb*, 2 Call 258.

(ee) Validity and Existence of Right Forbearance.

An agreement to forbear for a time proceedings at law, or in equity, to enforce a well-founded claim is a valid consideration for a promise. But this consideration fails, if it be shown, that the claim is wholly and certainly unsustainable at law or equity. "It is not material, that the party, who makes the promise in consideration of such forbearance, should have a direct in-

terest in the suit to be forborne, or be directly benefited by the delay. It is enough, that he requests such forbearance; for the benefit of the defendant will be supposed to extend to him; and it would also be enough to make the consideration valid, that the creditor is injured by the delay. But there must have been some party, who could have been sued. And in cases, in which the person to be forborne is not mentioned, but the forbearance may be understood to be forbearance of whoever might be sued, the promise founded on such consideration is binding, if there be any person liable to suit, though the defendant himself is not liable. In general, the waiver of any legal right, at the request of another party, is a sufficient consideration for a promise; or the waiver of any equitable right." *Bank v. Lockwood*, 13 W. Va. 427.

"Forbearance is not a good consideration for a promise, where there is no debt in existence; but if one be liable for a debt, general promises by several, in consideration of forbearance, are good and will bind all. When there has been a contract with the principal for delay, upon which the surety might claim his discharge, if the principal and surety subsequently agree upon a general contract to forbear the collection of the debt for a certain period, such contract, in the absence of fraud, is upon good consideration, the principal being liable, and will bind the surety as well as the principal." *Bank v. Lockwood*, 13 W. Va. 428.

Refraining from instituting proceedings to subject land to the payment of a judgment which is a lien thereon, on a written promise by the owner of the land to pay the judgment, constitutes a valuable consideration for the promise to pay it, although the landowner was not previously liable therefor. *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. 56.

(ff) Statement of Time of Forbearance.

Where the consideration for a con-

tract is a forbearance to sue, the forbearance should be stated as general or for a particular period. *Taliaferro v. Robb*, 2 Call 258.

(p) Compromise.

See the title COMPROMISE, ante, p. 40.

(aa) In General.

A compromise of a controversy is a valuable consideration to sustain a contract. *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240; *Davisson v. Ford*, 23 W. Va. 617; *Jarrett v. Ludington*, 9 W. Va. 337; *Zane v. Zane*, 6 Munf. 406; *Mosby v. Leeds*, 3 Call 441; *Moore v. Fitzwater*, 2 Rand. 442.

"This contract is good upon another ground; it is the settlement and compromise of a doubtful right. The ancestor of the defendant was about to take up this land; there was a claim upon it; he thought it better to buy out this claim, than test its strength by a law suit; and it is well established, that the compromise of a disputed title is not only a valuable but a favored consideration. *Moore v. Fitzwater*, 2 Rand. 442, where this subject is well treated by my brother Cabell, delivering the opinion of the court, and showing by the highest and strongest authorities, that the law is settled. The original contract then is good and valid." *Williams v. Lewis*, 5 Leigh 690.

Compromise of a colorable claim is a valuable consideration. 3 Minor's Inst. 133. *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240.

It is said, in *Braxton v. Harrison*, 11 Gratt. 60, that, "There can be no doubt that the resignation of a colorable claim, conflicting with that of another person, and the settlement of the dispute between the parties without suit, constitute a good consideration." And "in these cases, inequality of consideration does not, of itself, form any objection."

Favored in Law.—The consideration of compromising doubtful rights, and settling boundaries, are not only good

but favored in law. *Zane v. Zane*, 6 Munf. 406; *Jarrett v. Nickell*, 4 W. Va. 278.

"It is well settled, that the compromise of even doubtful rights, whether legal or equitable, and their surrender would be a valuable consideration, which will sustain a promise, and, of course, the compromise of a valid claim and its surrender would be a valuable consideration, though the surrender of a claim which was clearly wrong would not be (according to some of the authorities at least), but perhaps even the surrender of a claim clearly wrong might be a valuable consideration, if such claim was bona fide believed by the plaintiff to be a valid claim." *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

"Before considering the demurrer to the second count in this declaration we should have a clear conception of what in law constitutes a sufficient consideration to support a promise. If there be a dispute between parties, in which one of the parties not only makes a bona fide claim against the other but there is in law and fact some foundation for his claim, though whether it be well founded may be doubtful, and the party, who is thus claimed to be subject to a liability, to settle the dispute and avoid litigation, agrees to pay the other party a sum of money or makes to him a promise to do anything else, such promise is based on a sufficient consideration and may be enforced. (*Zane's Devises v. Zane*, 6 Munf. syl. 2, p. 406." *Davisson v. Ford*, 23 W. Va. 617, 627.

Agreement between Trustee and Cestui Que Trust.—A testator devised a sixth of his estate to trustees for the use of his grandson, who was an imbecile, his portion to be held by them and the interest expended annually in his support and education, till he should attain the age of twenty-five years. When this grandson attained the age of twenty-two years, these trustees, claiming that they had invested the

whole of his estate in a confederate bond, which was not shown to be true, and having furnished no support for more than a year claiming that they owed nothing, his whole estate being lost by its investment in a confederate bond, entered into an agreement with him, which he had not sufficient mind to fully comprehend, whereby he in effect released them from responsibility for the amount, which came into their hands, to an extent exceeding \$1,000. Such agreement ought not to be held binding on him, because there was no consideration to sustain such an agreement, unless we are to regard this abatement as a compromise between the imbecile and his trustees of a controversy existing between them and him at that time. *Knight v. Watts*, 26 W. Va. 176.

(bb) Where Claim of Liability Is Doubtful.

When there is a dispute between parties, and one of them claims that the other is liable to him, and there is some foundation for such claim, and to settle this controversy one party promises to pay money or to do some act for the benefit of the other, such promise is based on a sufficient consideration and may be enforced by suit. But if there be no foundation for such claim of liability, then the promise made to settle this assumed liability has no sufficient consideration to sustain it and no suit can be based on such promise. On the trial of a suit based on such promise, proof that the liability of the defendant, who made such promise, had no foundation, will defeat the plaintiff. *Davissou v. Ford*, 23 W. Va. 617; *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

"To make such consideration good it is not only necessary that the dispute should be one in which one party sets up that there was a liability on the other, but if it be assumed that such liability exists when in fact or law there is no foundation for such liability, a promise made by the party, who is thus

claimed to be liable, but who clearly is not liable either in law or equity, would be a promise made on no valuable or sufficient consideration, and it could not be enforced by suit. (*Cabot v. Haskins*, 3 Pick. 83; *Gould v. Armstrong*, 2 Hall [N. Y.] 266; *Lowe v. Weatherley*, 4 Der. & B. 212; *Jones v. Ashburnham*, 4 East 455; *Smith v. Algar*, 1 B. & Ad. 603; *Martin v. Black's Ex'or*, 20 Ala. 309; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119, and *Wade v. Simeon*, 2 C. B. 548.) But as before stated, mere proof that the liability is doubtful, will not render the consideration insufficient. The liability of the party making such promise must be shown to have no foundation." *Davissou v. Ford*, 23 W. Va. 617, 627.

"But even if that liability had been doubtful, it was at least a subject of controversy in a pending suit at the time the agreement was entered into, and was a good consideration or a compromise. 'There can be no doubt that the resignation of the colorable claim, conflicting with that of another person, and the settlement of the dispute between the parties without suit, constitute a good consideration;' and 'in these cases, inequality of consideration does not, of itself, form any objection.' *Chitty on Contr.* 26." *Braxton v. Harrison*, 11 Gratt. 60.

An agreement by executors to release their costs in an injunction suit, and dismiss it as far as they were concerned, in consideration that the administrator de bonis non of another party pay a debt of his testator within a limited time, is supported by a sufficient consideration, even though that liability is doubtful. *Braxton v. Harrison*, 11 Gratt. 30.

Where two parties claim title to lands, and they compromise the dispute by one party paying a sum of money, and the other conveying the land with warranty, such agreement will be binding, if not brought about by fraud. *Moore v. Fitzwater*, 2 Rand.

442; *Davisson v. Ford*, 23 W. Va. 617. If, however, there is no foundation for such claim of liability, then the promise made to settle this liability assumed in the compromise has not sufficient consideration to sustain it and no suit can be based on such promise, but the mere proof that the liability is doubtful will not render the consideration insufficient. *Davisson v. Ford*, 23 W. Va. 627.

(cc) Compromise of Bastardy Proceedings.

See the title BASTARDY, vol. 2, p. 342, and references given.

(q) Marriage and Promise of Marriage.

See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; MARRIAGE CONTRACTS AND SETTLEMENTS.

It is a familiar doctrine that marriage is a valuable consideration, sufficient to support a contract made in consideration thereof. *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 45; *Clay v. Walter*, 79 Va. 92; *Welles v. Cole*, 6 Gratt. 645; *Chichester v. Vass*, 1 Munf. 98, 4 Am. Dec. 536; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Hayes v. Jones*, 2 Pat. & H. 583; *Huston v. Cantrill*, 11 Leigh 136; *Argenbright v. Campbell*, 3 Hen. & M. 144.

In fact it has been said that marriage is the highest consideration known to the law. "Though the common law abhors every sort of cheating, it loves matrimony." *Boggess v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, followed in *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

While the common law loves matrimony, it abhors deceit, fraud, and seduction, and will not permit matrimony to be used by a guilty person to escape the consequences of his fraudulent, deceitful, and unlawful conduct. *Dent v. Pickens*, 46 W. Va. 378, 33 S.

E. 303, citing *Boggess v. Richards*, 39 W. Va. 567, 20 S. E. 599.

Recording Acts—Statute of Frauds.

—"The import of the consideration of marriage, is the same in our registry law as in the statute against frauds and perjuries, and its signification in the latter, is derived from the common-law doctrine in actions founded upon parol promises or agreements. The consideration of natural love and affection, is of no efficacy in such actions, a promise or agreement by parol, for which there is no other consideration, being merely nudum pactum. It was necessary, therefore, before the statute of frauds, as it still is, to prove in such actions a valuable consideration, and the early cases are numerous in which marriage was held to be such." *Welles v. Cole*, 6 Gratt. 653.

Antenuptial Settlements.—See the title MARRIAGE CONTRACTS AND SETTLEMENTS.

Marriage is a valuable consideration to support an antenuptial settlement. *Triplett v. Romine*, 33 Gratt. 651; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Tabb v. Archer*, 3 Hen. & M. 399, 3 Am. Dec. 657; *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155; *Moore v. Dawney*, 3 Hen. & M. 127; *Hayes v. Jones*, 2 Pat. & H. 603; *Argenbright v. Campbell*, 3 Hen. & M. 144; *Boggess v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, followed in *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

Promise by Third Person.—Marriage furnishes a valuable consideration for an agreement, as much so as money paid or agreed to be paid; and the consideration arises in a contract made, in contemplation of a specific marriage, between the parties to the intended union, or between one or both of them, and a third person who has reason to desire their intermarriage. If such third person promises or agrees, in the event of such intermarriage, to convey or settle, or pay, prop-

erty or money, to or for the parties to the marriage tie, or either of them, then the occurrence of the marriage is a sufficient consideration for such promise or agreement; the law presuming that the latter was an inducement to the performance of the solemn and irrevocable specific act which it contemplated. In such a contract, the law recognizes mutuality both of promise and consideration. *Welles v. Cole*, 6 Gratt. 652.

Promise to Prospective Son-in-Law.

—If A. promise B. that, if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience;" and the marriage be afterwards had with his consent, the promise is sufficiently certain and obligatory. *Chichester v. Vass*, 1 Munf. 98.

That although such promise may literally import a provision to be made for the daughter; yet, being made to the intended husband, it must be construed to be one which shall enure to the benefit of both, unless there be some special reservation to the contrary, manifesting a clear intention to preclude him from participating in the benefit thereof. *Chichester v. Vass*, 1 Munf. 111.

A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and if he survive the wife, may sue in his own right to recover damages for a breach. *Chichester v. Vass*, 1 Munf. 98.

In such case, A has not his lifetime to perform it in; but, in a reasonable time after the marriage (taking into consideration his property and other circumstances), is bound to make an advancement to B and wife, equal to the largest made to his other daughters. *Chichester v. Vass*, 1 Munf. 98.

A parol promise by a father to his daughter's husband before the mar-

riage, is a sufficient consideration to sustain a written agreement made after the marriage, if such written agreement be otherwise sufficient under the statute of frauds. So also, if the marriage be had on the father's request. *Argenbright v. Campbell*, 3 Hen. & M. 144.

Rule Where No Specific Marriage Contemplated.—It is quite otherwise

where no specific marriage is in treaty or contemplated, and the promise is in reference to a future possible state or condition of matrimony. As where a father promises a daughter, that if at any after period of life, she shall choose to enter into wedlock, he will in that event, and upon its occurrence, give, convey or pay to her specified money or property. In such a case, there is no mutuality either of promise or consideration. The agreement of the father is founded upon no undertaking or promise of the daughter, and upon no valuable consideration, but is merely for a future contingent advancement of the daughter. It is not in the eye of the law in consideration of marriage, but of natural love and affection. *Welles v. Cole*, 6 Gratt. 652.

A bond executed by a father to his daughter to be paid to her on her marriage, is not a covenant or agreement in consideration of marriage, under 1 Revised Virginia Code providing that covenants or agreements made in consideration of marriage shall be admitted to record in the county where the land charged lieth, etc., because no specific marriage was in treaty or contemplated, and the promise was in reference to a future possible state or condition of matrimony. The court said: "No case can be found in which a promise in reference merely to a future condition of wedlock has been treated as one made in consideration of marriage." *Wells v. Cole*, 6 Gratt. 653.

Who within Consideration.—"The consideration of marriage (merely) operated under the settlement, free

from fraud, to confer on the husband and wife and issue of the marriage, and on children base born but legitimated by subsequent marriage of the parents and recognition, rights in the property limited to them paramount to those of existing creditors of the settler although embarrassed with debt. This would seem to be going quite far enough, and the manifest injustice done to creditors by the established rules drew from Judge Staples, in *Herring v. Wickham*, supra, the remark, that 'the whole subject needs the attention of the legislative department.' We are now asked to go further and hold, that the consideration extends to persons who are not even collateral relatives but total strangers in blood to the settler, and that such persons are purchasers for value with rights paramount to those of pre-existing creditors. We are not at all disposed to take a single step further in that direction. The mischief and gross injustice which would result from extending the rule, as we are asked to do, is strikingly exemplified by the case in judgment." *Triplett v. Romine*, 33 Gratt. 659.

Children by Former Marriage.—While marriage prior to the statute was a valuable consideration to support an antenuptial settlement, this consideration did not extend to the children of the husband by a former marriage, so as to bar the rights of the existing creditors of the grantor. *Triplett v. Romine*, 33 Gratt. 651.

Where A, a widow, in contemplation of marriage with B, settled her separate property to the use of herself and her intended husband and children by a former marriage, the marriage contemplated having taken place, even before the statute it was held, such marriage was not a sufficient consideration to support the settlement to the use of such children against a creditor of A, whose debt existed at and before the date of the settlement, even though such debt was not a specific lien, if it

was then chargeable in equity upon the property settled. *Triplett v. Romine*, 33 Gratt. 651.

Legitimacy of Children.—Prior to the Virginia statute declaring marriage no consideration to support a conveyance as to existing creditors, it was held, that children born out of wedlock but legitimated by a subsequent marriage, were within the consideration. *Coutts v. Greenhow*, 2 Munf. 363; *Herring v. Wickham*, 29 Gratt. 628.

Remaindermen Not within Consideration.—But even when marriage was a valuable consideration in Virginia for an antenuptial settlement as against existing creditors, it was held, that where the settlement was upon the wife for life, with remainder over to the sister of the grantor and her children, the remainder was without valuable consideration and void as to existing creditors of the grantor. *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229.

Marriage Must Be Inducement.—There can be no doubt but marriage, for the benefit of society, is a good consideration, where there is any personal inducement to it, but where there is not, it should not, of itself, be deemed a good consideration against creditors; and more especially in the present case, where the parties lived in open violation of the laws, and to the evil example of the whole community. *Greenhow v. Coutts*, 4 Hen. & M. 486.

A marriage settlement on a wife with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. *Greenhow v. Coutts*, 4 Hen. & M. 486.

Validity as against Creditors.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Prior to the Statute.—Formerly in Virginia, the rule was that marriage was a valuable consideration not only as against subsequent creditors of the

grantor, but as to existing creditors, unless knowledge of the grantor's fraudulent design was clearly and satisfactorily proved. *Greenhow v. Coutts*, 4 Hen. & M. 486; *Herring v. Wickham*, 29 Gratt. 628; *Triplett v. Romine*, 33 Gratt. 655; *Clay v. Walter*, 79 Va. 92; *Welles v. Cole*, 6 Gratt. 645; *Noble v. Davies*, 1 Va. Dec. 633; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Bentley v. Harris*, 2 Gratt. 357.

"Marriage is a valuable consideration, sufficient to support a conveyance of property, even against creditors; and in such a case the wife is deemed a purchaser of the property settled on her, in consideration of the marriage, and is entitled to hold it against all the world." *Herring v. Wickham*, 29 Gratt. 628.

"That marriage is a consideration deemed valuable in law is an elementary principle, and, in antenuptial settlements untainted with fraud, that this consideration is sufficient to sustain against existing creditors of the settler, limitations of estates to the husband and wife and issue of the marriage, is well settled. 'In marriage contracts,' says Lord Cottenham, in *Hill v. Gomme*, 5 Myl. & Cr. 254, 'the children of the marriage are not only objects of, but quasi parties to it;' and it has been held, by this court, that the consideration extends to children born out of wedlock, who are legitimated by the subsequent marriage of the parents and recognition. *Herring v. Wickham*, 29 Gratt. 628; *Coutts v. Greenhow*, 2 Munf. 363." *Triplett v. Romine*, 33 Gratt. 655.

A deed conveying and assigning property in trust, to be applied to discharge a bond executed by a wealthy and embarrassed father to his daughter, to be paid to her on her marriage, was valid as against creditors of the father, becoming such after the marriage of the daughter, though at the time of the execution of the deed, the father was embarrassed to insolvency. *Welles v. Cole*, 6 Gratt. 645.

In *Clay v. Walter & Co.*, 79 Va. 92, *Herring v. Wickham*, 29 Gratt. 628, was reaffirmed on the proposition that whatever the design of the grantor, a settlement on a woman in contemplation and in consideration of a marriage, is valid, unless her knowledge of his intended fraud is clearly and satisfactorily proved, and it was held, that service by creditors of the grantor, of written notice on the grantee before the marriage, of the grantor's fraudulent design in making the settlement, can not affect her constructively with notice of such design, but her actual knowledge of and participation in that fraudulent design must be clearly established by proof. See also, *Moore v. Butler*, 90 Va. 683, 19 S. E. 850; *Triplett v. Romine*, 33 Gratt. 651; *Coutts v. Greenhow*, 2 Munf. 363; *Eppes v. Randolph*, 2 Call 125; *Shobe v. Carr*, 3 Munf. 10; *Huston v. Cantril*, 11 Leigh 136; *Bentley v. Harris*, 2 Gratt. 357; *Welles v. Cole*, 6 Gratt. 645; *Fones v. Rice*, 9 Gratt. 568.

A father possessed of an ample fortune having sent certain of his slaves, immediately after the marriage of one of his daughters, to her husband, in whose possession they remained, without interruption or claim, until his death, which happened two years and four months afterwards; it was presumed (no proof of fraud appearing), that such slaves, being no more than a reasonable provision for the daughter at the time, were a gift in consideration of the marriage; and the right of the representatives of the husband was good against the creditors of the father. *Moore v. Dawney*, 3 Hen. & M. 127.

An agreement made in contemplation of marriage, though void against creditors because not recorded, is valid between the parties; and the wife and children for whose benefit it is made, may call for a specific execution of the agreement, if there is no existing creditor or purchaser whose rights will be affected by it, though the marital rights of the husband have attached by an

actual reduction of the property into his actual possession. *Dabney v. Kennedy*, 7 Gratt. 317.

Since Statute.—But the statute in Virginia now provides every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers. Va. Code, 1904, § 2459.

Construction of Statute.—It will be seen that since this enactment, marriage is no longer a valuable consideration as to existing creditors of the grantor, but it is still a valid consideration to support a conveyance as to subsequent creditors. Therefore, a deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration of the marriage, and is based on a valuable consideration as to subsequent creditors, but void as to existing creditors. This enactment was intended to defeat frauds perpetrated upon existing creditors by the marriage of an insolvent debtor, accompanied by gifts to his wife, and of course renders nugatory the decisions in *Herring v. Wickham*, 29 Gratt. 628; *Coutts v. Greenhow*, 2 Munf. 363, which furnished instances of gross injustice to existing creditors. *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

"Nothing is better established, than that a postnuptial settlement, though voluntary, in favour of a wife or child,

by a person not indebted at the time, is valid against subsequent creditors. 2 Kent's Comm. 145." *Welles v. Cole*, 6 Gratt. 656.

Rule in West Virginia.—But there can be no doubt that under the West Virginia statute, providing that every transfer or charge which is not upon consideration deemed valuable in law, shall be void as to existing creditors, but not upon that account merely as to subsequent creditors, marriage is a valuable consideration for a conveyance even as against existing creditors, unless it is shown that there was fraud and that the wife had notice of and participated in it. W. Va. Code, 1899, ch. 74, § 2; *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, followed in *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303; *Martin v. Smith*, 25 W. Va. 579.

Marriage is a valuable consideration for an antenuptial contract, and where a man, in consideration of marriage, conveys all of his property to his intended wife, it is not on that account void, and the transfer is good as against existing creditors, unless it is shown that there was fraud, and that she had notice of or participated in it. *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, followed in *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

Proof of Wife's Knowledge of Fraud.—And it is well settled that the grantor's knowledge of the intended fraud must be proved by clear and satisfactory evidence in order for creditors to avoid a settlement upon the wife in consideration of marriage. *Herring v. Wickham*, 29 Gratt. 628; *Clay v. Walter*, 79 Va. 92; *Noble v. Davies*, 1 Va. Dec. 633.

When a man enters into a contract of marriage with a woman, and commits a breach thereof, and she sues him for nonperformance, and during the

pendency of such suit, to escape the payment of any judgment against him therein, he, under cover of a second contract of marriage with another woman, and under pretense of consideration therefor, conveys all his property, thus rendering himself hopelessly insolvent, if the facts and circumstances are sufficient to justify the presumption of notice to the grantee, of the fraudulent intent of the grantor, the burden of proof is shifted to such grantee, and it devolves upon her to prove want of such notice; and, if she fails to testify with regard thereto, such presumption becomes conclusive. *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

The facts and circumstances which tend to show notice or knowledge of fraudulent intent on the part of the grantee, the nature, character, and manner of the execution of the contract itself, and the character of the various items thereby conveyed, including a mere equity of redemption in other plainly fraudulent transfers made by him, and the explicitness with which it is set forth, the knowledge on her part of the charge of seduction, the birth of the child, and the pendency of the suit for breach of promise, it being a matter of common notoriety in the community in which she lived, were sufficient to put her on the guard and inquiry; and she must, therefore, be deemed to have accepted him with all his circumstances, and to have taken the risk of his escape from his first marriage contract, and thereby joined with him in his fraud to defeat a recovery on such first contract. *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

The statute of limitations providing that "no gift, conveyance, assignment, transfer, or charge not on consideration deemed valuable in law shall be avoided, either in whole or in part, for that cause only, unless within five years after it is made suit be brought for that purpose," has no application to contracts founded on a valuable con-

sideration but is expressly limited to contracts not "deemed valuable in law." It does not apply to a marriage contract. *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, followed in *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

But as marriage in Virginia is not a consideration "deemed valuable in law" as to existing creditors, the right to attack the settlement on the ground that it is voluntary, would be limited to five years after its recordation in that state, but there is no limitation upon the right of a creditor to attack a deed for fraud in fact. *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *McCue v. Harris*, 86 Va. 687, 10 S. E. 981; *Bickle v. Chrisman*, 76 Va. 678.

Parol Evidence.—Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it. *Eppes v. Randolph*, 2 Call 125.

In *Hord v. Dishman*, 5 Call 291, it is said, in *Eppes v. Randolph*, 2 Call 130, in a deed, the consideration whereof was expressed to be natural love and affection, the grantee was nevertheless allowed to aver and prove the real consideration to have been marriage, thereby giving a new and overreaching influence to the deed. For this proposition, *Eppes v. Randolph*, 2 Call 125, is also cited in *Duval v. Bibb*, 4 Hen. & M. 121; *Harvey v. Alexander*, 1 Rand. 234.

Postnuptial Settlements.—See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; MARRIAGE CONTRACTS AND SETTLEMENTS.

But marriage is not a sufficient consideration to support a postnuptial settlement in favor of a wife as against creditors. Such settlement must be supported by a valuable consideration. *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Marks v. Spencer*, 81 Va. 751.

Where it is charged that the plain-

tiff being about to purchase a tract of land, that the defendant, in order to encourage him to make the purchase, and in consideration that he, the plaintiff, had married his daughter, and for her advancement did advise and instruct the plaintiff to contract for the purchase of the said land, and to make the first payment himself, and in consideration of his so doing, agreed that he, the defendant, would pay the last payment for him, and that he, the plaintiff, depending on those promises, concluded the contract for the purchase, it was held, that a good and sufficient consideration is charged. *Scott v. Osborne*, 2 Munf. 413.

Parol Evidence.—The consideration of postnuptial settlement may be proved by parol. Recital in deed that consideration was paid by husband does not necessarily import that it was paid out of his funds, but only that it was paid per his hands. *Marks v. Spencer*, 81 Va. 751.

Witnesses.—Though wife be dead, husband is not competent to prove what was the consideration of a postnuptial settlement on her. *Marks v. Spencer*, 81 Va. 751. See the title WITNESSES.

(r) Wife's Equity.

See the title HUSBAND AND WIFE.

Wife's Equity Valuable Consideration for Postnuptial Settlement.—See *Poindexter v. Jeffries*, 15 Gratt. 363, cited and approved in *White v. Gouldin*, 27 Gratt. 505; *Walden v. Walden*, 33 Gratt. 88, 96.

There being a contest among the heirs and distributees of B. over a paper offered for probate as his will, they enter into an agreement for the adjustment of their respective interests in his estate, and by deed bearing date the 26th of September, 1866, they convey the whole property, real and personal, to T. in trust, setting out the interest which each was to take; and among them was W. and his wife A., who was a daughter of B., W. and A.

taking a certain part of the real estate and all the personalty. By deed dated the 27th of September, 1866, reciting what had been agreed upon and the recitals in the previous deed, and a promise by W. to B. that he would settle on A. her share of the estate to the separate use of A., B. and A. convey the property to T. for the separate use of A. Held, the deeds must be construed together; and A.'s equity is a valuable consideration for the settlement; and there being no fraud in the transaction, the settlement is valid against creditors of W., whose debts were contracted before the death of B. *Walden v. Walden*, 33 Gratt. 88.

If property of the wife which a court of equity would direct to be settled upon her, is conveyed by the husband to a trustee for her benefit, the court will sustain the deed against creditors of the husband. *Poindexter v. Jeffries*, 15 Gratt. 363.

To Show from Whom Consideration Moves.—In the case of *Marks v. Spencer*, 81 Va. 751, the evidence establishes that the settlement upon the wife was upon consideration moving from the wife's father, though the deed recites it was paid by the husband, and the settlement is upheld. *Cronie v. Hart*, 18 Gratt. 739; *Straus v. Bodeker*, 86 Va. 543, 10 S. E. 570.

(s) Support and Maintenance.

See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; MARSHALING ASSETS AND SECURITIES; SUPPORT AND MAINTENANCE; SPECIFIC PERFORMANCE.

An agreement to maintain and support another is a valuable consideration sufficient to support a transfer of property. *Keener v. Keener*, 34 W. Va. 421, 12 S. E. 729; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. 314; *Hisle v. Rudasill*, 89 Va. 519, 16 S. E. 673; *Henderson v. Hunton*, 26 Gratt. 926; *Williams v. Lewis*, 5 Leigh 686;

Baird v. Rice, 1 Call 18, 1 Am. Dec. 497; *Lester v. Lester*, 28 Gratt. 737; *Terry v. Clark*, 84 Va. 221, 4 S. E. 372; *Beverage v. Ralston*, 98 Va. 625, 37 S. E. 283.

Where an agreement is made by and between a widow of the first part, and several others, parties of the second part, to assign and convey to such parties of the second part, all the right, title and interest that she may be entitled to by virtue of the last will and testament of her father, in consideration of her support in a comfortable manner during her life, or she is to have her support out of the said property, does not embrace or include property bequeathed to her by her father's will, which passed to her husband by virtue of his marital rights, which property before and at the time of his death was his property, because in such case, after his death, his wife who survived him, had no interest in such property, in the absence of a will by her husband directing otherwise, except as one of the distributees of her husband. *Graham v. Graham*, 10 W. Va. 355.

Parent and Child.—A son is under no legal obligation to support his mother, and his contract to pay for her past support, furnished without his request, is without consideration. *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588.

A parol contract between a father and his son, whereby the father agreed to give to the son a certain tract of land, on the consideration that the son would support the father and his wife for their lives, is a valid contract, and will be enforced at the suit of the children of the son after his death against other children of the father, who had fraudulently procured a deed for the land from the father, with the knowledge of the said contract. *Lester v. Lester*, 28 Gratt. 737. See also, *Terry v. Clark*, 84 Va. 221, 4 S. E. 372.

When a father and mother enter into a contract with their son, whereby they sell to the son a small farm, and as a

part of the consideration therefor, the son agrees to comfortably support his parents during their lives; and the contract stipulates that it is expressly understood by all the parties that the parents are to reside on the farm, and occupy a portion of the dwelling house, and that the son is to keep his parents in eating at his own table the same as he has for himself; held, that the son is bound to comfortably support his parents at the dwelling house on the farm, and not elsewhere. *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17.

Sister and Brother.—A sister agrees to convey to her brother a certain tract of land, and, in consideration thereof, the brother agrees to support their aged father and mother during their natural lives, and that he will bind himself thereto by written contract after the conveyance shall have been made. The sister conveys the land to him, with recital of the receipt of a money consideration of \$50. Held, it is competent to show by parol evidence what was the contract between the parties, and what was the real additional consideration for the conveyance of the land, as what the grantee was to do was collateral to the conveyance, and it contained no recital inconsistent with such collateral undertaking or contradictory thereof. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

Uncle and Nephew.—The owner of a tract of land conveys it to his nephew in fee, subject to the maintenance and support of the grantor and his sister. The deed contains a covenant by the grantee for such maintenance and support, and declares that the land is to be bound therefor, into whose hands soever it may come. But the deed does not state that it is upon condition that such maintenance and support be furnished, nor is there any clause providing for a re-entry by the grantor. Held, the provision for maintenance and support constitutes merely a charge upon the estate, which may be enforced in equity, not a condition for breach of

which the grantor can re-enter as of his former legal estate. *Pownal v. Taylor*, 10 Leigh, 172 cited in *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17; *Bates v. Swiger*, 40 W. Va. 426, 21 S. E. 876.

Guardian and Ward.—A promise by a guardian to support and educate his ward at his own expense is without consideration and not binding on him. *Armstrong v. Walkup*, 9 Gratt. 372.

Effect of Failure to Furnish Support.

Time of Accrual of Action.—Where land is conveyed in consideration of a maintenance bond for the support of the grantors, by which the grantees bind themselves to support the grantors in their families on the land conveyed, no right of action accrues to the grantors, either against the grantees or the land, if any exists, until the grantees fail to perform their covenant undertaking, as set forth and stipulated in their bond. *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. 314.

Cancellation.—A contract in consideration of support and maintenance will be cancelled and set aside where there has been a failure to furnish maintenance, more especially where it has a clause of forfeiture for such failure. *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

Vendor's Lien.—See the title **VENDOR'S LIEN**.

The law is well settled that an implied equitable lien does not exist in favor of a vendor of real estate to secure the consideration therefor, when such consideration is the maintenance and support of the grantors during life. *McCandlish v. Keen*, 13 Gratt. 615; *Brawley v. Catron*, 8 Leigh 522; *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. 314.

(t) Arrears of Interest.

Arrears of interest which have accrued on a voluntary bond were held to form a valuable consideration to sustain any other bond or conveyance,

or to warrant the payment of arrears, even as against creditors in *Welles v. Cole*, 6 Gratt. 645. See also, *Fones v. Rice*, 9 Gratt. 569.

(2) Contract to Do What One Is Bound to Do.

(a) In General.

In *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922, the court refused to decide whether a contract to do that which by contract one is already under obligation to do, is supported by a lawful consideration.

Agreement by Principal to Reimburse Surety.—An insolvent bank holds judgments against a principal and surety,

and deposits of surety, on which it pays sixty per cent., but which third party had contracted to take at par. Surety pays judgment with his deposits, under agreement with principal to repay the value of the deposits so used. It was held, that the fact that the bank refused to transfer the surety deposits to the contractor for purchase thereof until the judgments were paid, does not make the principal's agreement to repay the amount at its face value without consideration. And the objection that the agreement is a mere nudum pactum, inasmuch as the president of the bank required the appellee to pay the judgments out of his deposits, he had no option in the matter, but was bound to pay them in that way, and hence the subsequent agreement with the principal based upon his promise to pay with his deposits, was without a valuable consideration, is answered by the fact that the surety could have filed a bill in equity to compel the creditor to enforce the lien of the judgments against the property of the principal debtor, and then have obtained absolute control of his deposits. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534.

(b) Payment of Subsisting Debt.

A promise to pay a debt for which the promisor is already bound, is mere nudum pactum, and adds naught to the original obligation. *Keffer v. Grayson*, 76 Va. 517.

Promise to pay subsisting debt, or even its actual payment, is not a consideration upon which a court of equity can decree specific performance of an agreement for the conveyance of real estate. *Smith v. Phillips*, 77 Va. 548.

In *Keffer v. Grayson*, 76 Va. 517, the court said: "A debt barred by limitation * * * may be revived by a new promise, and the new promise may constitute a valid consideration; but a promise to pay a debt for which the promisor is already legally bound, is a mere nudum pactum, and adds nothing to the force of the previous obligation. * * * It is, therefore, clear that a promise to pay a subsisting indebtedness, or even its actual payment, is not a consideration upon which a court of equity can decree the specific execution of an agreement for the conveyance of real estate. It is impossible to say there is a valuable consideration where the debtor does no more than the law compels him to do, and the creditor receives no more than he is entitled to receive." *Smith v. Phillips*, 77 Va. 551.

Paying a part of a debt, or promising to pay the whole debt, which the debtor was already bound to pay, is no consideration for a promise of forbearance. *Wells v. Hughes*, 89 Va. 543, 16 S. E. 689; *Tunstall v. Withers*, 86 Va. 900, 11 S. E. 565; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Cole v. Ballard*, 78 Va. 139; *Udike v. Lane*, 78 Va. 132; *Keffer v. Grayson*, 76 Va. 517.

(c) Part Payment of Debt as Consideration for Release of Balance.

An agreement to accept a part of a debt for the whole is nudum pactum and not enforceable in equity. *Smith v. Phillips*, 77 Va. 548. But see *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437, where such agreement was, between the creditor and a third person, held binding.

Creditor's agreement to release debtors on payment of less than his just demand, is not binding if without consideration (*Seymour v. Goodrich*, 80 Va.

303), particularly where debtors are not parties to agreement and do not promise to pay the less sum for the entire demand then due and payable. See *Sed vide Code*, 1887, § 2858. *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142.

The agreement to take a small part for the whole of this large debt, if any such agreement was ever made, as to which the proof is far from conclusive, without any valuable consideration to support it, is a nudum pactum, which will not be enforced in equity. In *Keffer v. Grayson*, 1 Hansbrough (76 Va.) 517, this court said: "A debt barred by limitation * * * may be revived by a new promise, and the new promise may constitute a valuable consideration; but a promise to pay a debt for which the promisor is already legally bound, is a mere nudum pactum, and adds nothing to the force of the previous obligation. No man can make his own wrong, in withholding what he justly owes, the foundation of a demand against his creditor. It is, therefore, clear that a promise to pay a subsisting indebtedness, or even its actual payment, is not a consideration upon which a court of equity can decree the specific execution of an agreement for the conveyance of real estate. It is impossible to say there is a valuable consideration where the debtor does no more than the law compels him to do, and the creditor receives no more than he is entitled to receive." *Smith v. Phillips*, 77 Va. 548.

Limitation of Rule.—An unsealed agreement to accept a smaller sum than the entire debt, does not bind the creditor. "But this rule being highly technical in its character, seemingly unjust, and often oppressive in its operation, has been gradually falling into disfavor; and the courts have therefore not only confined its operation strictly within its own narrow limits, but have seized upon every possible opportunity to evade its application." Hence, whenever a new element enters into the agreement to take a part for the whole,

the entire debt is satisfied; e. g., a promise to pay at an earlier date, or at a different place, a promise by a new party, or the like. *Seymour v. Goodrich*, 80 Va. 303; *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142. Thoroughly discussed and so held in *Lee v. Harlow*, 75 Va. 22.

Where Agreement Is Executed.—

Where a father or other relative pays one-half of a joint note on behalf of the promisor in consideration of an agreement that the promisee will release such promisor from payment of the other half, and the contract is executed, the money received, and the release indorsed on the note, such a transaction constitutes a valid contract, of which said promisor can avail himself when sued for the remaining half of said note. *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437.

Payment of Debt before Due.—The part payment of a debt made only two days before it is due, has been held a valuable consideration to sustain a promise by the creditor; but if this part payment had been made two days after it would have been no consideration. *Bantz v. Basnett*, 12 W. Va. 773, cited in *Hornbrooks v. Lucas*, 24 W. Va. 499.

Where before a note is due, a part of the debt is paid, and a new note executed for the residue by the debtor, and an express agreement made between the parties that the old note shall be surrendered, such agreement is founded upon valuable consideration, and extinguishes the old note, and no suit can be maintained thereon. *Bantz v. Basnett*, 12 W. Va. 772. The question, as to the effect of giving a new note for an old one, without any express agreement, is discussed in this case and numerous authorities cited. See, in accord, *Jarrett v. Ludington*, 9 W. Va. 333; *McLaughlin v. Beard*, 5 W. Va. 538.

Estoppel.—Creditor agrees to accept less than amount due from his debtors in satisfaction of his debt. He then assigns the entire debt. Of this assign-

ment the debtors have notice. They permit decree to be entered against them for the entire debt. Held, the debtors are estopped from falling back upon the compromise and release. *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142.

M., S. and others of the firm of A. C. & Co., owed \$2,000 to G.; W. agreed to pay, and paid G. \$400, on G.'s promise to release M. and S. from the debt. Held, the agreement was binding on G., and M. and S. were released. *Seymour v. Goodrich*, 80 Va. 303.

(3) Promise to Do Impossible Things.

Firm indebted to bank, latter consented to extend time on firm's giving negotiable notes for the debt, endorsed by K. and T., and getting latter to confess judgment for the aggregate as collateral security. K. did, but T. did not confess such judgment. Bank, informed of T.'s failure, promised to get judgment against T., but did not. The notes not being wholly paid, and K.'s estate being required to pay his judgment to the extent of the deficiency, K.'s executor insisted that bank should lose half of said deficiency on account of its laches in failing to get judgment against T. Held, bank's promise to obtain judgment against T. was nudum pactum, "and certainly could not impose upon the bank an obligation to do an impossible thing, namely, to compel T. to confess judgment." *Kelly v. Talliaferro*, 82 Va. 801, 5 S. E. 85.

(4) Illegal Consideration.

See the title ILLEGAL CONTRACTS.

A consideration mentioned, which is not legally enforceable, is equivalent to no consideration, and a contract dependent thereon is as much a nudum pactum as if no consideration were mentioned. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

(5) Past Consideration.

(a) In General.

A contract supported by a past con-

sideration can not be enforced for want of a valuable consideration. *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866; *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588; *Sturm v. Parish*, 1 W. Va. 125; *Gerow v. Riffe*, 29 W. Va. 462, 2 S. E. 104.

A promise by the maker of a common-law instrument, made to the assignee after the assignment, is a nudum pactum and not binding. *Hopkins v. Richardson*, 9 Gratt. 485.

Where A held liens on two lots of B, and C bought the two lots, and, in consideration that A would release the liens, she paid her \$300 in cash, and accepted an order drawn by B on himself for \$400, to be paid out of funds that might be due on a certain contract, and A made the release, and accepted the money and the conditional order, and the contract failed, and no money was due on the contract, and C afterwards promised to pay the \$400; held, that there was no consideration for such promise, and, the order being conditional, and the condition having failed, no recovery could be had on the order. "The consideration then passed; and even if the jury had evidence before it that Riffe, after that time, when the condition in the order had failed, promised to pay the \$400 mentioned in the order, it would not have justified the jury in finding for the plaintiff on such a promise, for there was no consideration to support it." *Gerow v. Riffe*, 29 W. Va. 462, 2 S. E. 104.

(b) Moral Obligations.

(aa) In General.

A moral obligation, to be sufficient to sustain a promise or contract, must be one which has been once a valuable consideration, but was not binding on account of some rule of law, or has ceased to be binding from some supervenient cause. A past consideration, which imposed no legal obligation at the time it was furnished, will not support a promise. *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588.

This court, in the recent case of

Stoneburner & Richards v. Motley, 95 Va. 788, 30 S. E. 364, quotes with approbation the language of Wightman, J., in *Beaumont v. Reeve*, 8 Adolph. & Ell. 486, that "a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise." *Davis v. Anderson*, 99 Va. 624, 39 S. E. 588.

But it is well settled, that a voluntary obligation, upon which a cause of action has accrued, may furnish a valuable consideration for a new contract, security or conveyance. *Welles v. Cole*, 6 Gratt. 657.

(bb) Joint Contracts.

A trust created by will for the payment of debts, by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay. Therefore, an undertaking which is merely nudum pactum is not comprehended, and may be barred by the act of limitations. The surviving obligor in a joint note (made before the act of 1786, see Rev. Code, vol. 1, ch. 24, § 3, p. 31), was formerly alone liable to an action at law; nor could the note be set up in equity against the representatives of the deceased obligor, but on the ground of a moral obligation antecedently existing on his part to pay the money. *Chandler v. Neale*, 2 Hen. & M. 124.

(cc) Obligations Barred by Limitation or Discharge in Bankruptcy.

A debt barred by limitation or by a discharge in bankruptcy, may be revived by a new promise, and the new promise may constitute a valid consideration. *Keffer v. Grayson*, 76 Va. 520, 44 Am. Rep. 171.

(aaa) Obligations Barred by Limitations.

It is now a well-settled doctrine that if a person makes a promise that he will pay a debt he justly owes, for the recovery of which all legal and equitable remedies are barred by the statute of limitations, such promise renders him liable to an action, the promise be-

ing founded upon the same legal consideration of an obligation existing in foro conscientiae. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440.

The original consideration is likewise sufficient to support a new promise to pay a debt barred by the statute of limitations. *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995; *Aylett v. Robinson*, 9 Leigh 45. A simple written contract can be taken out of the statute of limitations, not by part payment or by promise to settle, but only, by a promise in writing, or acknowledgment from which a promise to pay must be inferred. *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174.

The cases in which a debt extinguished is revived by a new promise, appears to be where the debt was due in conscience, and this would seem to exclude the case of a nudum pactum; for a man is not bound in conscience to pay any thing, unless he has received a benefit from, or produced a loss to, the other party. *Chandler v. Neale*, 2 Hen. & M. 131.

A note on which suit is brought may be barred by the statute of limitations, and the fact may be apparent upon the face of the declaration, yet the court would not, upon demurrer, dismiss the plaintiff's action. The barred note would be regarded as a good consideration for the new promise, and, if the defendant wished to interpose the defense, he would be required to do so by special plea; and this view is borne out by the statute, which only requires the new promise to be in writing, recognizing the old consideration as sufficient, and the plaintiff may either sue on such new promise or on the original cause of action. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440.

(bbb) Obligations Barred by Discharge in Bankruptcy.

A moral obligation to pay a debt is never stale, and may be the consideration for a new promise to pay an old debt, at any distance of time after the

discharge of the debt by bankruptcy, etc. *Horner v. Speed*, 2 Pat. & H. 617.

If a debt is discharged under bankruptcy or insolvency laws, the debtor, by a promise to pay it, waives the benefit of those laws, and payment may be compelled. The old consideration sustains the debt. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440; *Mackie v. Davis*, 2 Wash. 219. See also, *Stephens v. White*, 2 Wash. 206.

A verbal promise to pay an old debt will be sufficient to bind one discharged in bankruptcy, if it be of such a character (not casual or implied, but so express and equivocal) as to show that the promiser intended deliberately to waive the protection of his discharge in bankruptcy, and to rebind himself legally to pay the old debt; but a mere acknowledgment of the justice of the debt, of the moral obligation to pay it, and an expression of purpose to pay it at some future time, or when able, will not have the effect, in the absence of a deliberate intention thereby to bind himself. *Horner v. Speed*, 2 Pat. & H. 616.

(dd) Debts of Married Women.

The consideration, which will support an action for the debts of a married woman or her contracts, so as to make her separate estate liable, need not inure to her benefit, or that of her separate estate, but it may inure to the benefit of her husband, or any third party, or may be a mere prejudice to the other contracting party; in short, it may be any consideration which would support the contract, if she were a feme sole. *Radford v. Carwile*, 13 W. Va. 572; *Hughes v. Hamilton*, 19 W. Va. 366; *Patton v. Bank*, 12 W. Va. 587; *Camden v. Hiteshew*, 23 W. Va. 236.

The debts of a married woman, for which her separate estate is liable, are such as arise out of any transactions, out of which a debt would have arisen, if she were a feme sole, except that her separate estate is not bound by a

bond, or covenant based on no consideration, such bond, or covenant, being void at law, and she not being estopped from showing in a court of equity, that it was based on no consideration. *Radford v. Carwile*, 13 W. Va. 573.

Wife Surety for Husband.—A married woman as surety for her husband or any one else, can bind her separate estate by a writing without any consideration moving to her or her estate, the benefit to the principal being sufficient. *Williamson v. Cline*, 40 W. Va. 195, 20 S. E. 921; *Radford v. Carwile*, 13 W. Va. 572; *Dages v. Lee*, 20 W. Va. 584; *Hughes & Co. v. Hamilton*, 19 W. Va. 366. See ante, "Valuable Consideration," II, A, 6, d, (1).

Powers of Wife over Property.—A wife has full power to dispose of the whole estate conveyed to her under a deed of settlement. A mortgage of such estate afterwards executed by husband and wife joining, to secure a just debt due from the husband, is for valuable consideration and binding. *Lee v. Bank*, 9 Leigh 200; *Finch v. Marks*, 76 Va. 207; *Bailey v. Hill*, 77 Va. 492; *Frank v. Lilienfeld*, 33 Gratt. 377; *Bain v. Buff*, 76 Va. 374; *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478; *Darnall v. Smith*, 26 Gratt. 878. See also, *Bank v. Chambers*, 30 Gratt. 202, 32 Am. Rep. 661; *Justis v. English*, 30 Gratt. 565; *Burnett v. Hawpe*, 25 Gratt. 481; *Garland v. Pamplin*, 32 Gratt. 305.

(ee) Obligation of Child to Support Parent.

Under the Virginia Code 1904, providing that gifts, conveyances, etc., not upon a consideration deemed valuable in law shall be void as to existing creditors, a contract upon a good but not upon a valuable consideration is considered merely voluntary, and, while binding between the parties, is void as to creditors. Therefore, the moral obligation resting upon a child to support his parents, is not such a consideration as will sustain a conveyance as against the existing creditors of the child. For

a moral obligation to be sufficient to sustain a subsequent promise or conveyance, it must be one which had once been a valuable consideration, but which on account of some rule of law was not binding upon or enforceable against the party, e. g., from infancy or like cause, or which had ceased to be binding from some supervenient cause, as the act of limitations, the intervention of bankruptcy and the like. But a past consideration, other than the class referred to, which imposed no legal obligation at the time it arose, will support no promise whatever. *Davis v. Anderson*, 99 Va. 620, 39 S. E. 588.

(6) Meritorious Consideration.

See the title DEEDS.

Conveyance from Husband to Wife.—Though the conveyance in favor of a wife and children is not founded on a valuable, but only on a meritorious consideration, a court of equity will give effect to it against subsequent creditors of the husband. *Sayers v. Wall*, 26 Gratt. 354. See *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920; *Keffer v. Grayson*, 76 Va. 523; *Fox v. Jones*, 1 W. Va. 205; 2 Min. Inst. (2d Ed.) 883. In *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560, an important distinction is made between the effect of a meritorious, and an inadequate consideration.

A deed from a husband to his wife, conveying to her all his property real and personal, under circumstances showing a strong meritorious consideration, will be upheld in equity against a nephew, the heir at law of the grantor. *Jones v. Obenchain*, 10 Gratt. 259; *Stokes v. Oliver*, 76 Va. 72.

Personal Property Acquired by Marriage—Subsequent Deed.—Although personal property, acquired by marriage, can not be considered a valuable consideration to support a subsequent deed for the benefit of the wife, yet it is a meritorious consideration and will be supported or set aside according to circumstances. *Harvey v. Alexander*, 1 Rand. 219.

Parol Gifts of Land—Statute of Frauds.—The statute of frauds has no bearing on parol gifts of land, which are founded on meritorious considerations. If the promise reduced to writing, could, under the circumstances, be enforced in equity, it may be, although by parol. *Halsey v. Peters*, 79 Va. 68.

e. From Whom and to Whom Consideration Must Move.

See post, "Contracts for Benefit of Third Persons," IX, C.

In West Virginia it has been held, that only the person to whom the consideration moves can recover in an action on the contract. Thus a subsequent owner of a tract of land can not recover on a verbal contract of a railroad, made with a former owner of the land, to stop its trains at a certain point, even though it is a valid promise sustained by a valuable consideration. Such verbal contract does not run with the land. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

f. Consideration Must Be Stated in Agreement.

A written agreement, not under seal, to deliver bonds to a certain amount, must be held a nudum pactum, if no consideration for the contract be stated on its face or disclosed by testimony. *Sturm v. Parish*, 1 W. Va. 125; *Beverleys v. Holmes*, 4 Munf. 95.

g. Adequacy of Consideration.

See the titles DEEDS; FRAUDULENT AND VOLUNTARY CONVEYANCES; RESCISSION, CANCELLATION AND REFORMATION.

In General.—An executed contract will not be set aside for mere inadequacy of consideration. It is only in those cases where the inadequacy of price is so gross as to lead to the irresistible inference of fraud that a sale made without imposition, between parties standing on equal ground, will be rescinded by a court of equity. *Matthews v. Crockett*, 82 Va. 394; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Greer*

v. Greers, 9 Gratt. 330; *Tebbs v. Lee*, 76 Va. 744; *Hale v. Wilkinson*, 21 Gratt. 82; *Southerlin v. March*, 75 Va. 223; *Lowe v. Trundle*, 78 Va. 69; *Whitehorn v. Hines*, 1 Munf. 557; *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560.

It is a well-settled rule of law that mere inadequacy of price is no ground for setting aside a conveyance, unless so gross as to shock the conscience and furnish decisive evidence of fraud. *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196. In this case it is said, citing 2 Pom. Eq. Jur., § 928: "If there is nothing but mere inadequacy of price, the case must be extreme, in order to call for the interposition of equity. When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative." *Flook v. Armentrout*, 100 Va. 644, 42 S. E. 686.

Promissory Note.—Equity will not relieve the makers of a note, given for the purchase money of a newspaper, for mere inadequacy of consideration, unless the inadequacy is such as to shock the conscience, and of itself amount to fraud. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Matthews v. Crockett*, 82 Va. 394.

Catching Bargains.—A sale by a young man, who had just arrived at the age of twenty-one years, of a reversion in real estate, there having been no fraud or imposition on the part of the purchaser, and no confidential relation between the parties, will not be set aside for mere inadequacy of price. Mere inadequacy of consideration is not sufficient to avoid a sale, unless it is so gross as to shock the moral sense. *Cribbins v. Markwood*, 13 Gratt. 493; *Mayor v. Carrington*, 19 Gratt. 74. See

discussion of subject in *M'Kinney v. Pinckard*, 2 Leigh 149. See also, *Milhisier v. McKinley*, 98 Va. 207, 35 S. E. 446; *Forde v. Herron*, 4 Munf. 316; *Whittaker v. S. W. Va. Imp. Co.*, 34 W. Va. 223, 12 S. E. 509; *Pennybacker v. Laidley*, 33 W. Va. 639, 11 S. E. 44; *Brachan v. Griffin*, 3 Call 433; *Beverage v. Ralston*, 98 Va. 625, 37 S. E. 283; *Lowe v. Trundle*, 78 Va. 65.

Fraudulent and Voluntary Conveyances.—Where fraudulent intent against creditors is sought to be made out against a transfer of his property by a debtor on the sole ground of inadequacy, without any other element tending to show fraud, the inadequacy must be so great as fairly to induce the belief of fraudulent intent. *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560.

"But it is said the property's prime cost was \$22,000, and she gets it for \$10,000. That makes no difference, unless the price is so grossly inadequate as to warrant the presumption of fraudulent design, and half price has been held not gross. *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775. The same rule as to disparity between the price paid and the real value does not, it is true, prevail where the contest is between a creditor and an alleged fraudulent alienee, as between a vendor and vendee; but, when fraud is sought to be raised on inadequacy alone, it must be so great as to strike the understanding with the conviction that such a sale never could have been made in good faith." *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560.

In a suit to set aside an agreement on the ground of inadequacy of consideration, where it is shown that the property conveyed under the contract was worth something less than \$1,200, and that the consideration furnished by the grantee was a support and maintenance of the grantor during his natural life, and the payment of more than \$800 in money on the grantor's debts and to the children of the grantor, such evidence fails to show such an inade-

quate consideration as will justify a court of chancery in setting aside the contract. *Beverage v. Ralston*, 98 Va. 625, 37 S. E. 283.

Presumption of Fraud—Half Price.—Inadequacy that will justify the presumption of fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. Half the estimated value of property is not always inadequacy. *Bradford v. McConihay*, 15 W. Va. 732; *White v. McGannon*, 29 Gratt. 511; *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560; *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775; *Beverage v. Ralston*, 98 Va. 625, 37 S. E. 283; *Conaway v. Sweeney*, 24 W. Va. 643.

Inadequacy Combined with Circumstances of Oppression.—Inadequacy of consideration when combined with fraud, misrepresentation, studied suppression of the true value of the property, or any circumstances of oppression, is a material ingredient in the case affecting the discretion of the court in granting or refusing a specific performance. *Conaway v. Sweeney*, 24 W. Va. 643.

Unfair Advantage Taken.—Inadequacy of price, whether it be so gross as to be per se proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by the vendee of improvidence and distress of the vendor, will avoid the contract in equity, though it be a contract executed. *M'Kinney v. Pinckard*, 2 Leigh 149, 21 Am. Dec. 601; *Samuel v. Marshall*, 3 Leigh 567.

Mere inadequacy of consideration is no ground for rescinding contracts. But great weakness of mind, coupled with gross inadequacy of consideration, will induce courts of equity to rescind contracts, where from these facts, undue influence is inferable. *Crebs v. Jones*, 79 Va. 381.

Unequal Conditions.—A contract will be set aside in equity for gross inadequacy of consideration where there is

inequality in the position of the parties, and their relation is such as to warrant the presumption that the defendant took advantage of the plaintiff's illiteracy and ignorance. *George v. Richardson*, Gilm. 230; *Switzer v. Switzer*, 26 Gratt. 574; *Pennington v. Hanby*, 4 Munf. 140; *Deem v. Phillips*, 5 W. Va. 168.

Witnesses.—A release by an old woman to her agent of a large indebtedness, in consideration of small services, will not be upheld in the absence of all evidence of the circumstances under which the release was executed. The agent, after the death of the principal, is not a competent witness to show such circumstances. *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455. See the title WITNESSES.

Judicial and Sheriffs' Sales.—A trustee having sold property for one-fourth of its value, without getting the legal title, and the principal creditor secured by the deed having become the purchaser, the grantor being absent at the time, and the money to pay the debts having been forwarded to his agent at the place of sale, being at the time in the postoffice at the place and not delivered to the agent, though in the expectation of receiving it he had several times applied at the office for the letter, a court of equity will set aside the sale. *Rossett v. Fisher*, 11 Gratt. 492. See *Gibson v. Jones*, 5 Leigh 370; *Breckenridge v. Auld*, 1 Rob. 148; *Dabney v. Green*, 4 Hen. & M. 101.

Where sale of land is decreed to pay specific legacies, and the residue to four residuary legatees, and the land is bid in by one of those legatees, and the other legatees oppose the acceptance of the bid and the confirmation of the sale, and show by numerous witnesses well acquainted with the land, that though the sale was open and fair, yet the price bid was grossly inadequate, and that the land if divided and sold in parcels would, on the usual terms of payment in such cases, bring two or

three times the price bid; held, there was no error in the court rejecting the bid, and refusing to confirm the sale and directing a resale. *Terry v. Coles*, 80 Va. 695; *Taylor v. Cooper*, 10 Leigh 317; *Brock v. Rice*, 27 Gratt. 812. The general rule is that great inadequacy of price is, when clearly shown, sufficient cause to set aside such sale. *Sinnett v. Cralle*, 4 W. Va. 600; *Hartley v. Roffe*, 12 W. Va. 401; *Kable v. Mitchell*, 9 W. Va. 492; *Teel v. Yancey*, 23 Gratt. 691; *Talley v. Starke*, 6 Gratt. 339; *Roberts v. Roberts*, 13 Gratt. 639; *Heywood v. Covington*, 4 Leigh 373. See *Evans v. Spurgin*, 6 Gratt. 107.

A sheriff on the day appointed for the sale of a debtor's goods, undertook to pay the amount of the execution in consideration of the debtor assigning to him a well-secured bond of a third person for over double the amount of the debt, and agreed to return the bond if the debtor should pay the debt within a month. Upon the debtor's failure to pay within the prescribed time a dispute arose between the parties as to the debtor's right to subsequently redeem the bond and upon receipt of \$10 from the sheriff the debtor surrendered the written evidence held by him of his claim to redeem the bond. It was held that whether the original transaction was a pledge or a conditional sale the debtor is entitled to relief on the ground of fraud and oppression practiced upon him by the sheriff, and on account of the inadequacy of price paid. *Hyde v. Nick*, 5 Leigh 336.

Extent of Invalidity.—A deed of separation, being invalid as to husband and wife on the ground of gross inadequacy of consideration, is invalid as to the children. *Switzer v. Switzer*, 26 Gratt. 574.

h. Failure of Consideration.

As to right to set up failure of consideration in an action at law, see the title ACTIONS, vol. 1, p. 144.

In General.—An agreement without

a consideration is no bar to legal rights. *Mosby v. Leeds*, 3 Call 439; *Poling v. Maddox*, 41 W. Va. 786, 24 S. E. 1002.

Subsequent Failure.—"If the assignor have a title to the debt of which the bond is the evidence, there is, at the time, an existing and valid consideration given. A future diminution or loss of the debt, can never upon any principle relate back to the contract, so as to destroy it, any more than the subsequent death of a horse would, or the burning of a house in the possession of the vendee. I will go farther, and admit, that if the assignor be guilty of fraud, as by mistaking the circumstances of the obligor, or even by concealing them (if known to him), he might be liable; not because the consideration had failed, but on account of the fraud." *Mackie v. Davis*, 2 Wash. 222.

What Constitutes a Failure.

Sale of Worthless Goods.—In a sale of an article, in the absence of fraud or express or implied warranty, the common-law maxim of caveat emptor applies, and the purchaser can not defeat his promise to pay the price for the thing bought because it turns out to be worthless. *Mason v. Chappell*, 15 Gratt. 572; *Wilson v. Shackelford*, 4 Rand. 5.

Goods Sold Not According to Representations.—The mere fact that an article sold does not answer to the representation made respecting it, is not ground to assume that it was not the genuine article sold, so as to entitle the plaintiff to recover for a failure by the vendor to comply with his contract. *Mason v. Chappell*, 15 Gratt. 572.

Payment with Worthless Check.—Where A owes B a debt, and A gives B his check for the amount of the debt, and B presents the check for payment, and it is dishonored, such check is not a payment of the debt, even though it is agreed between the parties that the check is given and received in absolute payment of the debt. The debt re-

mains unpaid, and the agreement is without consideration, a mere nudum pactum. *Bantz v. Basnett*, 12 W. Va. 824, opinion of Johnson, J., citing *Miller v. Miller*, 8 W. Va. 542; *Feamster v. Withrow*, 9 W. Va. 296; S. C., 12 W. Va. 611; *Poole v. Rice*, 9 W. Va. 73; *Dunlap v. Shanklin*, 10 W. Va. 662.

Nonperformance of Services.—When the consideration of a note is the payee's engagement to perform some service or do some act, his nonperformance of such service or act constitutes a failure of consideration. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

Assignment of Forfeited Lease—Waiver.—In an action on a note given for an amount due on an assignment of a mining lease, which defendants contend had been forfeited before the attempted assignment, where it appears that the lessors apparently acquiesced in the assignment, and waived a forfeiture by plaintiff for nonpayment of rents and royalties, and did not declare the lease forfeited until long after defendants had been in possession and had violated the terms of the lease, a judgment for plaintiff will be affirmed. *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944.

Acceptance of an Order.—A general acceptance of an order binds the acceptor to the payee, by whom the same was taken bona fide, for valuable consideration paid by him, notwithstanding the consideration, which induced the acceptance, afterwards fails without any fault on the part of the payee. *Corbin v. Southgate*, 3 Hen. & M. 319; *Findlay v. Hickman*, 10 Leigh 354. See the title ORDERS.

Failure to Deliver According to Contract.—A and B execute a joint bond to C, part of the consideration of which is the price of a parcel of corn sold by C to A deliverable at a day subsequent to the date of the bond; the corn is not delivered according to contract; in debt on the bond by C against A and B the defendants can not set off the value or price of the corn. Where one

purchases goods deliverable at a future day, and presently binds himself by deed to pay the purchase money, or pays it in cash, the purchaser, in case the goods be not delivered, can not disaffirm the contract for failure of consideration and claim the stipulated price paid, or contracted to be paid, but can only recover damages against the vendor for breach of his contract. *Christian v. Miller*, 3 Leigh 84.

A father, for a consideration payable in futuro, granted to a son all his estate, including bonds of another son, which were afterwards collected in good money by grantee's attorneys, who, after retaining the same for several years, paid it over in confederate money. The loss was held to be no defense to an action by grantor's heirs against grantee to recover the consideration. *Kerlin v. Kerlin*, 85 Va. 475, 7 S. E. 849.

Slave Contracts.—During the year of 1861 slavery was recognized as existing both by the United States and Missouri, and slaves owed no allegiance to either; and there could be no demand for their services by the United States or the state, which could occasion a failure in part of the consideration of the notes given for their price. *Booker v. Kirkpatrick*, 26 Gratt. 145.

The purchasers of the emancipated slaves under executions, being bona fide purchasers, are entitled to recover back from the estate of the testatrix the amount paid by them, with interest, and the expense of keeping the chargeable negroes, they accounting for the profits of the negroes purchased by them. *Jincey v. Winfield*, 9 Gratt. 708.

Sale of Free Negro.—A negro man being conveyed by deed of trust to secure debts amounting to more than his value, his grantor sells him, and the purchaser pays to one of the cestuis que trust part of the purchase money, and executes to the other his obligation for the residue, payable some months afterwards. The grantor makes to the

purchaser a bill of sale of the negro as a slave, and therein warrants and defends the title to him against the claims of all persons whatsoever. The cestuis que trust do not join in the bill of sale of warranty, but, by the arrangement, their liens on the negro are relinquished to the purchaser, and the payment made by him to one of the cestuis que trust, and the obligation executed by him to the other, discharge the grantor's debt to them pro tanto. It turns out that the negro so purchased is a free man; and judgment being obtained at law against the purchaser upon his obligation, an injunction is awarded him. Held, the purchaser can have no relief against the cestuis que trust, and the injunction is therefore dissolved, and the bill dismissed. *Findlay v. Hickman*, 10 Leigh 354.

Failure of Condition.—Where vendor sells land of his wife without conveyance, and part of price is paid, with understanding expressed in receipt for sum so paid, that if a third person's heirs (who were likewise the heirs of wife), got a redivision of their ancestor's land (whereof the land sold is part), vendor is to pay vendee his money back; and wife dies intestate without having had issue, and the heirs get the land from vendee by legal proceedings, the latter is entitled to have his money, so paid upon a consideration that failed, refunded by vendor. *Ferguson v. Teel*, 82 Va. 690.

Conditional Grant.—An agreement to grant a right of way for a railroad was shown by parol evidence to have been delivered to the president of the road, on condition that it should not take effect until it was necessary to the building of the road, or unless the board of directors should make compensation therefor. After the road was completed, though no necessity had occurred for using the right of way, and though no compensation had been made therefor, the president turned the agreement over to the right-of-way

agent, who was aware of said conditions. Held, the agreement was void, and plaintiff entitled to an issue of quantum damnificatus to ascertain the damages to his land. *Humphreys v. R. & M. R. R. Co.*, 88 Va. 431, 13 S. E. 985; *Harris v. Harris*, 23 Gratt. 778; *Hicks v. Goode*, 12 Leigh 490. See *Isbell v. Norvell*, 4 Gratt. 176.

Building Contracts.—See the title **WORKING CONTRACTS**.

M. employs S. to build a house, and he is to pay for it in ten notes of \$5,000 each, payable at different periods, to be delivered by M. to S. when R. shall say he is entitled to them, one note to be first delivered, then two at the same time, when the work has advanced to a certain state, etc. If S. should fail to carry on the work to completion, any notes not delivered should be forfeited to M. The first note is properly issued. Before S. is entitled to receive the next two, M., at the request of S. delivered him one of them, S. having done more work than the amount of that note; and S. soon after receiving the last note, abandons the work. Held, though the note was given by M. to S. for his accommodation, before he was bound to deliver it, yet it is not an accommodation note in the legal sense, but is upon a valuable consideration; and M. has no equity on this ground, either against S. or the holder of the note for value, to have the note delivered up to him. *Ould v. Myers*, 23 Gratt. 383.

Effect of Failure.

In General.—A contract the consideration for which has failed, is not enforceable. *Trout v. Trout*, 86 Va. 295, 9 S. E. 1121.

Mode of Relief.—To entitle a party to recover back money which he has paid upon a contract which has been wholly rescinded, or the consideration of which has wholly failed, he must not have been guilty of any fraud or illegal conduct in the transaction. In such case, the usual and better mode of counting is the common count for money had

and received. But if the plaintiff declares specially, it must appear with sufficient certainty from the facts so set out, or from apt averments, made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff. *Johnson v. Jennings*, 10 Gratt. 1, 60 Am. Dec. 323.

Valid judgments of a court of record can not be attacked collaterally; and defense of failure of consideration must be set up either in a suit wherein judgment is rendered, or by a chancery suit brought by defendant for that purpose. *Spotts v. Commonwealth*, 85 Va. 531, 8 S. E. 375.

Defense against Remote Parties.—

A defendant may, in general, make the defense of a want of consideration against a remote party, if he could have made it against a nearer party, and the nearest party took the paper from the nearer party with a knowledge that it was open to this defense. But a very important exception to this rule prevails in the case of accommodation paper. The plain reason of this is, that the accommodation maker, acceptor, or endorser, intends to lend his credit, and does it as a favor to some party, who pays him nothing. This party, therefore, can never sue him; or if he does, the want of consideration will be a perfect defense. But if this accommodated party uses the credit he has borrowed, by selling the note or getting it discounted, the holder may say: "I bought the note, or discounted it, for the very reason that I knew you had lent your credit on it; and I took it on the faith of your credit." *Bank v. Lockwood*, 13 W. Va. 426. See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

i. Parol Evidence.

See ante, "Presumption of Consideration," II. B. 6, c. See the title **PAROL EVIDENCE**.

To Vary Consideration.—Where a

writing is not under seal, and in equity when under seal, parol evidence is admissible to show the real nature and character of the consideration, except in the case of negotiable instruments. *Bruce v. Slemph*, 82 Va. 352, 4 S. E. 692; *Bloss v. Plymale*, 3 W. Va. 409; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 929; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

In **equity** either party may aver and prove against the other the true consideration upon which the deed was founded, though a different consideration be expressed therein. *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558; *Duval v. Bibb*, 4 H. & M. 116; *Eppes v. Randolph*, 2 Call 185; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 929.

Bonds.—See the title BONDS, vol. 2, p. 562.

Parol evidence is admissible to prove the consideration of a bond and the character of the contract. *Wrightsmen v. Bowyer*, 24 Gratt. 433. In this case, by a bond dated July 7, 1863, B. promised to pay to W. three years after date \$2,000 without interest, in current funds in the state of Virginia, being money borrowed. In an action upon this bond it was held that parol evidence was admissible to prove the consideration thereof as throwing light upon the character of the contract; and the evidence showing that it was a contract of hazard, and that the parties contemplated the possibility, though not the probability, of the failure of the confederacy, and intended that the bond should be discharged in the currency in use when it fell due, judgment was entered for the plaintiff for an amount equal in value to \$2,000 in United States currency then in use in Virginia, on the day it fell due, with interest from that date. *Summers v. Darne*, 31 Gratt. 791. On this subject it is said in *Harvey v. Alexander*, 1 Rand. 230, that whatever may be the rule in a court of law, a court of chancery will inquire into the real consideration. *Quarles v. Lacy*, 4

Munf. 251. See also, *Eppes v. Randolph*, 2 Call 125; *Brent v. Richards*, 2 Gratt. 539; *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Effinger v. Kenney*, 24 Gratt. 116; *Gatewood v. Burrus*, 3 Call 194; *Rucker v. Lowther*, 6 Leigh 259.

By bond dated July 7th, 1863, B. promises to pay to W., three years after date, \$2,000 without interest, in funds current in the state of Virginia, being money borrowed. Held, parol evidence is admissible to prove the consideration of the bond and the character of the contract. *Wrightsmen v. Bowyer*, 24 Gratt. 433.

Conveyances.—A sister agrees to convey to her brother a certain tract of land, and, in consideration thereof, the brother agrees to support their aged father and mother during their natural lives, and that he will bind himself thereto by written contract after the conveyance shall have been made. The sister conveys the land to him, with recital of the receipt of a money consideration of \$50. Held, it is competent to show by parol evidence what was the contract between the parties and what was the real additional consideration for the conveyance of the land, since what the grantee was to do was collateral to the conveyance, and it contained no recital inconsistent with such collateral undertaking or contradictory thereof. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. See *White v. Campbell*, 80 Va. 180. "And it may be observed, that when fraud and illegality of consideration, or mistake in the transaction are alleged, the door is opened wide to any parol evidence relevant to the issue." *Starke v. Littlepage*, 4 Rand. 368. See also, *Mauzy v. Sellars*, 26 Gratt. 646.

B in his lifetime, conveyed land to his daughter's husband by deed reciting a valuable consideration. Here it was held that parol evidence is inadmissible to contradict, vary or add to a written

instrument, but it is always admissible to show the real nature and character of the consideration and in this case it was shown that the deed was intended to create an advancement for the daughter. *Bruce v. Slemph*, 82 Va. 352. See *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544; *Chinn v. Murray*, 4 Gratt. 348. It is said in *Click v. Green*, 77 Va. 838, that it is well settled that the consideration named in the deed may be inquired into, citing *Summers v. Darne*, 31 Gratt. 804. But he who undertakes to show a different consideration must do it by satisfactory proof. *McDearman v. Hodnett*, 83 Va. 281, 2 S. E. 643; *Peale v. Thurmond*, 77 Va. 753; *Watkins v. Young*, 31 Gratt. 84; *Jarrett v. Nickell*, 9 W. Va. 345.

Additional Consideration.—Parol evidence is admissible to show an additional consistent consideration to that expressed. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

"It is contended for the appellant that, because the deeds recite the consideration as one dollar, the grantee is estopped from showing that any larger consideration passed. It is true, even in equity, that a party claiming under a deed is bound by the general character of the consideration stated in the deed. He can not, for instance, as a part of his own case, if money be averred, prove natural love and affection; or, if natural love and affection be averred, prove money. But, when the deed is assailed by third parties on the ground of fraud, a larger field is opened, and, as relevant evidence to the issue of fraud, it is admissible to show, in addition to the consideration of affection expressed, a valuable consideration paid, or the converse. And when a deed recites no consideration, or an inadequate one, the party claiming under it may prove a substantial consideration, though, as against a third party contesting the deed, the onus of proving the consideration will rest upon the party claiming under it. 2 Whart. Ev., § 1046; *Rogers v. Ver-*

lander, 30 W. Va. 619, 5 S. E. 847; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 800.

"The deed of March 20, 1893, states that its consideration is five dollars and love and affection. It is said this is an estoppel upon the wife from showing other consideration. This is not law. The consideration may be shown. *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799;" *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560.

Consideration Unexpressed.—G. being indebted to H. and having mortgaged land to secure the debt, makes another mortgage of the same land to secure a debt of C. by which it appears that C. has undertaken to pay G.'s debt to H., then C. makes a written promise to H. to pay G.'s debt to him. In an action by H. against C. on this written promise; held, G.'s mortgage to C. is proper evidence to prove a consideration moving from G. to C. for C.'s promise to pay G.'s debt to H., though no such consideration is laid in the declaration. Consideration unexpressed in a written promise may be proved by external evidence. *Colgin v. Henley*, 6 Leigh 85.

III. Classification of Contracts.

A. ENTIRE OR SEVERABLE CONTRACTS.

1. In General.

No precise or invariable rule can be laid down by which it may be determined whether the contract is entire or severable, for it is a question of construction as to the intention of the parties to be discovered in each case from the language employed, and the subject matter of the contract. Thus the reservation of a percentage until the whole is completed would seem to indicate an entire contract. *Atlantic, etc., R. Co. v. Delaware Const. Co.*, 98 Va. 503, 37 S. E. 13.

2. Particular Contracts Considered.

Support and Maintenance.—"An agreement to support one during life was held to be an entire contract, and

upon a total breach thereof the promisee could recover full and final damages—i. e., not only the expenses of support up to the time of trial, but also the prospective expense during life." *Hancock v. White Hall, etc., Co.*, 102 Va. 239, 46 S. E. 288.

Building Contracts.—See the title WORKING CONTRACTS.

A contract between A and B, whereby A agreed to erect and have ready for occupancy by October 1, 1898, a tobacco factory for the use of B, the factory to be built according to specifications, and equipped with modern appliances for the proper steaming and handling of tobacco, by which contract B agreed to lease the factory for a term of two years from October 1, 1898, at an annual rental, is an entire and not a severable contract. *Hancock v. White Hall, etc., Co.*, 102 Va. 239, 46 S. E. 288.

A contract to erect a building at a fixed price is an entire contract, and must be performed in accordance with its expressed terms as contained in the writing creating it, unless properly modified in a legal manner. *McConnell v. Hewes*, 50 W. Va. 34, 40 S. E. 436.

Where one contracts to put a tin roof on a dwelling house at so much per square, if such house is consumed by fire before the roof is completed, without the fault of the contractor, he is entitled to recover on a quantum meruit for the work done under the contract. Such a contract is not one of risk or hazard, and the contractor is not an insurer of the property against destruction from fire, or other causes. *Hysell v. Sterling Coal, etc., Co.*, 46 W. Va. 158, 33 S. E. 96, citing *Clark v. Franklin*, 7 Leigh 1.

Contracts of Service.—See the title MASTER AND SERVANT.

"It is said by a learned author, that the spirit of the common law is opposed to apportionment of contracts. See 2 Evans's Pothier, 40. This certainly was anciently strictly true; and

it is still true, I imagine, as to all entire contracts, which do not admit of apportionment, and indeed as to many others. In contracts for service between master and servant, the principle seems often very rigorously to prevail; as in the case of a clerk who quitted his employer within the year for which he engaged to serve—he was held entitled to nothing." *Bream v. Marsh*, 4 Leigh 28.

"*Pagani v. Gandolfi*, and *Huttman v. Bulnois*, 2 Carr & Payne, 370, 510; 12 Com. Law Rep. 177, 239. So too, as to ordinary servants; *Spain v. Arnott*, 2 Stark. Rep. 256; 3 Com. Law Rep. 339. See also, *Cutter v. Powell*, 6 T. R. 320, though that case can only be sustained, I think, on the ground, principally relied on, of extra wages. But, notwithstanding these and other cases, which rigorously deny compensation unless there is entire performance, there can be no doubt, that where the subject is divisible, where the failure as to part can be fairly and accurately compensated by an apportionment of the consideration, the law permits, as justice certainly requires, that it should be done." *Bream v. Marsh*, 4 Leigh. 29.

3. Entire Consideration.

Where there is an entire consideration for the defendant's promise, made up of several particulars, and one of these consists of an agreement by the defendant, which the statute of frauds requires to be in writing, and which, for want of such writing, is void, the whole consideration is void, and the promise can not be supported. *M'Crowell v. Burson*, 79 Va. 302.

4. Performance and Excuses Therefor.

See the title WORKING CONTRACTS.

In General.—It is undeniably true, as a general rule, that in the case of an entire contract the whole work must be completed and delivered in a state of completion before there can be a demand of payment, and, if any part has been destroyed by accident or act of God before that time, the loss must

be borne by the contractor. Where one contracts to furnish the materials and labor and to construct an entire work, he is not excused from the performance of the contract by the destruction of the work, whether from his own negligence or unavoidable accident. *Atlantic, etc., R. Co. v. Delaware Const. Co.*, 98 Va. 503, 37 S. E. 13. But see *Clark v. Franklin*, 7 Leigh 1.

Excuses for Failure to Perform.

Acts of Other Party.—Nothing is more true than where a contract is entire, and the covenants are dependent, the plaintiff is, in general, obliged to aver and prove a complete performance of all that was to be done and performed on his part, before he is entitled to demand payment from the other party. But to this well-established rule, there is the equally well-established exception, that where the defendant has prevented a performance by the plaintiff on his part, it is not necessary that the plaintiff should aver or prove a complete performance to entitle him to his action. He may recover without doing so, and it is sufficient to show a readiness to perform, and that he was hindered by the defendant. *Clark v. Franklin*, 7 Leigh 8; *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

"The declaration here contains two distinct allegations, which show the hinderance by the defendant: 1. That he failed to furnish materials, which was a precedent act to be done by the defendant; 2. That after the house was blown down, the defendant would not permit the plaintiff to proceed with the work. 'If a man be bound to build a house, etc., he is excused, if the obligee refuse to let him build it, for he can not come upon the land against his will.'" *Clark v. Franklin*, 7 Leigh 8.

"Parsons, in his work on Contracts, vol. 2, p. 522, in discussing 'apportionment of contracts,' says: 'We have seen that when parties make a contract which is not apportionable, no

part of the consideration can be recovered in an action on the contract, until the whole of that for which the consideration was to be paid is performed. But it must not be inferred from this that a party who has performed part of his side of a contract, and has failed to perform the residue, is in all cases without remedy. For though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract, and give him a remedy on a quantum meruit. Thus, if a party is prevented from fully performing his contract by the fault of the other party, it is clear that the party thus at fault can not be allowed to take advantage of his own wrong, and screen himself from payment for what has been done under the contract. The law will, therefore, imply a promise on his part to remunerate the other party for what he has done at his request; and upon this promise an action may be brought.' 'So too if one party, without the fault of the other, fails to perform his side of the contract in such a measure as to enable him to sue upon it, still if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to cover that quantum of remuneration, and action of indebitatus assumpsit is maintainable.'" *Smith v. Packard*, 94 Va. 733, 27 S. E. 586.

Act of God.—The parties to an entire contract of such a nature as indicates that they, in entering into it, must have contemplated the possibility of its termination by act of the law or of God or by some cause beyond their power, are, upon the happening of such event, relieved from its obligations, so far as it remains unexecuted, upon the theory that though, in form, it was an entire and indivisible contract, yet as

the parties must have had in view the contingency which rendered it impossible of further execution, or gave right to terminate it, it was in fact and in law a divisible contract contrary to its form, and recovery is allowed for such part of the contract as has been performed, but profits which would have arisen from further and future performance are denied and refused. *Griffith v. Blackwater, etc., Co.*, 55 W. Va. 609, 48 S. E. 442.

Recovery on Contract Partly Performed.—Upon one entire contract to perform carpenter's work, the carpenter is entitled to recover the price of the work actually done, though the whole is not completed, if the employer either prevents him from completing the whole, or refuses to permit him to complete it except on such conditions as he has no right to impose. And, if the work partly done is destroyed by accident or act of God, much more in consequence of the employer's own negligence, the employer has no right to insist that the carpenter shall bear the loss. *Clark v. Franklin*, 7 Leigh 1, cited and expressly approved in *Hysell v. Sterling Coal & Mfg. Co.*, 46 W. Va. 158, 33 S. E. 96. See *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

5. Splitting Causes of Action.

See the title **ACTIONS**, vol. 1, p. 134.

It is an ancient and firmly-established rule of law that only one action can be maintained for the breach of an entire contract. 2 Sedg. on Dam. (8th Ed.), s. 642; 1 Suth. on Dam. (2d Ed.), S. 108. *Hancock v. White Hall, etc., Co.*, 102 Va. 239, 46 S. E. 288.

A demand arising from an entire contract can not be divided and made the subject of several suits; and if several suits are brought for a breach of such a contract, a judgment upon the merits in either will bar a recovery in the others. *Hancock v. White Hall, etc., Co.*, 102 Va. 239, 46 S. E. 288.

A contract by a lessor to build and equip by a given date a warehouse, which the lessee agrees to lease for a period of two years, with the privilege of extending the lease three years longer, is an entire contract, and the lessee can maintain but one action for the breach of the lessor's covenants to complete by a given time and equip in a specified manner. If action be brought by the lessee before the termination of the lease, he may recover therein not only the damages actually sustained down to the trial, but those to ensue thereafter if they are imminent and reasonably certain. *Hancock v. White Hall, etc., Co.*, 102 Va. 239, 46 S. E. 288.

B. EXECUTORY AND EXECUTED CONTRACTS.

Executory Contracts.—The promise to convey land, and a payment or promise to pay the consideration, constitute an executory contract for the sale of land. *Capehart v. Hale*, 6 W. Va. 547.

An agreement to sell land at the option of the vendee is executory, and becomes completed between the parties on notice by the vendee to the vendor of his election to take the tract before the expiration of the time allowed for that purpose. *Donnelly v. Parker*, 5 W. Va. 301.

Where a party signs and seals a written proposal to sell a tract of land therein described for a consideration therein named, one-half of the purchase money to be paid in cash, and the remainder in nine months, the deed to be made when the cash payment is made, subject to the condition that the party proposing to purchase shall have thirty days' option to elect whether he shall purchase or not, upon such election being made to take the property and notice to the proposer being given within said time, an executory contract was thus formed, with mutual obligations on the parties as in other contracts. *Clark v. Gordon*, 35

W. Va. 735, 14 S. E. 255, following *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Executed Contracts.—An executed contract is one in which the object of the contract is performed. *Washington v. Burnett*, 4 W. Va. 95.

A debt paid is a contract executed, and an executed contract, even though illegal, will not be disturbed between the parties to it. *Washington v. Burnett*, 4 W. Va. 84; *Brown v. Wylie*, 2 W. Va. 503.

Contract to Loan Money.—While an action for damages for refusal to execute a consummated contract to loan money lies as in other cases, it must be a complete and consummated contract. *Wells v. Michigan, etc., Ins. Co.*, 41 W. Va. 131, 23 S. E. 527.

"Made;" "Executed" Synonymous.—"A distinct section of the brief of appellant's counsel is that the answer of *Coast* is indefinite, so that it is difficult to say whether he claims the contract was executed and passed title, or merely executory, but that in no point of view can it be regarded an executed contract. That depends upon the sense in which we take the word 'executed.' If in the sense of 'made,' then it is an executed contract; if in the sense that it has not been carried out by payment and transfer of title, or that it does not pass legal title, the proposition is correct—it is not an executed but executory contract, yet it confers an estate and right in equity. An agreement to sell and convey land, but which is not a conveyance operating as a present transfer of legal estate and seizin, is at law wholly executory, and produces no effect upon the estates and titles of the parties, and creates no lien or charge on the land itself." *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

C. IMPOSSIBLE CONTRACTS.

A contract to do an impossible thing is a nudum pactum. *Kelly v. Taliaferro*, 82 Va. 801, 5 S. E. 85.

D. JOINT AND SEVERAL CONTRACTS.

See the titles *BILLS, NOTES AND CHECKS*, vol. 2, p. 463; *BONDS*, vol. 2, p. 531.

1. In General

It is a well-settled principle that covenants are to be considered as either joint or several, according to the rights and interests of the parties; and this on the soundest reason, for though a covenant with several persons be joint and several in its terms, yet if the legal interest and cause of action be joint, the action must be brought by all; and, on the other hand, if the interest and cause of action be several, the action must be brought by one only, though the covenant be in its terms joint. *Carthrae v. Brown*, 3 Leigh 101, 23 Am. Dec. 255.

The true rule as stated by Baron Parke is, that "a covenant may be construed to be joint or several according to the interest of the parties appearing upon the face of the obligation, if the words are capable of such construction; but it will not be construed to be several by reason of such interests, if it be expressly joint. *Peerce v. Athey*, 4 W. Va. 27.

Where an injunction bond is joint as to the obligees, and joint and several as to the obligors, a joint action may be brought by the obligees, and a joint judgment rendered for the whole of their demand, although the claims due them respectively may be of different amounts and bear interest from different dates. *Peerce v. Athey*, 4 W. Va. 22.

2. Joint Contracts.

In General.—Where there is but one duty covenanted to be performed to two or more, they have a joint interest and but one action, otherwise, the defendant would be vexed with two or more suits for one thing, and the court would not know for whom judgment should be pronounced. *Carthrae v. Brown*, 3 Leigh 101, 23 Am. Dec. 255.

It may happen also, that where there is but one duty to be performed to one of two individuals, yet both may be interested in the performance of it; in such case, the contract is joint, and both must sue; as where A. owes B. £100, and C. owes A. a like sum, and covenants with A. and B. to pay it to B. here A. though he is to receive nothing, is interested in the payment to B. and the action must be joint. Indeed, where a party covenants with two to pay money to one only, the law presumes an interest in the other, although he is to receive nothing; because he is joined in the contract, and there can be no other assignable motive for it; and there, the action must be joint. The interest presumed in such case, must be a joint interest, as two could not have a several interest, in the performance of a single duty to one of them. *Carthrae v. Brown*, 3 Leigh 101, 23 Am. Dec. 255.

If attorneys who are copartners accept a retainer, the contract is joint, and continues to the termination of the suit; and neither can be released from the obligation, either by a dissolution of the firm, or by any other act or agreement among themselves. *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457.

The following covenant was held joint: "Know all men by these presents, that we, John T. Peerce, Gustavus Cresap and Buckner Fairfax, are bound unto John W. Athey, Phillip Fletcher, Joseph Reitzell, and David Freeland, their heirs and assigns, in the penalty of four thousand dollars for the payment whereof we bind ourselves jointly and severally. Witness our hands and seals, this 6th day of November, 1865. *Peerce v. Athey*, 4 W. Va. 22.

Liability.—"In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each cocontractor ought to pay as between themselves; and each, in effect, takes

upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his cocontractors, at the request of such cocontractor." *Armstrong v. Henderson*, 9 Va. 234, 37 S. E. 839.

Contract by Several Presumed Joint.—When an obligation is undertaken by two or more, it is presumably a joint liability, unless there be express words to render it joint and several; therefore, where an implied promise raised by law imposes a liability on two or more, it is joint only. *Elliott v. Bell*, 37 W. Va. 834, 17 S. E. 399.

Suit Must Be against All.—Where a contract with several persons is joint, the action must be brought jointly against all. *Carthrae v. Brown*, 3 Leigh 98; *Armstrong v. Henderson*, 99 Va. 234, 37 S. E. 839.

Two persons, to whom or for whose benefit a third person has promised to pay a single amount, can not maintain separate suits for their alleged shares of such amount, or the whole thereof must sue jointly. *Phoenix Assurance Co. v. Fristoe*, 53 W. Va. 361, 44 S. E. 253.

In *Hoffman v. Bircher*, 22 W. Va. 542, it is said: "It is a well-established rule of the common law, that the plaintiff upon a joint contract, must sue all the joint contractors, and bring all of them before the court, and mature his cause against all, or if any could not be brought before the court he must proceed to outlawry against such defendants before he could obtain a judgment against any of them; and that he must recover a joint judgment against all the defendants, except such as may be discharged from liability by a defense personal to themselves, such as infancy, bankruptcy or any other matters which do not go to the foundation of the action, or against none of them; and this result followed in every joint action, whether brought upon a joint, or upon a joint and several obligation, for the plaintiff having elected to treat

it as joint, he took his joint remedy subject to all the incidents of a joint contract. *Taylor v. Beck*, 3 Rand. 316; *Baber v. Cook*, 11 Leigh 606; *Peasley v. Boatwright*, 2 Leigh 196; *Jenkins v. Hurt's Com'rs*, 2 Rand. 446; *Early v. Clarkson's Adm'r*, 7 Leigh 83." As authority for the above proposition, *Early v. Clarkson*, 7 Leigh 83, is cited in *State v. Hays*, 30 W. Va. 111, 3 S. E. 180; *Beazley v. Sims*, 81 Va. 646. See also, *Brown v. Belches*, 1 Wash. 9. *Early v. Clarkson*, 7 Leigh 83, overrules *Moss v. Moss*, 4 Hen. & M. 293, in which case it was held, that where an action on a joint and several bond against six obligors, and the capias (which was against them all) was executed, on two only, the plaintiff was not bound to sue out further process against the rest, but might take judgment against those two. In such case, it seems indifferent whether the declaration be against those two only, or against all named in the writ, provided the bond be properly described.

Joint Bond.—See the title BONDS, vol. 2, p. 531.

And there is no better settled rule of law than that all the obligees in a joint bond ought to be joined in the action thereon; or the death of such as are not so joined, or some other sufficient excuse for not joining them, ought to be averred in the declaration; and that if it appear upon the face of the declaration that there are other obligees who ought to be, but are not, joined in the action, the objection is fatal on general demurrer. *Strange v. Floyd*, 9 Gratt. 475.

Reason of Rule.—When the contract is made with several, whether it were under seal or by parol, if their legal interest were joint, they must all, if living, join in an action in form ex contractu, for the breach of it, though the covenants or contract with them were in terms joint and several; the reason assigned is that when the interest is joint, if several were to be permitted to bring actions for one and

the same cause, the court would be in doubt for which of them to give judgment; therefore where A declared upon an account stated with him, of moneys due to him and a third person, after verdict judgment was arrested on the ground that the promise, whether express or implied, must, in point of law, be considered as made to all the persons whose debt it was, and, therefore, they ought to have joined in the action. *Phoenix Assurance Co. v. Fristoe*, 53 W. Va. 365, 44 S. E. 253.

Extinguishment of Remedy on Joint Contract.—Where two or more are jointly bound by contract, the legal remedy must be pursued against all. And if, by act of the claimant in such joint contract, one or more of the parties jointly bound be discharged, so that all can not be subjected to a joint judgment, none are liable on a joint contract. *Ward v. Motter*, 2 Rob. 536.

Must Be Entitled to Joint Judgment.—See the title JUDGMENTS AND DECREES.

In an action against several defendants on a joint contract, plaintiff must be entitled to joint judgment against all, else he can not have judgment against any. *Baber v. Cook*, 11 Leigh 606; *Gibson v. Beveridge*, 90 Va. 697, 19 S. E. 785; *Moffett v. Bickle*, 21 Gratt. 280; *Muse v. Farmers' Bank*, 27 Gratt. 252; *Taylor v. Beck*, 3 Rand. 316; *Steptoe v. Read*, 19 Gratt. 1; *Bush v. Campbell*, 26 Gratt. 426; *Rohr v. Davis*, 9 Leigh 30; *Peasley v. Boatwright*, 2 Leigh 195; *Jenkins v. Hurt*, 2 Rand. 446; Va. Code, 1887, § 3212; *Early v. Clarkson*, 7 Leigh 83, 86, 91; footnote to *Baber v. Cook*, 11 Leigh 606; *Hoffman v. Bircher*, 22 W. Va. 542, 550; *Snyder v. Snyder*, 9 W. Va. 421; *State v. Hays*, 30 W. Va. 111, 3 S. E. 180.

Except in a few cases, the rule is general, that he who sues upon a joint contract, can not recover a separate judgment against one of the defendants. So firmly is this principle fixed, that even where one of two joint defend-

ants confesses the action, no judgment can be entered against him till the issue made up by his codefendants is tried, and it is wholly set aside if the issue be found for the codefendant. *Jenkins v. Hurt*, 2 Rand. 446; *Taylor v. Beck*, 3 Rand. 316; *Baber v. Cook*, 11 Leigh 611.

In joint action of debt against two, there is judgment by default against one; the other pleads to the action, and there is trial, and verdict against him. Held, there should be one and the same joint judgment against both. *Peasley v. Boatwright*, 2 Leigh 195.

Cure by Verdict.—See the title AMENDMENTS, vol. 1, p. 359.

In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, though not pleaded in abatement, and is not cured by verdict. *Newman v. Graham*, 3 Munf. 187.

Exceptions to Rule.—It is a general rule of the common law, that in a joint action upon contract, there can be but one final judgment, which must be either for or against all the defendants. And the rule is the same whether the contract on which the action is founded is joint or joint and several, or whether the action is founded on several and distinct contracts, as in a joint action under the statute against the maker and endorser of a note. *Taylor v. Beck*, 3 Rand. 316. This general rule does not apply where the plea of one of the defendants admits the contract alleged, and sets up his discharge by matter subsequent; as bankruptcy. Nor does it apply where one of the defendants alleges that he is not bound to perform his contract by reason of personal disability at the time it was entered into; as infancy. And these exceptions to the general rule apply equally, whether the contract sued upon is joint or joint and several. *Cole v. Pennell*, 2 Rand. 174; *Woodward v. Newhall*, 1 Pick. R. 500; *Minor v. Mech.*

Bank of Alexandria, 1 Peters' U. S. R. 46. *Steptoe v. Read*, 19 Gratt. 9.

But an exception to the general rule is not allowed where the defense, though personal to one of the defendants, involves a denial of the making of the contract on which the action is founded. 3 Rand. 334, per Green, J. So that in an action against several defendants upon a joint or joint and several contract, if it appear from the proof that one of the defendants was not a party to the contract, though all the other defendants were parties to it, judgment will be rendered in favor of all the defendants. *Rohr v. Davis*, 9 Leigh 30; *Baber v. Cook*, 11 Leigh 606; *Munford v. Overseers*, 2 Rand. 313; *Steptoe v. Read*, 19 Gratt. 9.

Objection for Nonjoinder.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 6.

In an action on a joint contract, the objection for nonjoinder can only be taken advantage of by plea in abatement verified by affidavit; and the failure of the defendant to plead in abatement is a waiver of the objection. *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976, citing *Prunty v. Mitchell*, 76 Va. 169.

Survivorship.—See the title BONDS, vol. 2, p. 532.

In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations" (1 Rev. Code, 31), if it appear from the declaration that one of the joint covenantors survived, it is a radical defect, and not cured by verdict. *Atwell v. Milton*, 4 Hen. & M. 253. See *Chichester v. Vass*, 1 Munf. 98.

But by statute in Virginia and West Virginia the representative of one bound with another dying in the lifetime of the latter, may be charged in the same manner as such representatives might have been charged if those bound jointly, had been bound jointly as well as severally. W. Va. Code,

1899, ch. 99, § 33; Va. Code, 1904, § 2855.

Variance.—In an action upon the joint contract of three defendants, the plaintiff, to sustain his action, must prove that all three joined in the alleged contract; for if it appears that one of the defendants was not a party to the contract, though the other two were, the plaintiff must fail in his joint action. *Rohr v. Davis*, 9 Leigh 30.

Appellate Practice.—Two defendants, jointly sued on a contract, having agreed that a verdict might be rendered against either or both liable, and a verdict and judgment having been rendered against one and in favor of the other defendant, on a writ of error to the judgment against the defendant held liable, this court can not inquire which of the defendants is primarily liable, as the other defendant is not before the court. *New York, etc., R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444.

3. Several Contracts.

On the other hand, where the rights are distinct, and plainly separate, the action must be several; for if a joint action be brought, there must be a joint judgment; and one might recover a judgment for the rights of another, and by survivorship at the common law, claim the whole interest instead of his due proportion. *Carthrae v. Brown*, 3 Leigh 101, 23 Am. Dec. 255.

"When there are several covenants by the obligors, as for instance, to pay 300 dollars to A and B, viz.; to A, 100 dollars, and B, 200 dollars, no doubt each may sue alone on his several covenant." *Peerce v. Sthey*, 4 W. Va. 27.

Instances of Several Contracts.—A brings his suit in equity against B, C and D to enforce a contract in which the defendants agree to pay the complainant ten per cent. for his services upon such sums as he should recover over and above certain sums named in said contract, which may be adjudged

against P. and be recovered of P., to be allowed and paid pro rata by each of said defendants to A. as each of said defendants shall recover over and above the sums named in the contract. Held, that it is error in the court below to decree jointly against said defendants. The contract is several and not joint and the decree should be entered against the defendants severally. *Ellison v. Peck*, 2 W. Va. 487.

On a joint purchase by three, and several payments by two, the right of action of the latter against the third party for contribution is several. *Armstrong v. Henderson*, 99 Va. 234, 37 S. E. 839.

"Where the covenant is with two jointly to pay to them £50 each, or to deliver a horse to each; in that case, though the language of the covenant is joint, yet the interest is several; for there are two duties to be performed, instead of a single duty, which two duties may be severed; and as the interest of each is distinct and separate, and the one has no interest in the performance of the duty to the other, by any inference from the covenant being joint, it is to be considered several and not joint; it is unlike the case in which the covenant is with two, and the duty to be performed to one only. So, where the covenant is joint and several, in its terms, yet if it appears that the interest and cause of action are joint, the action must be joint; as if one covenants to do an act for the benefit of two, and binds himself to them and each of them for performance, the action must be joint, though these last words are words of severalty. *Slingsby's case*, 5 Co. 19, a., 2 Bac. Abr. Covenant, D. p. 68. For, as there is a single duty only, a single action only will lie, or there would be a double recovery." *Carthrae v. Brown*, 3 Leigh 102, 23 Am. Dec. 255.

Words of Severalty.—The declaration alleges, that the defendant "covenanted with Brown and Jarman to pay them

300 dollars" (had it stopped there, it would have been a joint covenant; but it proceeds) "to wit, to each of them one moiety thereof." These are obviously words of severalty; two distinct duties are to be performed, in which each has a distinct and several interest. The words that follow—"also the sum of 400 dollars"—do not alter the character of the preceding covenant, but on the contrary take its character from it, as in *Northumberland v. Errington*, 5 T. R. 522. Neither do the words "to each of them a moiety thereof," give to that part of the preceding covenant, a several as well as joint character merely; they extinguish its joint character, not by adding a new principle to the contract, but by explaining that which the previous words seemed to give it. Those words "to each of them a moiety thereof," do not make the covenant joint and several, but several only. It is a covenant to pay several sums to each of them, and not to perform a single duty to both of them; a covenant to pay several sums to each of two persons, respectively, 150 dollars to one and 150 dollars to the other. Each has a distinct interest in one of the sums, and no interest in the other. *Carthrae v. Brown*, 3 Leigh 102, 23 Am. Dec. 255.

Survivorship.—C. covenants with B. and J. that he will pay them \$300, to wit, to each of them one moiety thereof, and also the sum of \$400, upon a certain condition. Held, this is a covenant to B. and J. severally, to pay each a moiety of each sum; so that J. being dead, B. can not maintain an action to recover the whole. *Carthrae v. Brown*, 3 Leigh 98.

How Suit Brought.—Where the right of action is distinct and plainly separate, the action must be several, for, as we have seen, if a joint action be brought, there must be a joint judgment; and one might recover a judgment for the rights of another, and by survivorship at the common law, claim the whole interest instead of his due

proportion. *Carthrae v. Brown*, 3 Leigh 98; *Armstrong v. Henderson*, 99 Va. 234, 37 S. E. 839.

In *Carthrae v. Brown*, 3 Leigh 98, Judge Brooks says (page 101): "For though a covenant with several persons be joint and several in its terms, yet if the legal interest and cause of action be joint the action must be brought by all; and, on the other hand, if the interest and cause of action be several, the action must be brought by one only, though the covenant be in its terms joint." See also, 1 Chitty on Pl., 16 Am.*Ed., page 11. *Armstrong v. Henderson*, 99 Va. 234, 37 S. E. 839.

M. and Z., creditors of S., claim to be entitled to a sum of money in the hands of St. to be divided ratably between them. St. pays the money to M. and Z. jointly, at one and the same time, and they divide it rateably between them. In fact, the money should have been divided between M. and B., and the proportion of M. would then have been less than he received. The money not having been received by M. and Z. for their joint use, but to be applied rateably, B.'s right of action is not against both jointly, but against each separately, for the amount that each received to which B. is entitled. *Moffett v. Bowman*, 6 Gratt. 219.

4. Joint and Several Contracts.

Instances of Joint and Several Promises.—A sealed instrument in the singular number, but signed and sealed by two persons, is joint and several. As for instance the writing begins, "I promise to pay," etc., and concludes "I bind myself, my heirs," etc., without mentioning any name in it, and is signed and sealed by both defendants. *Holman v. Gilliam*, 6 Rand. 39; *Keller v. McHuffman*, 15 W. Va. 67.

A sealed instrument in the singular number as "I promise to pay," but signed and sealed by two persons, is joint and several. *Holman v. Gilliam*, 6 Rand. 39.

An action of debt is brought, upon

an instrument of writing in these words, viz: "On demand, I promise to pay to David Keller the just and full sum of \$200, for value received, as witness my hand and seal the 1st day of March, 1862.

Thomas McHuffman, (Seal.)

Security:—Davis M. Riffe, "by the administrator of the payee against the said McHuffman and David M. Riffe jointly on the 9th day of April, 1872, in the circuit court of Monroe county. Held, that such instrument of writing is a joint and several promise to pay as to both defendants. *Keller v. McHuffman*, 15 W. Va. 64.

Discharge of Co-Obligor.—"It was decided in the case of *Dean v. Newhall* (8th Term Rep. 168), that a covenant never to sue one of two joint and several obligors, was not, at law, a discharge of the other obligor; even although that other be a security. If this decision be correct, of which I have no doubt, it follows a fortiori that the agreement for a temporary stay of execution against the principal in the case now before the court, was not at law, a discharge of the security.—I am, therefore, of opinion to affirm the judgment." *Ward v. Johnson*, 6 Munf. 9.

How Suit Brought.—A suit on a joint and several contract must be brought either against all the obligors jointly, or one of them singly, and not against any intermediate number; and if an error in this respect appears on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement. This proposition laid down in *Leftwich v. Berkeley*, 1 Hen. & M. 61, has met with approval in subsequent cases. *Atwell v. Milton*, 4 Hen. & M. 257; *Moss v. Moss*, 4 Hen. & M. 304, 306; *Newell v. Wood*, 1 Munf. 556. And *Saunders v. Wood*, 1 Munf. 406, is reported in the following words: "This case depending upon the same principles as that of *Leftwich v. Berkeley*, 1 Hen. & M. 61, the judgment against the appellants was

reversed by the whole court (consisting of all the judges), for the reasons given in that case." In *Chapman v. Chevis*, 9 Leigh 307, it is said: "It would seem from the case of *Leftwich v. Berkeley*, 1 Hen. & M. 61, and other cases in this court, that though the obligee in a joint and several bond can not proceed against more than one obligor unless he proceeds against all, yet if one be dead, he may proceed jointly against all the survivors." *Leftwich v. Berkeley*, 1 Hen. & M. 62, was distinguished in *Winslow v. Com.*, 2 Hen. & M. 465, on the ground that in that case the omitted obligor was dead before the suit was brought.

A creditor, if a contract of suretyship be joint and several, may sue the surety alone or he may sue all jointly. *Knight v. Charter*, 22 W. Va. 422.

5. Release

See the title RELEASE.

The release of one joint or joint and several promisor is, generally speaking, a release of all. *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437.

Thus, where a father or other relative pays one-half of a joint note on behalf of the promisor in consideration of the fact that the promisee will release such promisor from payment of the other half, and the contract is executed, the money received, and the release endorsed on the note, such transaction constitutes a valid contract, of which the promisor can avail himself when sued for the remaining half of the note. *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437.

6. Witnesses.

See the title WITNESSES.

In an action upon a joint or joint and several contract against two defendants, one of them is not a competent witness for the other to prove that the witness was the only party to the contract, and is alone bound by it. *Steptoe v. Read*, 19 Gratt. 2; *Moffett v. Bickle*, 21 Gratt. 287; *Warwick v. Warwick*, 31 Gratt. 77.

7. Variance.

See the title VARIANCE.

If upon an action in assumpsit against one person the proof is, that the promise sued on was made by the defendant and another jointly, the plaintiff can not recover. *Davisson v. Ford*, 23 W. Va. 617.

IV. Interpretation and Construction.

See generally, the title INTERPRETATION AND CONSTRUCTION, and references given.

A. INTENTION OF PARTIES.

1. In General.

The intention of the parties is a cardinal rule in the construction of contracts. *Talbott v. Richmond, etc., R. Co.*, 31 Gratt. 685; *Bank v. McVeigh*, 32 Gratt. 530; *Bradley v. Zehmer*, 82 Va. 685; *Hotchkiss v. Middlekauf*, 96 Va. 653, 32 S. E. 36; *Temple v. Wright*, 94 Va. 340, 26 S. E. 844; *Todd v. Summers*, 2 Gratt. 169; *Osborne v. Cabell*, 77 Va. 466; *Bream v. Marsh*, 4 Leigh 21; *Gibney v. Fitzsimmons*, 45 W. Va. 334, 32 S. E. 189.

In construing a contract regard should be had to the intention of the parties contracting, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject matter of the agreement, the object which the parties had in view at the time and intended to accomplish. *Young v. Ellis*, 91 Va. 301, 21 S. E. 480.

All contracts or agreements are to be taken and construed according to the true meaning and understanding of the contracting parties. *Moss v. Stipp*, 3 Munf. 166.

A contract or agreement not unlawful in itself and plain and express in its terms shall not be construed nor made to defeat the object and intention of the parties, and much less to work a result they sought to avoid. *Bloss v. Plymale*, 3 W. Va. 407.

"The object of construction in all

cases is to ascertain the intention of the parties, or more properly speaking, the meaning of the instrument; for we are bound to say that the parties intend, what the written instrument declares. It not infrequently happens that we have to settle the construction of a contract in regard to questions, which never occurred to the parties to it. And were we permitted to indulge in conjecture and probabilities, nothing is more probable than that the difference between one joint endorsement and several successive endorsements never occurred to the makers of this power of attorney. We shall best carry out their intentions by construing their language neither strictly nor liberally, but fairly, and this, I apprehend, is, in general, the true rule." *Bank v. Beirne*, 1 Gratt. 263.

2. How Intention Ascertained.

a. In General.

To ascertain the intent of the parties is said to be the fundamental rule in the construction of agreements, and in such construction courts look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Talbott v. Richmond, etc., R. Co.*, 31 Gratt. 689; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185; *Titchenell v. Jackson*, 26 W. Va. 460, point 1 of the syllabus, p. 469; *Crislip v. Cain*, 19 W. Va. 438, point 13 of syllabus, pp. 441-483; *Hurst v. Hurst*, 7 W. Va. 299; *Heatherly v. Farmers' Bank*, 31 W. Va. 70, 5 S. E. 757; *W. Va. Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 614; *Caperton v. Caperton*, 36 W. Va. 479,

15 S. E. 257; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 275; *Clark v. Nunn*, 25 Gratt. 290; *Bank v. McVeigh*, 32 Gratt. 531; *French v. Williams*, 82 Va. 467, 4 S. E. 591; *Collier v. Southern Express Co.*, 32 Gratt. 718; *Talbott v. Richmond, etc., R. Co.*, 31 Gratt. 685; *Scoville v. Terry*, 84 Va. 549, 5 S. E. 530.

"The subject matter of the contract, the general purpose and object of the contracting parties, or of the testator, shown by the instrument itself, has always been considered a just foundation for giving the words of an instrument an interpretation, when considered relatively, different from that which they would receive in the abstract. The provisions of the whole writing taken together, and showing the general design and purpose to be accomplished, is a just medium of interpretation of the language and meaning of the parties in relation to it. 1 Greenl. Ev., §§ 286, 287, and cases there cited. The great object being to discover the intention, the court may put itself in the place of the parties, and then see how the terms of the instrument affect the property or subject matter." *Brown v. Brown*, 31 Gratt. 507.

This court, in *Bank v. McVeigh*, 32 Gratt. 531, citing *Talbott v. Richmond, etc., R. Co.*, 31 Gratt. 685: "To ascertain the intent of the parties is the fundamental rule in the construction of agreements; and in such construction, courts look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of words and of the correct application of the language to

the things described." *French v. Williams*, 82 Va. 467, 4 S. E. 591.

In the construction of a contract the court must bear in mind the situation of the parties, the subject matter of the contract, and the intention and purposes of the parties in making it, and should carry that intention into effect so far as the rules of language and the rules of law will permit. 2 Pars. Cont. (7th Ed.) 631. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 213.

That, in order to arrive at a proper construction of written contracts, oral evidence to show the circumstances under which it was executed may be admitted, see *Richardson v. Planters' Bank*, 94 Va. 137, 62 S. E. 413, citing *Talbott v. Richmond, etc., R. Co.*, 31 Gratt. 685; *Crawford v. Jarrett*, 2 Leigh 630; *Tuley v. Barton*, 79 Va. 387; *French v. Williams*, 82 Va. 467, 4 S. E. 591. See also, *Knick v. Knick*, 75 Va. 21; *Senger v. Senger*, 81 Va. 704.

It was said by Lacy, J., in *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120, and repeated in *Shenandoah, etc., Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303, with reference to construing contracts: "Regard should be had to the intention of the parties, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject matter of the agreement, the object which the parties had in view at the time and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal, and that construction which is most obviously just to be favored as most in accordance with the presumed intention of the parties." *White v. Sayers*, 101 Va. 826, 45 S. E. 747.

Specific Application of Rule.—S. and T., lessees of hotel for a term of two and a half years, agreed to advance

\$8,000 for its improvement. At the end of said term, S. had leased it for five years. S. agreed to pay T. at the end of their joint term, \$2,500 for his interest in the improvement. Before that time arrived, hotel was burned down. S. endeavored to escape paying the \$2,500 on the pretext that, as T. was a part owner of the improvement at the time of its destruction, he should bear his part of the loss. Held, it was a sale in presenti for payment at a prescribed time in futuro, and S. is bound to pay T. the agreed price. "In construing this contract we must look to the language employed, the subject matter, and the surrounding circumstances; for, as has been well said, courts are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Nash v. Towne*, 5 Wall. 699; *Moran v. Prather*, 23 Wall. 501; *Talbott v. Richmond*, etc., R. Co., 31 Gratt. 689." *Scoville v. Terry*, 84 Va. 548, 5 S. E. 530.

Contract to Make Partition.—In determining the intention and design of the parties to a contract to make partition of their interests in the reversion, expectant upon the termination of a life estate therein, it was held, that the contract was very inartificially and awkwardly drawn, and by no means clear and explicit, that it should be construed in the light of the surrounding circumstances. *Clark v. Nunn*, 25 Gratt. 287.

"A contract of insurance is treated like any other contract; and the same rules of construction must govern it. To construe this policy, we must take our standpoint, where the parties themselves stood, consider each and

all of its parts; and if there are conflicts in the different provisions of the policy, then the facts and circumstances surrounding the transaction must determine how the parties themselves understood it, and that construction must prevail." *Barber v. F. & M. Ins. Co.*, 16 W. Va. 658, 678.

b. Verbal Declarations of Parties.

See the title DECLARATIONS AND ADMISSIONS.

If a written contract is on its face ambiguous, the surrounding circumstances, the situation of the parties, and the subject matter of the contract, and acts done by the parties under it, may be considered as aid in giving it construction, but not the verbal declarations of the parties. *Crislip v. Cain*, 19 W. Va. 440; *Titchenell v. Jackson*, 26 W. Va. 460; *Caperton v. Caperton*, 36 W. Va. 479, 15 S. E. 258; *W. Va. Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 614; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 183; *Heatherly v. Farmers' Bank*, 31 W. Va. 70, 5 S. E. 754.

When the language of a written agreement is susceptible of more than one interpretation, that is to say, is on its face ambiguous, the courts will look at the surrounding circumstances existing when the contract was made, at the situation of the parties and the subject matter of the contract, and will even call in aid the acts done by the parties under it as affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declaration of the parties either before, at the time or after the execution of the contract to aid it in giving construction to its language. *Crislip v. Cain*, 19 W. Va. 441; *Titchenell v. Jackson*, 26 W. Va. 469.

"It is true that when the language of a written agreement is susceptible of more than one interpretation, that is to say, is on its face ambiguous, it has been held, that the courts will look at the surrounding circumstances exist-

ing when the contract was made, at the situation of the parties and the subject matter of the contract, and will sometimes even call in aid the acts done by the parties under it, as affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declarations of the parties, either before, at the time of or after the execution of the contract, to aid in giving construction to its language." *Findley v. Armstrong*, 23 W. Va. 113, 126.

While prior or contemporaneous declarations of parties contracting can not be received to interpret an unambiguous written contract, yet evidence that certain alterations from the first draft of the contract were made by the parties before its execution, is admissible to show their real intentions. *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. 719.

c. Acts of Parties.

If the meaning of an instrument be doubtful, evidence of the acts of the parties under it may be received to show intent. *Glenn v. Augusta Perpetual, etc., Co.*, 99 Va. 695, 40 S. E. 25; *Bank v. McVeigh*, 32 Gratt. 530, *Knick v. Knick*, 75 Va. 12, 20; *Grubb v. Burford*, 98 Va. 553, 558, 37 S. E. 4; *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 39 S. E. 701; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185; *Titchenell v. Jackson*, 26 W. Va. 460; *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 757.

The defendant, however, contends that the contract is ambiguous, which we can not concede; and, even if it were so, it has been held, that the courts will look at the surrounding circumstances existing when the contract was made, at the situation of the parties, and the subject matter of the contract, and will sometimes even call in aid the acts done by the parties under it, as affording a clew to the intention of the parties. *Crislip v. Cain*, 19 W. Va. 483; *Hurst v. Hurst*, 7 W. Va. 299; *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637, 638.

In order to arrive at a just and reasonable interpretation of this contract, we must look at the situation and conduct of the parties, and the subject matter of their contract. *Ragland v. Butler*, 18 Gratt. 335.

B. CONSTRUCTION TO UPHOLD CONTRACT.

In General.—Every contract ought to be construed so as to give it effect, according to the real intent of the parties, to be collected from all the terms of the agreement; and when the expressions are equivocal, such intent gathered from the whole of the instrument, must determine the meaning of such expressions. If the terms conflict, or are so inconsistent that the intent of the parties can not be ascertained, the contract may be nugatory, by reason of such uncertainty; a consequence which should be avoided, if possible. The parties must have intended something by their agreement. *Cobbs v. Fountaine*, 3 Rand. 487.

All parts of the contract will be so construed as to give force and validity to all of them, and to all the language used, where that is possible. *Rhodes v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 213.

In the construction of contracts all the provisions thereof shall be taken into consideration and reconciled if possible, so that the true intent of the parties to the contract may be ascertained. *Barber v. F. & M. Ins. Co.*, 16 W. Va. 658.

"If there were any doubts as to the construction which should be given to the agreement, that construction should be adopted which would be more to the advantage of the defendants, upon the general ground, that a party who takes an agreement prepared by another (as this was by plaintiff's counsel), and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground, that when an instrument

is susceptible of two constructions, the one working injustice, and the other consistent with the right of the case, that one should be favored which standeth with the right." *Bank v. McVeigh*, 32 Gratt. 531.

Every Part to Take Effect.—In the interpretation of written contracts every part of the contract must be made, if possible, to take effect, and every word of it must be made to operate in some shape or other. *Tate v. Tate*, 75 Va. 522; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 245, 37 S. E. 851.

In the construction of contracts all the provisions thereof shall be taken into consideration and reconciled if possible, so that the true intent of the parties to the contract may be ascertained. *Barber v. F. & M. Ins. Co.*, 16 W. Va. 658.

In the interpretation of written contracts, every part of the writing must be made, if possible, to take effect, and every word of it must be made to operate in some shape or other. And where all other rules of construction fail, the words of the covenant must be construed most strongly against the covenantor. *Tate v. Tate*, 75 Va. 527.

But comparatively unimportant parts or provisions, which may be severed from the contract without impairing its effect or changing its character, will be suppressed or subordinated, if in that way, and only in that way, the contract can be sustained and enforced. *Rhodes v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 213.

L. H. T. and his brothers, J. B. T. and T. M. T., held real and personal property in common, and also owed joint and individual debts. An agreement was made by L. H. T. of the one part, and J. B. T. and T. M. T. of the other part, whereby, for considerations therein mentioned, the said J. B. T. and T. M. T. bound themselves "to pay all the debts due from the said L. H. T., J. B. T. and T. M. T., together with any sum that may be in arrear towards

the purchase money of the Poston place, or may be recovered against them by the widow and heirs of H. D. Poston, so as to leave the said L. H. T. free from debt and litigation." Held, in the interpretation of written contracts, every part of the writing must be made, if possible, to take effect, and every word of it must be made to operate in some shape or other; and when all other rules of construction fail, the words of the covenant must be construed most strongly against the covenantor. Here the covenant, in substance is to make such payment as will leave L. H. T. "free from debt and litigation;" and it is impossible to give effect to this language without construing the words as referring to all the debts of L. H. T., both individual and partnership. *Tate v. Tate*, 75 Va. 522.

Contract to Deliver Person into Custody.—C. having sued out a ca. sa. against M. for debt, and M. being in custody under the process of N. and W. undertook and promised to C. that if he would suffer M. to go at large, for a short time specified, they would deliver him into custody again under the process, or would pay C. the amount of the debt; N. and W. fail to deliver M. into custody. In assumpsit brought by C. against N. and W. upon this promise; held, C. is entitled to recover the amount of M.'s debt of N. and W., the objection to the promise not being in writing, having been expressly waived. *Noyes v. Cooper*, 5 Leigh 186.

C. SEPARATE WRITINGS PARTS OF SAME TRANSACTION.

Where two contracts are so connected as to be parts of the same transaction, they will be read together, and the court may look to one in construing the other. *Preston v. Heiskell*, 32 Gratt. 48; *Byrd v. Ludlow*, 77 Va. 483; *George v. Cooper*, 15 W. Va. 666.

Contracts made at the same time, between the same parties, and relating to the same subject matter, must be

considered as parts of the same transaction, and should be construed as one entire instrument. *Anderson v. Harvey*, 10 Gratt. 386; *French v. Townes*, 10 Gratt. 513; *Osborne v. Cabell*, 77 Va. 465; *King v. Norfolk, etc., R. Co.*, 90 Va. 210, 17 S. E. 868; *Walden v. Walden*, 33 Gratt. 88; *Nye v. Lovitt*, 92 Va. 711, 24 S. E. 345.

Thus unity of parties and subject matter is essential. *Nye v. Lovitt*, 92 Va. 711, 24 S. E. 345.

Endorsements on contracts are to be considered a part of them in construing the same. *Eidson v. Fontaine*, 9 Gratt. 286.

D. CONSTRUED AGAINST OBLIGOR.

An obligation is construed most strongly against the obligor. He must take care to use intelligible words to express any condition precedent he may wish to impose on his obligation. *Smith v. Lloyd*, 16 Gratt. 311; *Carrington v. Goddin*, 13 Gratt. 587; *Bank v. McVeigh*, 32 Gratt. 531; *Tate v. Tate*, 75 Va. 522; *Allemong v. Gray*, 92 Va. 216, 23 S. E. 298; *Bank v. Green*, 45 W. Va. 168, 31 S. E. 263.

Insurance Contracts.—Same rules of construction apply to contracts of insurance as to other instruments. Its language is to receive a reasonable construction, and its intent and substance should be regarded. Where two constructions can be given it, that most favorable to insured must be given. Where there is doubt as to meaning of terms employed by company to except it from liability, they are to be construed most strongly against insurer. *United States Mut., etc., Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805.

E. CONSTRUCTION ACCORDING TO PURPOSE AND EFFECT.

See the title SALES.

In determining the real character of a contract, courts will always look to its purpose, rather than to the name given it by the parties. *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 86

Va. 1, 9 S. E. 759; *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. 746; *Hurst v. Hurst*, 7 W. Va. 289.

Lease or Conditional Sale.—In accordance with the rule that the courts in determining the real character of a contract will always look to its purpose rather than to the name given it by the parties, it has been held, that a written contract between the parties, though purported to be a lease, will be construed as a conditional sale if it was in legal effect of such character. *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 9 S. E. 759.

F. CONSTRUCTION MUST BE REASONABLE.

Every contract must receive a reasonable construction. Regard should be had to the intention of the parties, their situation, the subject matter of the agreement and the object to be attained. But a construction which would be unreasonable and unjust is to be avoided, if it can be done consistently with the terms of the agreement, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

A construction should be avoided, if it can be done consistently with the terms of the agreement, which would be unreasonable or unequal, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties. *Young v. Ellis*, 91 Va. 301, 21 S. E. 480; *United States Mut., etc., Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805.

An agreement to pay money, no time being specified, is held to be an agreement to pay the same on demand, and an agreement to pay money yearly is an agreement to pay at the end of the year from the date of the agreement; while an agreement to do something other than to pay money, no time being expressed, means a promise to do

it in a reasonable time. *Co van v. Radford Iron Co.*, 83 Va. 550, 3 S. E. 120; *Young v. Ellis*, 91 Va. 301, 21 S. E. 480.

G. MEANINGLESS AND CONTRADICTORY LANGUAGE.

Where language used in a contract is unmeaning and contradictory, it should not be construed so as to negative clearly expressed provisions of the contract. *Findley v. Armstrong*, 23 W. Va. 113.

H. WHOLE CONTRACT CONSTRUED TOGETHER.

See the title DEEDS.

When a contract is to be construed, another well-settled rule based on common sense is that the whole contract should be considered in determining the meaning of any or all its parts. The reason of this rule is obvious. The same parties make all the contract, and may be supposed to have had the same purpose and object in view in all of it; and, if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. *Heatherly v. Farmers' Bank*, 31 W. Va. 70, 5 S. E. 757; *Millan v. Kephart*, 18 Gratt. 1.

In the construction of a written contract the whole instrument is to be considered; not any one provision only, but all its provisions; not the words merely in which they are expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties. *White v. Sayers*, 101 Va. 821, 45 S. E. 747, citing *Millan v. Kephart*, 18 Gratt. 1.

In the construction of agreements the whole must be taken together. *Tabb v. Archer*, 3 Hen. & M. 399.

"But seeking the intent of the parties as manifested by the instrument, we are not, under the established rules of construction, to be tied down to the terms and expressions referred to. Especially are we not at liberty arbitrarily

to break up the intimate companionship of words and lop one member of a sentence from another. The maxim is, *noscitur a sociis*. We must consider all the language employed—the instrument as a whole and every part of it. The general intention to be collected from the whole context, and every part of a written instrument, is always to be preferred to the particular expression." *Talbott v. Richmond*, etc., R. Co., 31 Gratt. 691.

Reason of Rule.—In construing a contract, much light will be thrown upon the subject when the object and intent of the parties have been ascertained. The parties make the contract, and it may be assumed that they had the same purpose and object in the whole of it; and, if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated and explained by the light of the other terms. And this is the reason for the rule that the exposition or construction of a contract is to be upon the entire contract in all its parts and terms, and not upon separate and disjointed portions of it. *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 586.

In ejectment the deed should be so construed as to arrive at the true intent of the grantor and grantee, and in so doing the whole of the deed, and all its parts, should be considered together. *Hurst v. Hurst*, 7 W. Va. 289.

I. CONSTRUCTION BY PARTIES.

In cases where the language used by the parties to a contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation put upon it by the parties themselves, as shown by their acts and conduct, is entitled to great, if not controlling, weight. *King v. Norfolk*, etc., R. Co., 99 Va. 625, 39 S. E. 701; *Knopf v. R. F. & P. R. Co.*, 85 Va. 778, 8 S. E. 787; *Kidwell v. Baltimore*, etc., R. Co., 11 Gratt. 676; *Knick v. Knick*, 75 Va. 12; *Bank v. McVeigh*, 32 Gratt. 531; *Gib-*

ney v. Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

"This is clear upon the face of the contract, and is, besides, in accordance with the construction put upon it by the plaintiff herself; for in a letter, addressed by her to the defendant company, on the 28th of July, 1886, she wrote; 'My contract calls for the best ice harvested on fields of Eastern Ice Company on the Penobscott river,' and this would be decisive of the matter, even if the language of the contract were doubtful, as it also accords with the construction given to it by the defendant. *Chicago v. Sheldon*, 9 Wall 50, 84; *Knopf v. R., F. & P. R. Co.*, 85 Va. 769, 8 S. E. 787." *Eastern Ice Co. v. King*, 86 Va. 100, 9 S. E. 533.

Beach on the Modern Law of Contracts (vol. 1, § 721), speaking of construction by the parties, says: "If the words or terms of a contract are equivocal, resort may be had to the circumstances under which the contract was executed, and to the contemporaneous construction given to the contract by the parties. * * * The subsequent acts are admitted to show how the parties understood their contract, and are a practical construction of it. * * * It is a familiar doctrine that when the terms of an agreement are in any respect doubtful or uncertain, and the parties to it have by their own conduct placed a construction upon it which is reasonable, such construction will be adopted by the court, because it is the duty of the court to give effect to the intention of the parties, where it is not wholly at variance with the correct legal interpretation of the terms of the contract." *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637, 639.

Where Confirmed by Acts of Parties.—Construction put on contract by parties held controlling, especially where confirmed by the acts, conduct and declarations of the parties. *Clark v. Nunn*, 25 Gratt. 287; *Kidwell v. Baltimore, etc., R. Co.*, 11 Gratt. 676.

Limitation of Rule.—2 Pars. Cont. (8th Ed.) 495, under the head of "Construction and Interpretation of Contracts," says: "The first point is to ascertain what the parties themselves meant and understand. But, however important this inquiry may be, it is often insufficient to decide the whole question. * * * Courts can not adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law." *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637, 639.

Practical construction of contracts is that given to agreements by the parties themselves by acts subsequently done with reference to the contracts. To such exposition of contracts, the courts pay high regard, and will effectuate it if they can do so consistently with the rules of law. *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312; *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591.

Examples.—If parties enter into an agreement stipulating the mode of settling certain past transactions between them; and add a clause, that, when justice requires, the agreement shall be departed from, it runs through the whole agreement. And the ideas of the parties with regard to a particular item will be the rule concerning it, notwithstanding the agreement. *Braxton v. Willing*, 4 Call 288.

The contract providing that the final estimate of the engineer shall be conclusive upon the parties to the contract is a valid contract, and the estimate of the engineer, in the absence of fraud or mistake, is conclusive. *Kidwell v. Baltimore, etc., R. Co.*, 11 Gratt. 676.

P. owned \$37,500 of stock for which he paid \$17,500 in cash, the balance being issued on the betterments to the corporation's property, to pay for which its notes indorsed by P. & S. and another stockholder were outstanding and unpaid. S. bought P.'s stock "on the basis of cost" and \$5,000. In another similar contract, S. used the

same expression, which he interpreted as an assumption of the other party's liabilities as to said corporation, and P. was cognizant of that interpretation. S. afterwards paid off said notes and sued P. as his coendorser for contribution. Held, S. is bound by his own interpretation to treat P. as released from all liability as respects said notes. *Peyton v. Stuart*, 88 Va. 50, 13 S. E. 408, 16 S. E. 160.

Questions of Law and Fact.—In a doubtful case the construction placed upon a contract by the parties will be accepted by the court, but what construction has been so placed is a question of fact, and, in an action at law, is to be determined by a jury. *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591.

J. MAXIM FALSA DEMONSTRATIO.

"There is a class of cases (he says) in which, upon applying the instrument to its subject matter, whether person or thing, the description in it is true in part, but not true in every particular." The rule in such cases is derived from the maxim "Falsa demonstratio non nocet, cum de corpore constat!" Here so much of the description as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application. *Preston v. Heiskell*, 32 Gratt. 59.

K. STATUTES.

Legislative enactments should be read into contracts made and obligations assumed after their enactment. *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218.

L. WORDS AND PHRASES.

1. Specific Words and Phrases Considered.

a. "Or;" "And."

See OR.

In the construction of contracts, the word "or" is frequently construed to mean "and" and vice versa. *French v. Williams*, 82 Va. 462, 4 S. E. 591;

Lloyd v. Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. 104. See OR.

Sometimes the word "or" is made in contracts to mean "and," when it is proper in order to carry out the obvious meaning of the parties to the contract. *Petty v. Fogle*, 16 W. Va. 497.

The words "or" and "and" in a contract will be changed and read as "and" and "or" where it is plain they were so intended. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271.

"It is true that when parties make contracts, it is the province of the courts in proper cases and in the proper jurisdiction to construe such contracts according to the established rules of interpretation, and enforce them, as far as may be; and it strikes me that the word 'or,' as used in said exhibit A in the last clause thereof in connection with the words 'county' and 'state,' was meant and intended by the parties to mean the same as if the word 'and' had been used instead thereof." *Petty v. Fogle*, 16 W. Va. 497, 519.

"Words must serve intention in the construction of contracts. Story, Cont., §§ 773, 774. These words 'or' and 'and' are so often used inexactly that the one will be read as if the other had been used, to serve the plain intent. It is done in the construction of wills (Schouler, Wills, § 477), and in the construction of statutes (Suth. St. Const., § 252); and if the word of a wise legislative assembly must yield to intention, why not the word of two men not so learned and exact? The intention is the question in all these cases. Bish. Cont., § 383, says it can be done in the construction of contracts. Likewise, 2 Pars. Cont. 497. Just now I notice the case of *Petty v. Fogle*, 16 W. Va. 497, holding this to be law in this state in construing contracts." *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 275.

b. "As Soon as Possible."

The expression "as soon as possible," in a contract between S. and W.

for the sale of certain land, construed to mean "as soon as it was within W.'s power," or "as soon as W. had the ability" to make the deed. *Snodgrass v. Wolf*, 11 W. Va. 159.

Where a written contract is made by S. to W. for the sale of certain land by W. to S. to be paid for in three months, for which he, S., executed to W. his note payable in three months, and W. bound himself to convey the land to S. by quitclaim deed as soon as possible, it was held, that if W. possessed the ability to make the deed before the three months expired in which the purchase money was to have been paid, he should have performed his part of the contract without delay, and have made and tendered the deed to S., and it was a breach of his contract not to do so. But if W. did not have it in his power to make the deed before the purchase money was due, then it was not a breach of his contract in failing to make and tender the deed to S. before the purchase money was due. *Snodgrass v. Wolf*, 11 W. Va. 158.

c. "Coal."

"Coal" Held Not Embraced in Term "Minerals."—See the title MINES AND MINERALS.

In the case in judgment three persons entered into a deed by which, after reciting that they severally owned different parcels of land and jointly owned other parcels upon some or all of which they had reason to suppose there were valuable minerals, and that it was their intention to explore these lands to ascertain the presence of such minerals, if they existed, and to work them if found in sufficient quantities and richness, they mutually conveyed to each other such interest in all such minerals as might be found on any or all of the lands conveyed as would make each of the parties thereto own in fee simple one undivided third of all such minerals. The parties mutually covenanted with each other to explore for minerals on the land, at their joint

and equal cost, and if valuable minerals were found to work them at their joint costs—profits and losses to be borne by them equally. The only consideration for the deed was the mutual covenants contained in it. The deed also provided for the continuation of operations notwithstanding the death of one of the parties, and that neither party should sell, lease or otherwise dispose of his interest in the minerals without the consent in writing of the other two. At the time the deed was made coal had practically no market value for want of transportation facilities, and did not have for nearly forty years thereafter, but it was believed that gold might be found on the land, and for a few years the parties did explore for gold or other valuable minerals, but finding none, abandoned the undertaking and did nothing further under the deed or contract. No change took place in the possession of any of the lands. Nearly fifty years after the deed was made this suit was brought by the survivors of the parties and others to remove the deed as a cloud upon the title to their land. Held, coal was not within the contemplation of the parties, and hence is not covered by the word "minerals" used in the deed; and the deed was not intended to convey to each of the parties a fee simple in an undivided one-third of the minerals on the lands, nor was the contract of the parties intended to be of indefinite duration. The parties merely intended to enter into a partnership agreement to explore for minerals and to work them if found in sufficient quantity and richness, which partnership was subsequently dissolved by abandonment of the undertaking. *White v. Sayers*, 101 Va. 821, 45 S. E. 747.

d. "Free and Full Possession."

B. covenanted to pay C. a certain sum on condition that he came into "free and full possession" of a certain estate, in consideration that C. released

L. of a debt of a larger amount. B. did shortly come into possession of the estate, but not without great expense in litigation. C.'s executor sued B. on the covenant. B. set up as his defense that he did not come into "full and free possession" of the estate, because of said expense of litigation. Held, the defense was untenable. *Baily v. Chancellor*, 89 Va. 87, 15 S. E. 507.

c. Merchantable.

"The term 'merchantable' is not one that the law can define; and the sense in which it was used must be left to the determination of the jury. For that purpose, they are to consider the circumstances under which the contract was entered into, the situation and business of the parties, and the usage of the lumber trade, that prevailed in the city of Richmond at the date of the contract, as the means of ascertaining the intention of the parties." *Ragland v. Butler*, 18 Gratt. 336.

f. "Best Quality."

Defendant sold plaintiff a certain quantity of ice of the "best quality harvested in Penobscott river" during five years, unless by reason of the elements it should be impossible to harvest the ice by reasonable effort from the fields controlled by defendant. Held, the furnishing of an average quality of ice, or "just as it run," was not a compliance with the contract, and instructions to such effect were properly rejected. *Eastern Ice Co. v. King*, 86 Va. 97, 9 S. E. 506.

(g) "Lumber;" "Timber."

The terms "lumber" and "timber" in a contract are synonymous. *Ragland v. Butler*, 18 Gratt. 332.

2. Words Given Their Plain and Ordinary Meaning.

It is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning. *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. 214.

Power of Attorney.—See the title POWERS.

In construing all instruments, powers of attorney included, we are not at liberty to depart from the plain and obvious meaning of the words. They may, nevertheless, be restrained, or enlarged, by the subject matter. Words importing juncture, may be construed distributively; and vice versa." *Bank v. Beirne*, 1 Gratt. 265.

B. and C. entered into a written agreement which stipulated that C. agreed "to furnish the material and do all the work of plastering at B.'s house, on Quincy street, at full book of plaster's prices, in payment of which B. agreed to furnish all materials and do all of C.'s carpenter work at full book of carpenter prices." The special article sued on is to be construed according to the intention of the parties, to be collected from the instrument, and to that intention technical forms of expression must give way. *Brodie v. Clator*, 8 W. Va. 599.

Insurance Contracts.—"The principles upon which contracts of insurance are to be construed are well understood in the profession and have been clearly laid down in this and other appellate tribunals, and are to be found in all the text writers. The principles applicable to them are the same as those which obtain in the construction of other contracts; the same rule of construction which applies to other instruments, apply to these, also. They are to be construed according to the sense and meaning of the terms used. Their terms are to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, acquired a peculiar sense distinct from the popular sense—rendering it necessary to resort to extrinsic proof in order to determine in which sense they are used, and so to explain their ambiguity; or, unless the context evidently points out that they must, in the particular instance and in order to

effectuate the immediate intention of the parties, be understood in some special and peculiar sense." *United States Mut. Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805.

3. Technical Words.

If parties in making a contract use words of definite legal signification, they must be understood as using such words in their definite legal sense. *Findley v. Findley*, 11 Gratt. 434; *Rayfield v. Gaines*, 17 Gratt. 1; *Nye v. Lovitt*, 92 Va. 714, 24 S. E. 345; *Holston Salt, etc., Co. v. Campbell*, 89 Va. 398, 16 S. E. 274; *Wallace v. Minor*, 86 Va. 550, 10 S. E. 423; *Moon v. Stone*, 19 Gratt. 130; *Bowyer v. Martin*, 6 Rand. 525.

It may be laid down as a rule of construction established beyond question, that a written contract must be construed by the terms used therein if plain and intelligible; that extrinsic proof is not admissible for the purpose of adding to, or detracting from, or explaining, or in anywise varying the plain meaning of the instrument itself; that extrinsic proof may be heard only for the purpose of explaining a latent ambiguity or of applying ambiguous words to their proper subject matter. It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense. *Findley v. Findley*, 11 Gratt. 437.

Illustrations of Rule.—B. and C. entered into a written agreement which stipulated that C. agreed "to furnish the material and do all the work of plastering at B.'s house, on Quincy Street, at full book of plasterer's prices, in payment of which B. agreed to furnish all material and do all of C.'s carpenter work at full book of carpenter prices." The special article sued on is to be construed according to the intention of the parties, to be collected from the instrument, and

to that intention technical forms of expression must give way. *Brodie v. Clator*, 8 W. Va. 599.

By an agreement in contemplation of marriage, the intended husband bound his estate to pay to the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. Held, this agreement barred her of her dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate. "Applying these rules to the language of the contract, 'which sum or sums is to be considered as in lieu of and in full compensation for the said Elizabeth's dower,' we must hold, that the appellee's right of dower only, properly so called, is barred. That word means an entirely different thing from distributive share. Dower is a widow's life estate in land; a widow's distributive share is a third part of the slaves for life, and of the other personal estate absolutely." *Findley v. Findley*, 11 Gratt. 434.

4. Supplying Omitted Words.

Words omitted in an instrument, which can be clearly ascertained by the context, will be supplied by the court, and the instrument will be read and treated as if the words were in it. *Harman v. Howe*, 27 Gratt. 676; *Selden v. King*, 2 Call 72; *Liston v. Jenkins*, 2 W. Va. 64.

5. Words of Exception.

As a general rule, words of exception in any instrument are to be construed most strongly against the party for whose benefit they are introduced; and this rule has been expressly applied to words of exception in policies of insurance as well in England as in this court. *United States Mut. Ass'n v. Newman*, 84 Va. 59, 3 S. E. 805.

6. General and Specific Description.

The meaning of general words is restricted by more specific and particular descriptions of the subject to

which they apply. The general words must be confined to the class of words enumerated. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 245, 37 S. E. 851; *Glenn v. Augusta Perpetual Bldg., etc., Co.*, 99 Va. 695, 40 S. E. 25.

In the interpretation of written contracts, every part of the contract must be made to take effect, if possible, and every word to operate in some shape or other. If general words are followed by words of a more particular or specific description, the former will be restricted by the latter. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

Where a particular purpose is to be accomplished, and the language which expresses it is clear and certain, no general words used in the same agreement shall extend the meaning of the parties. *Bloss v. Plymale*, 3 W. Va. 393.

A covenant by a lessee "to keep in repair during the term," followed by other covenants in the lease "to pay for broken glass" and for "repairs to pipes burst by freezing," is restricted to the ordinary repairs indicated by those specially mentioned. The liability of the tenant to pay the rent stipulated for in the contract is limited by the terms of § 2455 of the Virginia Code, which allows a reduction of the rent where buildings are partially destroyed without the fault or negligence of the tenant. "To give the words 'to keep in repair' the comprehensive meaning contended for, would be to treat the language immediately following as surplusage and exclude it from all consideration in determining the intention of the parties. The reasonable construction of the contract is, that the language 'to replace at its own expense all glass broken during the tenancy, and restore any damage caused by the bursting of water pipes,' was intended to indicate the character of the repairs contemplated by the language immediately

preceding 'to keep the plant and buildings in repair during the term of this lease.'" *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

M. GRAMMAR AND PUNCTUATION.

Bad grammar or punctuation will not vitiate an instrument, or overrule or control its meaning. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832.

In the interpretation of written instruments very little consideration is given by the courts to the punctuation, and it is never allowed to interfere with or control the sense and meaning of the language used. The words employed must be given their common and natural effect regardless of the punctuation of grammatical construction. *O'Brien v. Brice*, 21 W. Va. 704.

A tract of land is conveyed to a husband and R., his wife, jointly; the husband dies intestate leaving children; and the said R., his widow, being his administrator, then executes a deed to a third party for said land, in the premises of which she is mentioned as "R., in her own right as widow, and also as administratrix;" the grant in the deed is of the land without qualification and the deed is signed, "R. in her own right, R. as administratrix." The court said: "If the construction contended for by the appellant is permitted, the words 'in her own right' can have no effect; because a conveyance of her dower and a conveyance of her dower in her own right mean one and the same thing. This would be equivalent to an entire elimination of those words from the deed. Such a construction would violate the well-settled rule, that where it is possible, effect must be given to every sentence, phrase and word, and the parts must be compared and considered with reference to each other. Applying this rule and changing the punctuation, the sentence will read, 'Rebecca C. Brice

in her own right, as widow and also as administratrix.' This gives to the words their common and natural meaning, and gives effect to each word and the whole sentence together." *O'Brien v. Brice*, 21 W. Va. 704.

N. USAGES AND CUSTOMS.

See the title USAGES AND CUSTOMS.

In general.—A general and well-established custom or usage, or one actually known to the parties, constitutes the common understanding of the parties, and ought to be resorted to as an interpreter of the contract. *Connolly v. Bruner*, 48 W. Va. 71, 72, 35 S. E. 927; *Pleasants v. Pendleton*, 6 Rand. 473.

The general usage and understanding of the people of this country, in relation to the subject, is an important circumstance to be considered in the construction of a contract. *Harris v. Nicholas*, 5 Munf. 483.

An usage, that flour in store is sold by order, and passes by the transfer of the order from hand to hand, without actual delivery of the flour, is a reasonable usage, and ought to be enforced as part of the contract. *Pleasants v. Pendleton*, 6 Rand. 473.

B. contracts to sell the merchantable pine timber on certain land, and saw it into lumber by the vendor according openly with sticks, and deliver it in Richmond. One count says the lumber was piled openly with sticks; another count says the lumber delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. Held, a contract to sell the merchantable pine timber upon a certain tract of land, to be sawed into lumber by the vendor according to the directions of the purchaser, and to be delivered at Richmond, is a contract that the lumber shall be merchantable; and the usage at Richmond as to what constitutes a compliance with the directions of the purchaser, is

to be the rule in determining that question. *Ragland v. Butler*, 18 Gratt. 323.

Grounds of Admission of Evidence.

—Mr. Starkie in his work on Evidence, at page 709 (side p. 710), in speaking of the admissibility of evidence of custom and usage, says: "The principle upon which such evidence is admissible seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom and usage to similar dealings." *Connolly v. Bruner*, 48 W. Va. 71, 72, 35 S. E. 927.

Evidence of such custom or usage is admissible on the principle of ascertaining and carrying into effect the intention of the parties, and thus doing justice between them, and such evidence may be admitted under the general issue. *Connolly v. Bruner*, 48 W. Va. 71, 72, 35 S. E. 927.

Prerequisites to Admission.

In General.—Usage to be admissible to explain the intent of parties in a contract must not only be so well settled, so uniformly acted upon and of such long continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to and in conformity with it, but it must not control the express intention of the parties nor the interpretation and effect, which result from an established rule of law applicable to it, nor be inconsistent with a rule of the common law on the same subject. And such usage of a trade, in order that it may be regarded as incorporated into a contract, must be certain, general, known, reasonable and not repugnant to the contract nor to the rules of law. *Sterling Organ Co. v. House*, 25 W. Va. 96.

In order that a contract may be regarded as having been made with reference to a usage of trade, such usage must be certain, general, known, reasonable and not repugnant to the

contract or the rules of law; and if such a usage is proposed to be proven, and it appears to the court that it is unreasonable or repugnant to the contract or to the rules of law, the court may properly exclude such proof from going to the jury. *Sterling Organ Co. v. House*, 25 W. Va. 65.

Pleading.—It is well settled that a custom or usage may be admitted in evidence under the general issue, in aid and explanation of contracts, without pleading it specially. *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927; *Pleasants v. Pendleton*, 6 Rand. 473; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.

O. ACQUIESCENCE IN CONSTRUCTION.

While acquiescence in an unlawful demand is not a reason why a person shall continue to acquiesce, yet where the question is whether or not a right exists, or what construction shall be placed on an agreement where its terms are not clearly defined, the acquiescence by one party in the other's known construction, and compliance with his demands, is material, and throws light on the question at issue. *Mutual Reserve, etc., Ass'n v. Taylor*, 99 Va. 209, 37 S. E. 854.

A contractor for the construction of a bridge on a railroad, having received the monthly estimates based upon a particular construction of his contract without objection, will be held to have acquiesced in that construction, and to be bound by it. *Kidwell v. Baltimore, etc., R. Co.*, 11 Gratt. 676.

P. QUESTIONS OF LAW AND FACT.

See post, "Questions of Law and Fact," XI.

It is the province of the court to construe written contracts and state their legal effect. *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591; *Washington Southern R. Co. v. Lacey*, 94 Va. 460,

26 S. E. 834; *Poage v. Bell*, 3 Rand. 586; *Talbott v. Richmond, etc., R. Co.*, 31 Gratt. 685; *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. 719.

"The legal effect of the instrument, to be gathered from the deed itself, properly read and construed, is a question for the court. See *State v. Emblem*, 44 W. Va. 521, 29 S. E. 1031. But its application to its proper subject matter, as found on the land, is the duty of the jury, under instructions to be received from the court. A written instrument speaks for itself, and it is the duty of the court to read it by the light of the surrounding circumstances, to be ascertained, if necessary, by a jury, and to construe it, as soon as the true meaning of the words are ascertained, and then instruct the jury as to its character, meaning, and legal effect. And it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally when those words or circumstances are necessarily referred to them (see *Neilson v. Harford*, 8 Mees. & W. 806, 823; 2 Pars. Cont. bottom page 610, note N.), and thus informed by the court as to the law of the case, and by the testimony as to facts, apply the instrument to its proper subject matter on the ground,—eminently a question of legal construction for a law court to make, and for a jury to receive and apply." *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 800.

Province of Jury.—It is the duty of the court to construe written contracts, but if it is necessary to resort to oral evidence to prove the contract, or the facts in the light of which it is to be read, and the evidence is conflicting, it is for the jury to determine what the contract is. *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591.

Construction by Parties.—See ante, "Construction by Parties," IV, I.

In a doubtful case the construction placed upon a contract by the parties will be accepted by the parties, but what construction has been so placed is a question of fact, and in actions at law, is to be determined by the jury. *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591.

Specific Applications of Rule.—It is a province of the court to determine whether a deed is to be construed as a dedication. *Talbott v. Richmond*, etc., R. Co., 31 Gratt. 685.

Legality of Contract.—"Whether the contract put in evidence by the defendant, which was that approved by the board of education and under which another than the plaintiff taught the school, was a legal contract, was a question of law for the court and not of fact for the jury, and having correctly decided the contract legal and binding, it was not error to instruct the jury to find for the defendant. *Davis v. Miller*, 14 Gratt. 1; *Pasley v. English*, 10 Gratt. 236; *Burke v. Lee*, 76 Va. 386; *Washington Southern R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Herbert v. Wise*, 3 Call 239; *Addington v. Etheridge*, 12 Gratt. 436; *Hines v. Board of Education*, 49 W. Va. 431, 38 S. E. 550.

Carriers Renewal of Pass.—Railway company by contract issued to plaintiff an annual pass. On its expiration plaintiff applied for and secured a renewal. On its expiration he did not apply for another. Held, it is a question for the jury whether it was the duty of the company to issue a renewal without application. *Knopf v. Richmond*, etc., R. Co., 85 Va. 769, 8 S. E. 787.

Lease.—K. leased to M. a house and lot in the city of A. for four years, but there was a stipulation in the lease, that if K. sold the property before the time ran out, upon a proper notice of such sale, M. should deliver up pos-

session of the premises. The lease had been destroyed, and the contents were proved by parol evidence. K. did sell the property before the four years expired, and gave a notice to M. to deliver possession. Held: 1. It was for the jury to ascertain from the evidence what were the terms of the contract, and to determine, under such instructions as the court might give for their information and guidance, what was their legal effect. *Millan v. Kephart*, 18 Gratt. 1.

Q. OVERRULED DECISIONS CONSTRUING STATUTES.

See the title STARE DECISIS.

An overruled decision is regarded not law, as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception, that where there is a statute, and a decision giving it a certain construction, and there is a contract valid under such construction, the later decision does not retract so as to invalidate such contract. *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193.

R. APPEAL AND ERROR—RES ADJUDICATA.

See the title APPEAL AND ERROR, vol. 1, p. 645.

On the second appeal or writ of error in the same case, the construction placed upon a contract between the parties on the former appeal, together with the court's ruling on the points stated, becomes the law of the case, binding on the appellate court whenever that case comes before it for adjudication. It is *res adjudicata*. *Norfolk*, etc., R. Co. v. *Mills*, 91 Va. 613, 22 S. E. 556.

S. PARTICULAR CONTRACTS CONSIDERED.

1. Abiding the Event.

These are two actions of debt by the bank of O D against J, maker, and W as the endorser, of the notes sued on, pending in the same court, at the

same time, in both of which the defense and the evidence is the same. There is a verdict and judgment for the plaintiff in one case; and the defendants propose to appeal. And then in the second case the following entry is made: "Bank of O D v. J & al.— judgment by consent in favor of plaintiff for \$10,760, the debt in the declaration mentioned, with interest thereon from the 1st day of January, 1866, till paid, and costs. Execution on the judgment to be stayed for ninety days; and in the event of an appeal being obtained and perfected in the Bank of O D v. J & al., decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case; provided the appeal bond in that case be sufficient to secure the amount of both judgments. C, p. q.; B & W, p. d." Held, the true construction of this contract is, that the stipulation for the suspension of the execution for ninety days, and also that the judgment should abide the result of the decision by the court of appeals in the other case, was in each particular absolute; and the giving of the bond was required as a condition precedent only to the suspension of the execution on that judgment while the other case was pending in the court of appeals on writ of error. No supersedeas bond having been given, as provided in the agreement, if it was possible legally to give such bond, execution could have been sued out at any time, to subject the personal property of the defendants, or proceedings in equity instituted and prosecuted to subject their real estate. *Bank v. McVeigh*, 32 Gratt. 530.

2. Contracts for Right of Way.

See the title RAILROADS.

An oil transportation company entered into an agreement with a landowner, whereby the landowner for a valuable consideration granted to the company and their assigns the exclu-

sive right of way and privilege to construct and maintain one or more lines of tubing for the transportation of oil through and under a tract of land containing two thousand acres, which agreement was signed, sealed and delivered by the landowner. Held, by the true construction of this instrument it operated first as a grant of right of way for such tubing for the transportation of oil through said tract of land, and secondly, it was intended to operate as a covenant, whereby the landowner agreed, that he would not himself transport oil from or through this tract of land nor grant rights of way to any other person or company to lay tubes for the transportation of oil through said tract of land, whether the oil was produced on said tract of land or not. *W. Va. Transportation Co. v. Pipe Line Co.*, 22 W. Va. 600.

3. Contracts of Loan.

See the title LOANS.

"I have this day Sept. 26, 1859, borrowed of Mrs. P, five thousand dollars, in stock of the state of Va., on which interest is payable semi-annually; and for the repayment of the same, with the accruing interest, I bind myself, my heirs, etc. Witness, etc., K. The stock was borrowed to be converted into money, and was sold in November for \$4,755." Held, it is a money contract and P. is entitled to the value of the stock at the time of the loan. *Davis v. Knight*, 24 Gratt. 406.

4. Contract to Pay Off Liens.

A. agreed to give his land to T. & W. if they pay off certain liens thereon. The writing also recited another lien thereon to C. as having been assigned to T. & W., but the latter did not assume to pay it, and it was no part of the consideration of the land. It turned out that A. himself had paid off the lien of C. In suit on bond of A. as trustee, wherein J. was surety, J. claimed in his cross bill that as A. and not T. & W. had paid off C.'s

lien, he was entitled to have said land to the extent of said lien, subjected to sale in order to exonerate him as such surety. Held, the prayer of the cross bill was rightly denied. *Jones v. Covington*, 84 Va. 778, 6 S. E. 212.

5. Contracts with Attorneys.

Where a decree has been rendered in the circuit court for a certain sum, and the plaintiff, not satisfied therewith, obtains an appeal to this court, where the decree is affirmed, and four parties interested therein employ an additional attorney to obtain a rehearing of said cause, and, in the event the same is reversed, and further prosecuted, agree to pay him one thousand dollars certain, and a contingent fee of five per cent. on the net recovery in excess of the decree rendered in the circuit court, said fees to be paid pro rata by said four parties, said contract is unambiguous, needs no construction, and is enforceable against each of said four parties. *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637.

6. Joint Owners.

A tract of land is purchased by a bricklayer and carpenter, who are to pay part of the price in money at stipulated times, and the rest in a house to be erected by them. The work to be done by each is agreed upon between them, and they commence its execution; but the carpenter, from misfortune in business, becomes unable to comply with his portion of the agreement. Thereupon a new agreement is made, that the carpenter shall cover in the house, and that for the work he has done, and for covering the house, he shall be allowed the value thereof, and receive that amount in the land out of the tract. The carpenter, nevertheless, fails to cover in the house, and the bricklayer has this part of the work done. Held, 1. that by the new agreement, the carpenter's interest in the land in such proportion thereof, as the amount of work then done, and under that agree-

ment to be done by him, was of the original price of the land; and 2. that this proportion is charged to the bricklayer with the value of the work which under that agreement ought to have been, but was not, done by the carpenter. *Cosby v. Lambert*, 1 Rob. 225.

"The contract sued on was not an agreement between the parties as partners or joint tenants. It was a contract between them as individuals, for the purchase of property to be divided equally between them when purchased, and for its violation by either the other had the right to sue at law to recover damages for its breach. *Wright v. Michie*, 6 Gratt. 354; *Venning v. Leckie*, 13 East 7; 3 Rob. Pr. (new) 151; 3 Minor's Inst. 700." *Barnes v. Morrison*, 97 Va. 377, 34 S. E. 93.

Two persons unite to purchase a tract of land, for which they give three thousand dollars; and they enter into a contract, under seal, by which one of the parties is to pay two thousand dollars, and the other one thousand dollars of the purchase money, and the land is to be divided equally between them. Held, each is to have a moiety of the land. *Stubblefield v. Beazely*, 5 Gratt. 51.

7. Stipulations as to Time.

a. Delivery of Goods.

A contract is made for the delivery of a crop of wheat at the barn of the farmer, between certain days; the farmer is not bound to have the whole ready at one time; but the other party is bound to use reasonable industry in receiving and taking it away in reasonable parcels. *Lewis v. Weldon*, 3 Rand. 71.

b. Payment of Money.

A general undertaking to pay money, without appointing a day of payment, obliges the party to pay immediately; but an undertaking to do a collateral act, as to convey lands, entitles the party to perform it at any time during his life, unless hastened

by the request of the other party. *Bailey v. Clay*, 4 Rand. 346.

A stipulation to pay on a particular day, unless some event shall happen, which, in its nature, may happen either before or after that day, necessarily implies that the money is to be paid, if the event does not happen before that day. *Cobbs v. Fountaine*, 3 Rand. 487.

A contract to pay a sum of money in case a certain person is not found guilty of murder in the first degree and sentenced for that crime before the time appointed for the payment of the money, is not to be construed that the plaintiff is not entitled to the money until such party is acquitted or convicted. But it is to be construed as payable if the party is not convicted, even though this resulted from the fact that the accused died or fled the country and never returned. By the former construction, the money would never be payable if the party were never acquitted or convicted in consequence of his death or flight; and even in case of his acquittal after the day appointed for payment, not until such acquittal. The contract is that the money shall be paid if the accused is not convicted no matter how that may result. *Cobbs v. Fountaine*, 3 Rand. 484.

Where vendor sells land of his wife without conveyance, and part of price is paid, with understanding expressed in receipt for sum so paid, that if a third person's heirs (who were likewise the heirs of wife), got a redivision of their ancestor's lands (whereof the land sold is part), vendor is to pay vendee his money back; and wife dies intestate without having had issue, and the heirs get the land from vendee by legal proceedings, the latter is entitled to have his money, so paid upon a consideration that failed, refunded by vendor. "The plain common sense meaning of the contract is, and the intention of the parties was, when reviewed in the light of the lan-

guage used by Ferguson in the receipt of August 17th, 1870, as explained by attendant circumstances, that if Teel did not get the land Ferguson was to pay back the purchase money received." *Ferguson v. Teel*, 82 Va. 690.

8. Transportation Contracts.

See the titles CARRIERS, vol. 2, p. 671; SHIPS AND SHIPPING.

Covenant between T. and W. T. agrees to transport for W. from his works, from 1,200 to 5,000 barrels of salt annually for three years from date, water permitting, and insure the safe delivery of same to W., or his consignees, on the top of the bank of Tennessee river, at any point that W. shall direct, from Florence to the mouth of said river, for which W. agrees to pay T. twenty-five dollars per ton. T. reserves the privilege of delivering at Marathon one-third part of said salt; and for such part delivered at Marathon, W. is only to pay twenty-two dollars per ton. For all salt received by T. at the works and not delivered as above, T. is to allow W. one dollar, twenty-five cents, per bushel, and forty-six cents for each barrel, except that for all salt lost by staving or sinking the boats used in the transportation thereof, T. is to be charged only fifty cents per bushel, and forty-six cents for each bushel. Held, the agreement of T. to transport the salt, and of W. to pay him therefor, imports an implied covenant by W. to allow T. to transport salt, and to furnish him with the agreed quantities for that purpose. If the condition of the navigation is such that the salt can not be transported, T. is absolved from the obligation to transport it; and W. is absolved from the obligation to deliver it. *White v. Toncray*, 5 Gratt. 179.

The agreement is not for the transportation of an aggregate amount of salt in the course of three years, but for the transportation of from 1,200 to 5,000 barrels in each year of that

period. *White v. Toncray*, 5 Gratt. 179.

The election of the annual quantity within the specified limits, is with W., the manufacturer, and not with T., the carrier. *White v. Toncray*, 5 Gratt. 179.

T. is ~~entitled~~ to transport within the year all the salt W. delivers in that year; and if he does so, his right in regard to the quantity to be transported the next year, is not thereby affected. *White v. Toncray*, 5 Gratt. 179.

T. is bound to transport within the year all the salt he receives from W.; and if he fails to do so, he is still entitled to transport at least 1,200 barrels of W.'s salt the next year, if the contract has not then expired; but having it already in his hands, he has no right to call upon W. for the delivery to him of 1,200 barrels more. *White v. Toncray*, 5 Gratt. 179.

The transportation of the salt which T. already has in his hands in the next year, will be a compliance with his contract for that year; and W.'s permitting him to do it will be equivalent to an actual delivery by W. of the same quantity for that year. *White v. Toncray*, 5 Gratt. 179.

If T. willfully fails to transport the salt received by him in the first or second year, he is bound to transport it in the second or third year; and can not withhold it, and at the same time call upon W. to supply what he already has in his own hands. *White v. Toncray*, 5 Gratt. 179.

9. Trees and Timber.

See the title TREES AND TIMBER.

Where, by a contract in writing, S. agrees to saw a certain number of trees at a stipulated price per 1,000 feet, which price is to be paid upon estimates at certain intervals, at the rate of 85 per cent. on each estimate, and whatever residue may remain unpaid at the completion of the sawing shall be paid when the lumber is

loaded on the cars for shipment, and that the measurement on board the cars when the lumber is ready to be shipped shall be the final estimate and basis of settlement, the balance remaining unpaid shall be regarded as the basis of settlement, unless fraud or unfairness is shown in the measurement and delivery of said lumber on the cars, in which instance the jury may ascertain the amount thereof, and price to be paid therefor, from the evidence before them. *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76.

Where A. agrees to cut, haul and deliver to B. from timber lands belonging to C. a certain quantity of logs per day, for a period of two years, it was held, that there was no obligation resting on B. to furnish A. any standing timber, and therefore an instruction to the jury that if they believe from the evidence that the damages sustained by B. was because of a failure to obtain at convenient seasons standing timber from the lands of C., that he can not recover from B. unless they further believe that B. was the cause of A.'s failure to get the timber, is error. *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591.

B. contracts to sell the merchantable pine timber on certain land, and saw it into lumber, pile the said lumber openly with sticks, and deliver it in Richmond. One count says the lumber was piled openly with sticks; another says the lumber delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. Held, the contract meant the lumber should be piled, and therefore the first count was good; and that the merchantable timber meant merchantable lumber, and therefore the second count was good. *Ragland v. Butler*, 18 Gratt. 323.

10. Logs and Logging.

See the title LOGS AND LOGGING.

Vendor contracts to sell to vendees

a raft of logs then lying in the Ohio river a half mile below their landing for a given sum, deducting therefrom the expense of floating the raft to their landing which they might incur over and above the services of one of the vendees and a negro in his employ; and they promise to pay him for the same the sum of three dollars down as earnest money, and the residue of the agreed price less the expense aforesaid, when they should be afterwards requested; and that they would cause the raft to be floated to their landing aforesaid, as soon as the state of the water would permit. Held, that by the terms of the contract the residue of the price of the logs was not to be paid until they were floated up to the landing; and to entitle the vendor to recover, he must aver that the logs had been floated up to the landing, or that the state of the river had become such as to admit of it, but that the vendees had unduly neglected, failed and delayed to do it. *Kennaird v. Jones*, 9 Gratt. 183.

11. Insurance Contracts.

See the title INSURANCE.

The principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. The same rule of construction which applies to other instruments applies also to these. They are to be construed according to the sense and meaning of the terms used, and if these are clear and unambiguous, parol evidence will not be admitted to contradict, vary, or to explain them. Their terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, acquired a peculiar sense, distinct from the popular sense, rendering it necessary to resort to extrinsic proof in order to determine in which sense they are used, and so to explain their ambiguity; or unless the con-

text evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense. *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209; *United States Mutual Ass'n v. Newman*, 84 Va. 57, 3 S. E. 805; *Barber v. Ins. Co.*, 16 W. Va. 658.

V. Modification and Ratification.

A written contract not under seal can not be modified by one party without the knowledge and concurrence of the other party. In short, the same formalities and requirements are exacted in the case of oral modifications as in the formation of the original contract. *White v. Toncray*, 5 Gratt. 179; *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

A sealed agreement may be modified by a subsequent parol contract. *Baird v. Blagrove*, 1 Wash. 170; *Ward v. Johnson*, 6 Munf. 6; *Stephoe v. Harvey*, 7 Leigh 501; *Shepherd v. Wysong*, 3 W. Va. 46.

Where a contract for dredging a channel is fully and clearly entered into between a dredging company and a lumber company, and the dredging company after finding that the work was more difficult than anticipated, and that it would be conducted at a loss at the original contract price, demands a modification of it as to the rate of compensation to be paid and the manner in which the material to be removed is to be estimated, and the lumber company declines to modify the original contract, this gives the dredging company no right to violate the contract. A party may notify the other party to the contract that he will proceed no further in its execution, and then it is for such party to accept the situation and terminate all relations, sue for the breach, or negotiate for terms for the performance of the duties imposed by the violated con-

tract. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

Contract of Employment.—If a corporation, at its home office, employs an agent to sell its stock, and subsequently informs its agent by telegram, in answer to a telegram from him, that it has no more stock for sale, but that he can continue to sell stock in conjunction with another, who had an option on all the stock left, and divide commissions with him, and the agent does proceed to make sales, this is not a new contract, but a modification of the original agreement, and an action to recover commissions on stock sold before and after the said telegram must be brought within the jurisdiction of the home office, and can not be maintained in the jurisdiction where the telegram was received by such agent. "The telegram did not constitute a new contract; it was only a modification of the original understanding. It informed the agent, in answer to his own question, that the company had no more stock for sale, but that he could continue to sell in conjunction with another, who had an option on all the stock left, and divide commissions with him. And further, if the telegram was held to contain the terms of a new contract, it should have been promptly accepted by telegram, in order to make it a complete and binding agreement." *Ferguson v. Grottoes Co.*, 92 Va. 316, 23 S. E. 761.

Building Contract.—A contract to erect a building at a fixed price is an entire contract, and must be performed in accordance with its expressed terms as contained in the writing creating it, unless properly modified in a legal manner. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

Authority of Agent.—In the absence of acquiescence or ratification, a principal is not estopped to deny the unauthorized acts of an agent whom he has not held out to the other party to an alleged contract, or to the world,

as having the authority claimed. In the case at bar there was a valid written contract between two principals, and the evidence fails to show authority in the agent of one of them who was superintending the execution of the contract to modify that contract, or that his principal held him out as having such authority, or that such principal had any knowledge of the alleged modification, or that he has since acquiesced in or ratified the unauthorized acts or declarations of the agent, if any such there were, and hence the principal is not bound by the alleged modification. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

Ratification of Modification.—Where an oral modification of a written contract is claimed by one of the parties to the original contract, if there is no evidence of any knowledge of the alleged modification on the part of the other party, no acquiescence in or ratification of the modification of it can be charged. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

Ratification.—Hare says there are two grounds on which a contract which failed in the first instance, or became invalid subsequently, may be confirmed by a promise. One of these is waiver, the other ratification. Ratification is an adoption of a contract made on our behalf by some one whom we did not authorize, which relates back to the execution of the contract and renders it obligatory from the outset. Waiver is a renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure. Hare on Contracts, 272; *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

...stance of Substituted Performance.—Although a man need not take less or other than he stipulated for, he is still free to choose, and the acceptance of a substituted performance will defeat the right to rely on the breach

as an entire failure of consideration, although it will not preclude a claim for compensation for the difference between what is and what ought to have been performed. *Hare on Contracts*, 620; *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

Thus, where one who is entitled to strict performance of a contract for the delivery of a purchased article, at a given day, accepted at a later day a delivery of that article, as by substituted performance, and gave his note subsequently for the price, he must be held to have waived the original breach. *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

Building Contracts.—Where a proposition is made in writing by certain contractors to erect a church building for an amount named therein, in accordance with annexed specifications, which proposition is addressed to the building committee, and is accepted by W. and B., over their individual signatures, and the contractors proceed with the work, and receive a large proportion of the pay therefor from the pastor of the church, representing the congregation, said contractors must be held to have contracted with W. and B. as the building committee of said church, and this contract is ratified by their proceeding with the work, and receiving compensation therefor from their pastor, representing the church. *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585.

Extent of Ratification.—It is said that a contract, if ratified at all, must be ratified as a whole. A leading principle in the law relating to this subject is that, where a contract is made by one assuming to act in behalf of a corporation, and for a purpose authorized by its charter, and the corporation, after knowledge of the facts attending the transaction is brought home to the proper officers, receives and retains the benefit of it without objection, it thereby ratifies the un-

authorized act, and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming it in whole, and not in part; that it can not disaffirm so much of the unauthorized act as is onerous, while retaining so much of it as is beneficial; that it can not keep the advantage while repudiating the burden; that it can not disaffirm the contract while keeping the consideration. *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 455.

Burden of Proof.—The burden of proving ratification, or acquiescence in a voidable contract, is upon him who alleges it. But as ratification and acquiescence imply knowledge, they can not be imputed in the absence of all knowledge of the facts on which they are predicated. There must be knowledge of the facts out of which rights arise before there can be a waiver of those rights. The law does not hold one to have waived his rights, unless, with knowledge of the facts, he has distinctly waived them. *Smith v. Miller*, 98 Va. 535, 37 S. E. 10; *Hotchkiss v. Middlekauf*, 96 Va. 656, 32 S. E. 36, 43 L. R. A. 806; *Wilson v. Carpenter*, 91 Va. 192, 21 S. E. 243; *Montague v. Massey*, 76 Va. 307; *Rowe v. Bentley*, 29 Gratt. 756.

VI. Waiver or Abandonment.

See generally, the title WAIVER.

Definition.—Waiver is a renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure. *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

What Constitutes.—Although a method of ascertaining weights may not have been in accordance with the contract of the parties, yet long continued acquiescence, with full knowledge of all the facts, will constitute a waiver of the right to insist on the terms of the contract. "Although the

methods of ascertaining the weight of the manganese ore may not have been in accordance with the agreement of the parties, the long-continued acquiescence of the defendant in such methods, with full knowledge of all the facts, was a waiver of its rights to insist upon the terms of such contract upon that point. If one owing a sum of money, the amount of which is not ascertained and fixed, offers his creditor a certain sum, declaring that it is in full for all that is owing him, which sum is accepted by the creditor, such acceptance is in full discharge of the demand." *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272, 21 S. E. 466.

Allowing a party to complete his contract is no waiver of a right or claim to damages or loss incurred and actually paid, caused by his failure to complete it at the time agreed on. *Norfolk, etc., R. Co. v. Shippers' Compress Co.*, 83 Va. 278, 2 S. E. 139.

A contract under seal decreed, at the instance of one of the parties, to be set aside, as having been vacated and abandoned; the other (at whose request, and for whose accommodation, it was expressly made) having for a long time neglected to carry it into effect, and shown by particular acts (though without any acknowledgment under seal) that he considered it as being no longer in force. *Cringan v. Nicholson*, 1 Hen. & M. 429.

The plaintiff agreed to furnish the defendant with railroad ties at points where needed, but alleged a contemporaneous parol agreement of the defendant to haul part of the ties. It was held, in an action for the defendant's failure to perform the parol agreement, that if the plaintiff accepted payment and receipted in full for all demands under the contract for such ties as he hauled, such receipt was a complete defense to the plaintiff's action. *Scott v. Norfolk, etc., R. Co.*, 90 Va. 241, 17 S. E. 882.

How Waived.—Powell on Contracts, 436, etc., states many instances in which the most solemn and sealed agreements were considered as altered and waived by acts other than the execution of instruments deemed of equal dignity with them; the spirit of equity, especially as applying to the construction of the statute of frauds, exploding the maxim "*dissolvitur eodem ligamine quo ligatur*." *Cringan v. Nicolson*, 1 Hen. & M. 441.

Oral Waiver.—There is no doubt but that an executory contract for the sale of land, whether written or oral, can be rescinded or waived, in equity, by word of mouth, if possession be given up, or the writing be destroyed, but not without something done by way of execution of the rescission or waiver. *Boggs v. Bodkins*, 32 W. Va. 566, 9 S. E. 891; *Straley v. Perdue*, 33 W. Va. 375, 10 S. E. 780; *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

A written contract, creating an equitable interest in land, may be rescinded, waived, or abandoned by a subsequent distinct and independent parol agreement between the parties, partially acted on or fully performed by them. *Phelps v. Seely*, 22 Gratt. 573; *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866.

An oral waiver or abandonment of an oral contract for the purchase of land, is not valid unless executed by a surrender of possession. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

Proof of Waiver.—"The court requires as clear evidence of the waiver as of the existence of the contract itself. Abandonment of a contract, according to the law of this court, is a contract in itself." *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

An oral waiver of a contract must be clear, positive and above suspicion, and can not be proven by mere loose casual conversation. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

Circumstances may amount to conclusive evidence of a general abandonment of an agreement by all the parties thereto. *Cringan v. Nicolson*, 1 Hen. & M. 435.

VII. Discharge of Contract.

A. PERFORMANCE.

1. Necessity for.

No recovery can be had on a contract, which has never been performed by the party to be charged thereby. *Trout v. Trout*, 86 Va. 295, 9 S. E. 1121.

Failure of Seller to Perform His Part of Agreement.—A contract of sale is not considered, in equity, as binding on the parties by the execution of a bond for the purchase money, if it appears that the seller failed to perform what was to be done on his part in order to consummate the contract. *Page v. Winston*, 2 Munf. 298.

2. Mode of Performance.

A trade usage may control the mode of performance of a contract, but can not change its intrinsic character. *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879.

Installment Contract.—"If the contract for the price of the houses was payable in installments bearing interest, that contract can not be discharged by the tender of cash at the time when the buildings are completed." A debtor has no right to anticipate the payment of a debt payable at a future day, and bearing interest, without the consent of the creditor. *Graeme v. Adams*, 23 Gratt. 225.

Right to Sublet Contract.—Where a person in his lifetime employed another to perform his contract, and after the work was commenced the administrator notified the plaintiff not to proceed under the contract, and if he did so it would be at his own risk, but the plaintiff sublet the contract and performed the work in accordance with the specifications; it was held, that the defendant's estate was liable to the plaintiff first because the obligation of the contract was not affected by the

notice served by the administrator, as this would amount to a holding that all a party to a contract has to do, who wishes to rid himself of its obligation, is to notify the other party not to perform his part, and the contract is at an end; secondly, because the fact that the plaintiff being without means to perform the contract, sublet it to another, was not an abandonment of the contract, and hence no bar to recovery on the original contract. *Ferguson v. Wills*, 88 Va. 136, 13 S. E. 392.

Substantial Performance.—Where a contract has been substantially performed by the other party, the other can have no pretext for not performing it himself, if the contract entered into be fair and legal. *Brachan v. Griffin*, 3 Call 433.

If an attorney in fact undertake to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "in case the land can not be found, to have a proportional part of the damages which may be recovered by his employer of the person of whom he bought, and a proportional part of his expenses paid," he is not bound to have it done at all events; but only to a faithful performance, according to the best information he can obtain. *Betts v. Cralle*, 1 Munf. 238.

In this case, therefore, the attorney in fact being imposed upon by the county surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract. *Betts v. Cralle*, 1 Munf. 238.

3. Time of Performance.

If a contract other than a money demand specifies no time within which performance is to take place, the promisor is allowed such time for performance as is reasonable, taking into consideration the subject matter of the

contract. *Hammon on Contracts*, § 444; *Boyd v. Gunnison & Co.*, 14 W. Va. 1; *Clark on Contracts*, § 251. *Poling v. Boom, etc., Co.*, 55 W. Va. 539, 47 S. E. 279.

"It will be observed that the contract fixes no time limit for the scaling, branding, or delivery of the logs. Certain advances were to be made to Pyle when they were scaled and branded. An additional advance was to be made when they were put into Laurel Fork, provided a good splash dam had then been built by Pyle to insure the coming of the logs into Dry Fork, i. e., to insure the speedy delivery of the logs at the place appointed therefor. No certain time could have been fixed for the delivery of the logs in Dry Fork, as that work depended upon the uncertainty of water, and the presence of the ice in Laurel Fork, a swift mountain stream, down which the logs could be drifted only on a high stage of water therein. The parties were acquainted with the country and its physical conditions. It is therefore but fair to say that they contemplated and fully considered all of those contingencies, when the agreement in controversy was made. Pyle sold, and the company bought of him, all of the timber, which he might cut during the next twelve months, at the prices named in the contract. He therefore had a right to cut timber, during the entire period, and to be paid therefor the price fixed as aforesaid, upon compliance by him with the conditions specified in the contract; but it would have been an impossibility for him to have had all the timber cut within that time by him, scaled, branded, and delivered in Dry Fork, a distance from the place of scaling and branding of about fifteen miles, within the said period. The offer of the company to pay to Pyle an additional dollar on each thousand feet, when the logs were put into Laurel Fork, provided he would build the splash dam, is evidence of the desire of the company that the logs should

be delivered in Dry Fork as speedily as possible, and that the freshets which might occur in Laurel Fork should be fully utilized for that purpose." *Poling v. Boom, etc., Co.*, 55 W. Va. 538, 47 S. E. 279.

Contract for Delivery of Crop.—

Where a contract is made for the delivery of a crop of wheat at the barn of the farmer between certain days, the farmer is not bound to have the whole ready at one time, but the other party is bound to use reasonable industry in receiving and taking it away in reasonable parcels. *Lewis v. Weldon*, 3 Rand. 71.

4. Place of Performance.

See the title **CONFLICT OF LAWS**.

Where the circumstances show that a contract is to be performed where it was made, it is the duty of the defendant to be at that place on that day, and tender performance. His absence on that day excuses the plaintiff from performance of his part of the agreement, if he was then ready and willing to perform. It is not the duty of the plaintiff to follow the defendant and to make tender of performance. *Kern v. Zeigler*, 13 W. Va. 707, citing *Pugh v. Cameron*, 11 W. Va. 523.

5. Conditions.

a. Conditions Precedent.

(1) Definition and Nature.

Hammond on Contracts, § 476, says: "Conditions precedent may be regarded as vital or suspensory. A vital condition precedent is one whose non-performance discharges the contract. A suspensory condition precedent is illustrated where a promise is made to depend upon the act of a third person, as in the case of a promise in a building contract to pay for the work upon receiving a certificate of approval from the architect. * * * 'In all these cases,' says Sir William Anson, 'it would appear that an action brought before the fulfillment of the condition would be brought prematurely; and

though neither the nonfulfillment of the condition, nor the action brought before it was fulfilled, would discharge the contract, the condition suspends, according to its terms, the right to the performance of the promise." *Fairmont Plumbing Co. v. Carr*, 54 W. Va. 272, 46 S. E. 460.

(2) Necessity of Performance.

Where a condition precedent is annexed to a contract upon which it is to take effect, the contract will not take effect until such condition is performed. *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727.

When a day is appointed for the payment of money, and the day is to happen after the thing, which is the consideration of the money, is to be performed, no action can be maintained for the money before performance. *Brockenbrough v. Ward*, 4 Rand. 352.

Where a condition precedent is alleged, in the declaration, to have been performed, or offered to have been performed, after the day appointed for its performance, the declaration will be fatally defective. *Robertson v. Robertson*, 3 Rand. 68.

(3) Time of Performance.

(a) In General.

Where, under a contract, a right has passed, and the purchaser takes possession and makes improvements, that right will not be divested by failure to do the act at the appointed time. But where no right is acquired until the doing of some act by the purchaser stipulated to be done, the performance of the act is a condition precedent, and time becomes of the essence. *Keffer v. Grayson*, 76 Va. 517.

This rule may be modified or varied, however, by peculiar circumstances which account for the delay and show that notwithstanding the failure to perform, the party in default is still entitled to relief. *Keffer v. Grayson*, 76 Va. 517.

(b) Time as Essence.

See the title SPECIFIC PERFORMANCE.

When Particular Time Specified.—

Where a proposal is made, and the party is given a certain time to perform a condition precedent, if he fails to perform such condition in the stipulated time, no contract exists. *Cox v. Cox*, 5 W. Va. 335.

Agreement between M. and N. that if N. can get possession of a runaway slave belonging to M. before a certain day, N. shall have the slave at a stipulated price, and that the agreement shall continue in force only till that day. N. gets possession of the slave, after the appointed day, and continues to hold him. Held, M. may maintain an action for the slave, but not for the stipulated price. *Newell v. Mayberry*, 3 Leigh 250.

Building Contracts.—See the title WORKING CONTRACTS.

Time is of the essence of a contract to furnish material for a building "within" sixty days from the date of order. *Kirn v. Champion Iron Fence Co.*, 86 Va. 608, 10 S. E. 885.

No Time Specified in Contract.—But if no time be specified in the contract for testing, ordering, or receiving raw material which is to be accepted, and ordered if on testing, it proves satisfactory to the purchaser, the law presumes that a reasonable time was meant for those purposes. But if the purchaser cancels the contract before it is incumbent on the seller to deliver the materials, the seller is not required to show that he was ready and offered to deliver it before maintaining an action for the breach of the contract. *Carpenter v. Virginia-Carolina Chemical Co.*, 98 Va. 177, 35 S. E. 358; *Young v. Ellis*, 91 Va. 297, 21 S. E. 480; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93.

Where, in a contract for the conveyance of land, no time is fixed for payment and delivery of the deed, payment must be made in a reasonable time or on request. *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255.

Contracts for Sale of Land.—See the title VENDOR AND PURCHASER.

In executory contracts for the sale of land, time is not ordinarily treated by courts of equity as of the essence of the contract unless it is made so by the express stipulations of the parties or arises by implication from the very nature of the property or the avowed objects of the vendor or vendee; and especially is this so as to the payment of the purchase money, for mere default in the payment of money at a stipulated time generally admits of compensation. Therefore, when time is not of the essence of the contract, and compensation can be made, courts of equity can grant relief against the failure to punctually perform conditions precedent. But perhaps there may be circumstances or terms employed such as to take the case out of the general rule. *Selden v. Camp*, 95 Va. 527, 28 S. E. 877; *Smith v. Profit*, 82 Va. 832, 1 S. E. 67; *Jackson v. Ligon*, 3 Leigh 187; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Abbott v. L'Hommedieu*, 10 W. Va. 678; *Ballard v. Ballard*, 25 W. Va. 471.

Options.—See the title **VENDOR AND PURCHASER**

In the case of unilateral contracts called options the doctrine that time is not of the essence of the contract, does not apply; that doctrine applies to contracts when made, not to offers to make them. In case of proposals called options, time is of the essence as to acceptance. "In case of unilateral contracts, called options, as the obligation is, before acceptance, on one side only, the proposer being bound to comply with this proposal, while the other party is under no obligation, and under no peril until acceptance, the provision of the offer as to time of acceptance is viewed with strictness." *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, citing *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 394; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540; *Barrett v. McAllister*, 33 W.

Va. 738, 11 S. E. 220; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Keffer v. Grayson*, 76 Va. 517.

Reasonable Time.—It is the general rule that where an option to be exercised or a condition to be performed is not limited by the agreement, then such option must be acted upon and condition performed or abandoned within a reasonable time. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

Contracts Suspended during War.—The doctrine of the revival of contracts suspended during the war is based on considerations of equity and justice, and can not be invoked to revive a contract, which it would be unjust or inequitable to revive, as when time is of the essence of the contract, or the parties can not be made equal. *Abell v. Peen., etc., Ins. Co.*, 18 W. Va. 401.

Relief in Equity.—There is no lack of power in a court of equity to grant relief against the failure to perform punctually conditions precedent, when time is not of the essence of the contract, and compensation can be made. *Selden v. Camp*, 95 Va. 531, 28 S. E. 877.

Mere default in the payment of money at a stipulated time generally admits of compensation, and hence the time of payment is rarely of the essence of the contract, and when time is not of the essence of the contract, and compensation can be made, courts of equity can grant relief even against the failure to perform punctually conditions precedent. But such relief will not be granted at the instance of a party who has been guilty of gross negligence. *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

(4) Particular Instances.

(a) Contracts for Sale of Land.

See the title **VENDOR AND PURCHASER**.

In a contract for the sale of land, where there is a definite time appointed for the payment of the purchase money,

and no fixed time for making the deed, the making of the deed is not a precedent condition to the right to demand the money. *Clarke v. Curtis*, 11 Leigh 578, citing *Bailey v. Clay*, 4 Rand. 346, as authority. This latter case was distinguished in *Roach v. Dickinsons*, 9 Gratt. 154.

In a contract for the purchase of land, where no time is limited for the conveyance of the property, and a time is limited for the payment of the purchase money, the conveyance is not a condition precedent to the right to demand the money. "The great objection insisted on by the appellant, is, that upon the true construction of the contract, a conveyance of a good title to the lot sold by the appellees to him, was a condition precedent to their right, to demand the purchase money; and, that such a conveyance, or offer to convey, was neither alleged in the pleadings, nor proved upon the trial. If such were the true construction of the contract, the failure to allege a conveyance, or a tender of a conveyance, in the declaration, would, after verdict, have been cured by the statute of jeofails. Yet the plaintiff would have been bound to prove such conveyance or tender upon the trial. It is a general rule, that no party can be called upon to prove, upon the trial, any matter not alleged by him in his pleadings; unless the fact not alleged, is necessarily implied from the facts stated in the declaration or other pleading." *Bailey v. Clay*, 4 Rand. 346.

(b) Payment.

"It is plain of itself, and well settled by authority, that where by the terms of a contract a payment by one party is to precede some act to be done by the other, then the performance of the act can not be treated as a condition of the payment." *Matthews v. Jenkins*, 80 Va. 468.

When a day is appointed for the payment of money, and the day is to happen after the thing which is the consideration of the money is to be per-

formed, no action can be maintained for the money before performance. *Brockenbrough v. Ward*, 4 Rand. 352.

In *Bailey v. Clay*, 4 Rand. 350, the contract was, that the plaintiffs agree to sell and convey to the defendant, a lot at the rate of \$40, for each front foot, one-half at next Christmas, and the other half in twelve months thereafter. In both these cases, no time is limited for the conveyance of the property, and a time is limited for the payment of the purchase money; and according to the rule laid down, in *Thorp v. Thorp*, 1 Salk. 171, when the money is to be paid at an appointed time, and the day of payment is to happen, or may happen, before the thing which is the consideration of the payment of the money is to be performed, the performance of the thing is not a condition precedent to the right to demand the money. A general undertaking to pay money, without specifying the time of payment, obliges the party to pay immediately; but an undertaking to do any collateral act, as to convey lands, entitles the party to perform it at any time during his life, unless hastened by the request of the other party.

Where the defendant was drafted to serve a tour in the militia, and contracted to give the plaintiff a sum of money for performing the tour for him "upon his return from performing the same," it was held, that the performance of the tour of duty was a condition precedent to the payment of the money. *Conrod v. Conrod*, 2 Va. Cas. 138.

Options.—See the title **VENDOR AND PURCHASER**.

Speaking of these unilateral contracts or options, by which nowadays so much property is sold, and which have come into so great practical importance, Pomeroy, in his work on Contracts (§ 387), says: "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment

must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or payment must be done within the prescribed time, and time is from the very form of the contract essential. If, therefore, a vendor agrees to convey, if payment be made at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of payment is certainly essential; in fact, payment is a condition precedent to the vesting of any right in the vendee. If, however, the offer or option requires an assent and acceptance within a given time, such assent must be made within the time prescribed, and the contract thereby becomes concluded and mutual; but whether time is essential with respect to its subsequent performance must depend upon its object or the nature of its subject matter." *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Where an option requires payment to be made within a certain time, payment or tender within the time is essential to the formation of the contract. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Where payment is not in a proposal for the sale of land made an act of acceptance, or required to be made within the time fixed for acceptance, payment or tender within the time is not essential to the formation of a contract, but only an element in the performance of it. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

(c) Claims under Indemnity Bonds.

See the title INDEMNITY.

The fact that accounts are complicated, and a settlement difficult to make, will not excuse the noncompliance with a clear and explicit provision in an indemnity bond that the right to make a claim thereunder shall cease at the end of six months from the death of the principal in the bond. There is no rule of law or consideration of policy that should induce a court to refuse to

give effect to a stipulation of this kind, which is reasonable in itself, and founded on a valuable consideration. Where an act is required to be done by one party as a condition precedent to his right to claim performance upon the part of the other, he can not claim such performance without averring the doing of such act, or giving some sufficient excuse for its nonperformance. *Granite Bld'g Co. v. Saville*, 101 Va. 217, 43 S. E. 351.

(d) Contracts Conditioned upon Performance Being Satisfactory.

In *Clark on Contracts*, 66, we find: "Again a promise may depend upon the act of the promisor or of some third person. For instance, it may be made a condition precedent to one party's liability under the contract that he shall approve of, or be satisfied with, the other party's performance; and in such a case, by the weight of authority, he can not be compelled to accept the other party's performance, and perform his part, unless he is satisfied. Examples of such a condition occur in contracts for the manufacture and sale of goods, or for services, where the buyer's or master's liability to pay is made to depend on his being satisfied with the goods or the services. Other examples are in the case of promises to pay for the construction of a building or a railroad, or for any other construction work, conditional upon the approval and certificate of the architect, engineer, or other third person. In such cases payment can not be enforced without such approval unless there is fraud, or such gross mistake as to necessarily imply bad faith." *Fairmont Plumbing Co. v. Carr*, 54 W. Va. 272, 46 S. E. 459; *Kinsley v. Monongalia County*, 31 W. Va. 464, 7 S. E. 445.

Contracts for Sale of Goods.—In a contract to do work in a manner satisfactory to the person who is to receive it, if the thing to be done is to gratify taste, serve personal convenience, or satisfy the individual preference of such person, he is the sole

judge of whether the work is satisfactory to him, and may arbitrarily decline to accept it. *Carpenter v. Virginia-Carolina Chemical Co.*, 98 Va. 177, 35 S. E. 358.

But in a contract to purchase raw material if, upon testing, it proves satisfactory to the proposed purchaser, the purchaser has not the arbitrary right to declare it unsatisfactory to him, but must act in good faith in making the test. He can not fraudulently and in bad faith declare that he is not satisfied, when in fact he is. *Carpenter v. Virginia-Carolina Chemical Co.*, 98 Va. 177, 35 S. E. 358.

Building Contracts.—Where a county court made a contract for making a road, and building a bridge according to certain specifications, and added "to the satisfaction of the court," it means that it must be done according to the specification, and that would be to the satisfaction of the court. In such case, in a suit by the contractors for damages for breach of the contract, the declaration need not allege that the work was done "to the satisfaction of the court." *Kinsley v. Monongalia County*, 31 W. Va. 464, 7 S. E. 445.

Building Must Comply with Specifications.—One who contracts for the purchase of land on which a building is to be erected by the seller according to certain specifications, can not be compelled to accept the property unless the building is in substantial compliance with such specifications, though it may be equally valuable. *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781.

(e) Extension of Time for Performing Contract.

H., by written contract, sells T. & Bro. certain growing timber, and allows them four years to cut it down. Afterwards, she endorses on the contract these words: "I agree to extend the time for cutting timber as fixed in this contract each year T. & Bro. rent and operate the G. steam mills, said exten-

sion to cover a period of five years from the expiration of this within contract, this extension of time being based on said T. & Bro. renting and operating said G. steam mills." Before the expiration of the four years, said mills burned down and were never rebuilt, and had never since then been rented and operated by T. & Bro. Held, the extension was to begin after the expiration of the four years, and the condition upon which the extension was to begin, never was fulfilled. *Hughes v. Tinsley*, 80 Va. 259.

(f) Subscriptions.

See the title SUBSCRIPTIONS.

A subscription of money for the accomplishment of an object, like any other promise or offer, may be conditional. If particular terms are prescribed in the subscription paper, these terms are in themselves conditions, which must be complied with before the subscription is binding. *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311.

(g) Charge of Debts on Real Estate Devised.

See the title MARSHALING ASSETS AND SECURITIES.

A father having undertaken, by written agreement as surety for the payment of a gaming debt of his son; and afterwards, by his will (reciting that he had so become surety), having devised to his son certain real estate, charged with the payment of that debt, such charge is not a condition precedent, binding the son or his representatives to pay it; but he and they shall hold the estate discharged thereof. *Carter v. Cutting*, 5 Munf. 223.

(h) Building Contracts—Payment of Estimates of Architects.

In an action to recover on a building contract providing that certain contractors will erect a building on a certain lot for the owner thereof for a fixed sum payable in installments on estimates and certificates of the architect as the work progresses, to recover under § 6, chapter 75, of the West

Virginia Code, the plaintiffs must allege and prove either that the architects made proper estimates and gave proper certificates or that they in bad faith collusively refused to make such estimates and give such certificates; also, that the appellant refused to pay such proper estimates whether properly made or not and that such payment was a precedent condition to further fulfillment of the contract incapable of satisfaction in damages. *McConnell v. Hewes*, 50 W. Va. 41, 40 S. E. 436.

In an action for work and labor by a contractor on a railroad against the company, under a special contract, which provides that upon receiving the full amount of the final estimates, made out agreeably to the terms of the contract, he shall give a release under seal from all claims or demands whatsoever, growing out of the contract; the giving such release is a condition precedent to his recovery, if the final estimate has been properly made out; but not if the final estimate was fraudulently made. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 448.

The contract between a railroad company and one of the contractors on its line of improvement, provides, that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. The contractor can not recover the amount of the final estimate until he has executed the release; and his attaching creditor at law has no greater rights against the company in respect to this final estimate than he has, and therefore can not recover the amount unless the contractor has executed the release. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 595.

Where the declaration in an action on a contract to construct a portion of a railway, having set forth the same, alleges performance and acceptance of the work required thereby, and the refusal of the company to pay therefor,

except in the estimates and certificates of its engineer made so plainly in violation of the terms and prices specified in the contract, as to amount to fraud, it is sufficient in law. *Mills v. Norfolk, etc., R. Co.*, 90 Va. 523, 19 S. E. 171.

(i) Notice.

"It is true as a general rule, that a party, unless he has stipulated for it, is not entitled to notice before he can be held liable. But to this general rule there is an exception. When the obligation to perform a promise is dependent on something else to be done, and when from the nature of the case the knowledge of whether this preliminary act has been done lies peculiarly within the knowledge of the plaintiff and could not reasonably be expected to be known to the defendant, unless the information was given him by the plaintiff, then such information must be given to the defendant, before he can be held bound to the performance of his promise; and therefore in such case notice must be alleged in the declaration. See *Hanle v. Hemyng*, Vin. Abr. 'Condition' (Ad.) Pl. 15; *Vise v. Wakefield*, 6 M. & W. 454; *Rountrul v. Hendricks, adm'r*, 1 B. Mon. 192; *Austin v. Richardson*, 3 Call. 201; *Lamb v. Harrison*, 2 Leigh 525; *Pasteur v. Parker*, 3 Rand. 458." *James v. Adams*, 16 W. Va. 245, 253.

Notice of Nonpayment.—Where a party agreed with another that if the latter would take the bond of a third party in payment of a debt, the former should see the money paid, it is not necessary, in an action on the agreement, the bond not having been paid, to aver notice of the nonpayment by the maker of the bond, the rule being, where the party can not perform the thing, without receiving notice from the person to whom it is to be performed, special notice and demand is necessary, but the rule is otherwise, where he may perform it without such notice from the other side. *Austin v. Richardson*, 3 Call 201.

(5) Must Be Strictly Performed.

A condition precedent must be strictly performed, and at all events, even though it be illegal and contrary to public policy. If, however, it be subsequent, then its effect depends on whether it is reasonable or not. *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241.

Dismissal of Suit.—A. is prosecuting debt against B., the surety of C., and C.'s father agrees in writing to pay the debt with interest, if A. will dismiss his suit against B. at A.'s own costs. A. dismisses his suit, generally. In assumpsit by A. against the father upon his conditional promise to pay the debt, it was held, that A. was bound to perform the condition strictly, in order to entitle himself to enforce the promise, and having dismissed his suit generally instead of at his own costs, he can not recover upon the promise. *Couch v. Hooper*, 2 Leigh 557.

And though the father subsequently approved A.'s dismissal of his suit against the son's surety, generally, yet A. not having averred such subsequent ratification in his declaration on the father's promise, that fact can not avail him. *Couch v. Hooper*, 2 Leigh 557.

A debtor executes a trust deed for securing the debt, and the trustee files a bill against him to enforce the deed; pending the suit, he engages a third person to defend it for him, and covenants, that if the suit be decided in his favor, or the bill be dismissed, he will give the covenantee a mortgage of the subject in controversy; the cause never comes to the hearing, but the bill is dismissed as to one of the trustees on his own motion, and as to the other by consent of his and defendant's counsel. Held, this is a dismissal within the terms and intent of the covenant, and the covenantee is entitled to his mortgage. *Laidley v. Merrifield*, 7 Leigh 346.

Time of Performance.—Agreement between M. and N. that if N. can get possession of a runaway slave belong-

ing to M. before a certain day, N. shall have the slave at a stipulated price, and that the agreement shall continue in force only till that day. N. gets possession of the slave, after the appointed day, and continues to hold him. Held, M. may maintain an action for the slave, but not for the stipulated price. *Newell v. Mayberry*, 3 Leigh 250.

Payment.—In accordance with the rule that conditions precedent must be strictly performed, where payment of money within a specified time is a condition precedent to acquiring a right under the contract, payment after the time specified entitles the party to no such right. *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171.

On an agreement to remit part of a debt, on condition the residue is paid within a certain time, the condition must be strictly performed. *Robertson v. Campbell*, 2 Call 421.

(6) Pleading Performance of Conditions.

(a) Necessity of Pleading.

The general rule is that where an act is to be done by one party as a condition precedent to his right to claim performance upon the part of the other, he can not claim such performance without averring the doing of such act or giving some sufficient excuse for its nonperformance. *Metropolitan Life Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Virginia, etc., Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191; *Home Life Ins. Co. v. Sibert*, 96 Va. 403, 31 S. E. 519; *Granite Building Co. v. Saville*, 101 Va. 223, 43 S. E. 351; *Daniel v. Morton*, 4 Munf. 120.

In *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597, it is said: "Stipulations in a covenant or other contract are to be regarded as dependent or independent, according to the intention and meaning of the parties, and the good sense of the case. *Hotham v. East India Company*, 1 T. R. 638; *Por-*

ter *v. Sheppard*, 6 T. R. 665; *Campbell v. Jones*, 6 T. R. 570; *Morton v. Lamb*, 7 T. R. 125. And where an act is to be done by one party by way of condition precedent to his right to claim performance on the part of the other, he can not claim such performance without averring the doing of such act or his readiness and offer to do it. *Thorpe v. Thorpe*, Lord Raym. 662; *Collins v. Gibbs*, 2 Burr. R. 899; *Brockenbrough v. Ward*, 4 Rand. 352."

"The declaration nowhere alleges, avers, or pretends that the plaintiff had complied with the terms of the contract and performed what was required of him; but the averments of his declaration show that he had willfully and deliberately violated both the letter and spirit of the contract, and had assumed such an attitude towards the defendant railroad company and its servants, as to prevent entirely the performance of the contract between him and the company, as it was intended and agreed. The contract is entire, and it must be construed as a whole. To strike out the conditions and stipulations which constitute the consideration or inducement to the company to enter into the special contract to carry the plaintiff at a reduced rate—only a little more than one-half of their regular fare—would be to destroy the contract and deprive it of its character as a special contract differing from that implied in the regular tickets sold by the company, and which the law makes in favor of every passenger who gets upon the train and pays his full passenger fare. For the foregoing reasons, the demurrer to the declaration should have been sustained." *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 255.

Administration.—A declaration, in assumpsit, stating that, the plaintiff being a creditor of a person deceased, and having (with a view to secure his debt) moved the proper court to grant him administration of the estate of said decedent, the defendant (alleging that he was a creditor also), assured him that

if he would withdraw his said motion, and suffer the defendant to have the administration, he, the defendant, would pay him his debt out of the first money which should come to his hands as administrator; "that, thereupon, the plaintiff did agree to relinquish his right to administer as aforesaid; and the defendant did then and there administer" (without averring that, in conformity with the said agreement, the plaintiff did relinquish his pretention to the administration)—such declaration is altogether defective, and not to be aided by verdict. *Daniel v. Morton*, 4 Munf. 120.

Contract for Sale of Goods.—If, in an action on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract, the contract was for the sale of such of the goods as might be in the store at a future day named, by the contract the plaintiff agreed to run down the stock of goods as much as possible by the future day named for their delivery by making sales of such goods, it is not only necessary to allege in the declaration, that this obligation of the defendant had been fulfilled, but also that the defendant had notice thereof. But such notice is sufficiently proven by showing the defendant's knowledge of its fulfillment, and an express notice thereof need not be proven. *James v. Adams*, 16 W. Va. 246.

But when the performance of the defendant's agreement is a condition precedent to his right to demand the remuneration, it is not necessary in a suit brought against the defendant for the nonperformance of his agreement, for the plaintiff to allege in his declaration that the defendant has been paid the remuneration. *Davisson v. Ford*, 23 W. Va. 617.

b. How Pleaded.

(aa) Sufficiency of Averments.

(aaa) In General.

Generally, the same rules which ap-

ply to an assignment of breaches also apply to an averment of performance of a condition precedent. If there be any difference, the rules which apply to the latter are less stringent than those which apply to the former. The courts, especially in England, have gone very far in sustaining the sufficiency of averments of performance of condition precedent. 3 Rob. Prac. 571, 578. It is true that it is sometimes insufficient to follow the words of the contract, but it is necessary to be more specific. And it is also true that there are cases which decide that the declaration should not present for the determination of the jury what is matter of law; or partly of law and partly of fact; as that a party was duly appointed administrator; or was duly appointed receiver; but it should state what in particular was done, so that if the fact be admitted, the court can determine whether he was duly appointed; or, if issue be joined on the allegation, the jury can answer as to its truth. *Smith v. Lloyd*, 16 Gratt. 311.

The setting out of the performance of a condition precedent in the language of the condition is sufficient. *Smith v. Lloyd*, 16 Gratt. 295.

Where a county court made a contract for making a road and building a bridge according to certain specifications, and added, "to the satisfaction of the court," it means that it must be done according to the specifications, and that would be to the satisfaction of the court. In such case, in a suit by the contractors for damages for breach of the contract, the declaration need not allege that the work was done "to the satisfaction of the court." *Kinsley v. Monongalia County*, 31 W. Va. 464, 7 S. E. 445.

Nature of Objection—Special Demurrers.—But whether or not, according to the strict and technical rules of pleading, the averment of performance of conditions precedent being in the very words of the deed, is sufficient, or should have been more specific, or

should have been only of matter of fact; certainly the defect, if there be one, is only of form and not of substance, and, since special demurrers have been abolished, is not now ground of demurrer. The Virginia Code, ch. 171, § 31, provides that "on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, can not be given." *Smith v. Lloyd*, 16 Gratt. 313.

(bbb) Readiness and Willingness.

Where the circumstances surrounding a contract show that it was to be performed on a certain day, at a certain place, in a certain state, and the plaintiff in a count in his declaration alleges, that he was on the day at the required place, ready and willing to perform his part of the contract, after setting forth what was required of him; but that the defendant was not at the place on that day, but was absent from the state, the plaintiff has shown a sufficient legal excuse for not performing the covenants required of him; and the count is good. *Kern v. Zeigler*, 13 W. Va. 708; *Pugh v. Cameron*, 11 W. Va. 523; *Jones v. Singer Mfg. Co.*, 38 W. Va. 147, 18 S. E. 478, citing *Roach v. Dickinson*, 9 Gratt. 154; *Clark v. Franklin*, 7 Leigh 1.

Carriers.—To entitle the plaintiff to recover in an action of trespass on the case against a carrier for damages for the alleged violation by the defendant of its special contract with the plaintiff, embodied in the terms and conditions of what is called accommodation ticket, for an alleged violation of this contract, he must aver in his declaration, and prove that he had faithfully performed his part of the contract, or was willing and ready to perform it, but

was prevented by the failure or inability of the railroad company to perform it on their part. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 255.

Limitation of Rule.—Where an action of assumpsit is brought on an entire contract under seal, in which the covenants are dependent, and the pleader sets forth the contract in a special count, it is not sufficient for the plaintiff to aver his readiness and willingness to perform the condition precedent contained in the contract, but he must go further and show a sufficient legal excuse for his nonperformance. *Jones v. Singer Mfg. Co.*, 38 W. Va. 147, 18 S. E. 479, citing *Clark v. Franklin*, 7 Leigh 1. To the same effect *Clark v. Franklin*, 7 Leigh 1, is cited in *Kern v. Zeigler*, 13 W. Va. 716; *Schwarzbach v. Protective Union*, 25 W. Va. 649. See also, *Gas Co. v. Wheeling*, 8 W. Va. 369.

Where the condition precedent lies, by the covenant itself, in a definite and certain form, and consists of certain facts to be performed by plaintiff, and what is required by the covenant is by the pleader in the declarations specifically set out, under the provisions of our statute law it is sufficient to allege in general form, that the plaintiff has performed them according to the true intent and meaning of the covenant. It is not sufficient in such a case to allege, that the plaintiff was ready and willing to perform. *Kern v. Zeigler*, 13 W. Va. 708.

Demand.—But a willingness and readiness to perform on the part of one party to a contract, without any demand on the other party, who has wrongfully refused performance, or without doing anything which places the latter in a worse condition or increases the rights or immunities of the wrongdoer, does not show that he has not accepted the other's renunciation as final, and thereby terminated the contract, so as to authorize an action for the breach. *Mutual, etc., Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854.

(c) Demurrer.

See the title DEMURRERS.

When in action of covenant, the declaration does not allege the happening of the event or condition upon which the obligation was to become due and payable, it is not error to sustain a demurrer thereto. *Harris v. Lewis*, 5 W. Va. 575.

(d) Cure by Verdict.

See the title AMENDMENTS, vol. 1, p. 359.

The failure to allege in a declaration the performance of a precedent condition will be cured by a verdict. *Bailey v. Clay*, 4 Rand. 346.

In an action on a contract for the purchase of land, if the conveyance of a good title or tender of such conveyance, is a condition precedent to the demand of the purchase money, then there is no necessity to allege in the pleading, or prove at the trial, any such conveyance or tender; but if the conveyance of a good title, or tender of such conveyance, is a condition precedent, the omission to make such an allegation in the pleading was cured after verdict at common law, and is cured by the statute of jeofails. *Bailey v. Clay*, 4 Rand. 346.

When the recovery is on a contract, the verdict establishes not only that the plaintiff is entitled to the amount awarded by the jury as damages or compensation, but that he did every act and performed all the stipulations that were conditions precedent to the right to maintain the action. *Linke v. Fleming*, 25 Gratt. 709.

(7) Proof of Conditions—Parol Evidence.

Parol evidence is competent to prove a condition upon which a contract in writing is to take effect. *Wendlinger v. Smith*, 75 Va. 309.

G., executor of V., makes a contract with W., to sell to W. a lot of ground. The contract is perfect on its face and absolute; but at the foot of it is a paper referring to it, and indicating that the

devises of V. expressed their approval of the sale. This paper has to it nine seals, only four of which have names attached to them. This writing is presumably a part of the instrument, and indicates that all the devisees of V. were to approve it. Whether their approval was to be a condition upon which the contract was to take effect, is uncertain upon the face of the papers; and, therefore, parol evidence to prove the condition is competent. *Wendlinger v. Smith*, 75 Va. 309.

b. Conditions Subsequent.

A condition subsequent is one the effect of which is to enlarge or defeat an estate already created. *Phillips v. Ferguson*, 85 Va. 511, 8 S. E. 241.

The necessity of performing a condition subsequent, that is illegal or contrary to public policy, depends on whether it is reasonable or not. *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241.

c. Impossibility of Performance.

But whether the condition be precedent or subsequent, if the act of the party who imposed the condition makes its performance impossible, or unnecessary, the condition is no longer binding, and the estate conveyed by the deed, in which it is contained, is discharged therefrom. *Jones v. Chesapeake, etc., R. Co.*, 14 W. Va. 514.

d. Nature of Condition—How Determined.

Whether a condition contained in a deed is a condition precedent or subsequent, is a question of intention in the grantor, to be gathered from the whole instrument. *Jones v. Chesapeake, etc., R. Co.*, 14 W. Va. 514.

e. Disjunctive Conditions.

"Although it is good law, that where a condition is in the disjunctive, it is sufficient that either part be performed, Co. Litt. 225, a. and that where two alternative conditions are both lawful and possible, and one of them becomes impossible before the day of performance, the obligor shall be bound to

perform the other. 1 Salk. 170; 2 Thom. Co. Litt. p. 59, marg. note, N. 1, yet that, I apprehend, is true only where neither condition involves the commission of some offense, for which a public prosecution may be carried on." *Noyes v. Cooper*, 5 Leigh 190.

Where the condition of a bond is to do one of two things, showing that one could not be performed, is no good reason for not having performed the other. *Noyes v. Cooper*, 5 Leigh 189.

f. Concurrent Conditions.

See post, "Construction of Covenants—Dependent or Independent," VII, A, 5, g.

Where nothing has been said as to payment, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Where an option to sell land providing "one-half the purchase money to be paid in cash, and the remainder in nine months, the deed to be made when the cash payment is made," the obligation of the proposer to deliver the deed and the obligation of the holder of the option to pay the money, are mutual and dependent, and are to be performed simultaneously. *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255, following *Barrett v. McAlister*, 33 W. Va. 738, 11 S. E. 220; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

Pleading.—"Where an act is to be done by one party by way of condition precedent to his right to claim performance on the part of the other, he can not claim such performance without averring the doing of such act or his readiness and offer to do it. *Thorpe v. Thorpe*, Lord Raym. 662; *Collins v. Gibbs*, 2 Burr. R. 899; *Brackenbrough v. Ward's adm'r*, 4 Rand. 352. So where the reciprocal acts are concurrent, and to be done at the same time, neither party can maintain an action against the other without averring performance of his own

part of the agreement, or that which is equivalent. *Glazebrook v. Woodrow*, 8 T. R. 366; *Morton v. Lamb*, 7 T. R. 125; *Heard v. Wadham*, 1 East's R. 619; *Robertson v. Robertson*, 3 Rand. 68; 1 Saund. 320d; *Roach v. Dickinsons*, 9 Gratt. 154." *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597.

The plaintiff in his declaration states that he had kept and performed the said contract, in all parts by him to be kept and performed, etc. And according to the unanimous opinion of the court, in the case of *Rawson v. Johnson* (1 East 203), "One man," says Lord Kenyon, "agrees to do a certain act in consideration of another man's doing another act; the acts are to be done at the same time and place; it is sufficient for the plaintiff to aver that he was ready at the time and place to perform the agreement on his part." *Moss v. Stipp*, 3 Munf. 166.

g. Construction of Covenants—Dependent or Independent.

See the title COVENANTS.

Stipulations in a covenant or other contract are to be regarded as dependent or independent, according to the intention and meaning of the parties, and the good sense of the case. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597; *Brockenbrough v. Ward*, 4 Rand. 352.

Covenants and agreements are construed according to the intention of the parties, and the good sense of the case. Though in form they may be dependent, yet, to prevent injustice, they will be construed as independent, and vice versa. *Todd v. Summers*, 2 Gratt. 169; *Osborne v. Cabell*, 77 Va. 466; each case citing *Bream v. Marsh*, 4 Leigh 21, as its authority. *Bream v. Marsh*, 4 Leigh 22, is also cited with approval in *Tait v. Tait*, 6 Leigh 165.

Contract of Service.—A contract to continue for the period of a year, with salary payable monthly, does not make it incumbent on the employee to aver and prove that he performed the entire

year's service, or was prevented from performing it, by the employer, as a condition precedent to the former's recovering anything. If the whole is to be done on one side, before anything is done on the other, then the promises are dependent. But if something is to be done on the one side, before the whole is to be done on the other, then the promises are independent. *Matthews v. Jenkins*, 80 Va. 463.

Time for Performance.—Where a contract is made to deliver a crop of wheat at the barn of the seller, before a certain day, and the purchaser is to pay for it some months after delivery, the covenants are dependent. *Lewis v. Weldon*, 3 Rand. 71.

Where two parties contract, the one to assign bonds, and the other to convey and surrender lands at the same time, the covenants are dependent on each other; and neither party can insist on the performance of the other, unless he himself performed, or offered to perform, his part of the agreement. An allegation in the declaration of an offer to perform, after the day, is an incurable error. *Robertson v. Robertson*, 3 Rand. 68, cited with approval in *Roach v. Dickinsons*, 9 Gratt. 162; *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597.

B. contracts to sell the merchantable pine timber on certain land, and saw it into lumber; pile the said lumber openly with sticks, and deliver it in Richmond. One count says the lumber was piled openly with sticks; another count says the lumber delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. Held, the demand of the note is averred to have been made on the day of the delivery, or the offer to deliver the lumber. It is a case of mutual promises, and B. was entitled to demand the note when he delivered or offered to deliver the lumber; and the demand was not made too soon. *Ragland v. Butler*, 18 Gratt. 323.

A parol agreement dated the 9th of

April, 1838, by which Summers agreed to sell to the Todds his interest in a tract of land on Little Sandy river, including his improvements thereon; for which they were to make him 50,000 good staves by the next Christmas, he sawing the stuff to their hands; and they were to make 25,000 more good staves by the 1st of May, 1839, and 25,000 by the 1st of November of the same year; Summers to board the hands whilst making the staves, and the Todds to pay him ten days sawing with two hands. On the trial of the cause it appeared that the defendants had been put in possession of the land, and continued to hold it; and that they had made from eighteen to twenty-five thousand staves in 1838 and '39, out of timber sawed by the plaintiff; but he had not sawed the balance of the timber which by the agreement he was bound to saw. The court said: "If this agreement were construed as dependent, the plaintiff will have lost his property without receiving any compensation. The defendants agreed to perform the work by a certain time. They could not be considered as undertaking to perform it at any subsequent period during their lives, however inconvenient it might be to do so. If the plaintiff sued, he would be compelled to aver and prove a performance on his part, to entitle himself to a recovery; and the time having passed within which the agreements on the one part and the other, were to be complied with, he could not sustain his action. These considerations having induced the courts so to construe agreements, as to prevent a failure of justice; to hold them to be independent, when the necessity of the case, and the ends of justice require it, notwithstanding the form." *Todd v. Summers*, 2 Gratt. 167.

Effect of Partial Performance.—Where reciprocal covenants have been contracted, and one party has partially performed the covenants on his part, and has no other remedy for compensation therefor but by action on the

covenant, in such case, whatever be the form of the contract, and even though the covenants are expressly dependent covenants in form, and though they are pleaded as dependent covenants, yet they shall be held independent covenants and the plaintiff shall recover compensation for his part performance. *Bream v. Marsh*, 4 Leigh 21.

In dependent covenants, when the plaintiff has performed a part, for which he can have no other remedy than by an action on the covenant, an action may be maintained in the same manner, as if the covenants were independent. *Lewis v. Weldon*, 3 Rand. 71.

Right of Action.

Where Covenants Dependent.—Where a contract is entire, and the covenants are dependent, the plaintiff is in general obliged to aver and prove a complete performance of all that was to be done and performed on his part, before he is entitled to demand payment from the other party. But to this well-established rule, there is the equally well-established exception, that, where the defendant has prevented a performance by the plaintiff on his part, it is not necessary that the plaintiff should aver or prove a complete performance, to entitle him to his action. He may recover without doing so; and it is sufficient to show a readiness to perform, and that he was hindered by the defendant." *Gas Co. v. Wheeling*, 8 W. Va. 369, opinion of Haymond, J.; *Kern v. Zeigler*, 13 W. Va. 716; *Roach v. Dickinson*, 9 Gratt. 154; *Clark v. Franklin*, 7 Leigh 7.

"It becomes necessary, therefore, to inquire into the character of the covenants between the parties in this case. If they were independent, it would be no objection to an action brought by Brockenbrough for the purchase money, that he had not complied with the covenant on his part. But, if the covenants were dependent; if the covenant, on the part of Brockenbrough to convey the land, was a condition precedent to the obligation on the part of

the purchaser to pay the purchase money, without alleging a conveyance or a tender to convey; he could maintain no action for the purchase money, without alleging a conveyance or a tender to convey. 'Covenants are to be considered to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case, and technical words should give way to such intention.' *Pordage v. Cole*, 1 Saund. 319, note 4; *Hotham v. East India Company*, 6 Term Rep. 571; *Porter v. Sheppard*, Ib. 668; *Campbell v. Jones*, Ib. 571; *Moreton v. Lamb*, 7 Term Rep. 130. Here Brockenbrough was to convey in convenient time, but that stipulation is limited and explained by the subsequent stipulation that Ward was to give a mortgage to secure the purchase money, the first installment of which was to fall due on the 1st of January, 1811. This clearly and incontestably proves, that the parties intended that Brockenbrough should convey the land, before the purchase money was payable. Now, it is settled law, that when a day is appointed for the payment of money, and the day is to happen after the thing, which is the consideration of the money is to be performed, no action can be maintained for the money before performance. *Thorpe v. Thorpe*, 1 Salk. 171, 2d resolution; *Pordage v. Cole*, 1 Saund. 319, note 4. Brockenbrough's covenant was, therefore, a condition precedent to his right to demand the purchase money; and as his conveyance of the land to another, has forever put it out of his power to comply with that condition precedent, it follows, that Ward's representatives can never be under any obligation to pay the purchase money, and consequently, that Brockenbrough is bound, *ex æquo et bono*, to restore what he had received merely as a pledge to secure its payment." Brockenbrough *v. Ward*, 4 Rand. 354.

Where Covenants Independent.—Upon a refusal to perform a covenant

independent, an action may be maintained without showing performance of the covenant. *Tait v. Tait*, 6 Leigh 154, approving *Lewis v. Weldon*, 3 Rand. 71; *Bream v. Marsh*, 4 Leigh 21.

A party having covenanted to do two things, one of which he has done, will be allowed to maintain an action for the part done, as upon an independent covenant. *Todd v. Summers*, 2 Gratt. 167.

6. Excuses for Nonperformance.

a. In General.

Where the performance of the condition of a contract becomes impossible by the act of God, or of the law, or of the obligee, the default is excused. *Caldwell v. Com.*, 14 Gratt. 698; *Gas Co. v. Wheeling*, 8 W. Va. 369; *Kern v. Zeigler*, 13 W. Va. 716.

If a person make a binding contract to give employment, which he fails to furnish for any reason not attributable to the fault of the employee or an act of God, such failure is a breach of the contract, and an action lies. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

b. Act of God.

(1) In General.

If the performance of any contract is rendered impossible by the act of God alone, such act will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621.

Illness Included in Term "Act of God."—Under the expression "the act of God" is comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. Hence, it is held that "illness," being beyond the power of man to control or prevent, is the act of God. *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621.

(2) Building Contracts.

See the title WORKING CONTRACTS.

Destruction of Building While Being Repaired.—If a contract be made to do work on a building already in existence, whether by way of repairs or alterations, or for work which forms only a part of a new building, the destruction of the building before completion excuses the contractor from the performance of his contract, and he is entitled to the value of any work that may have been done at the time of the destruction. *Hysell v. Sterling Coal, etc., Co.*, 46 W. Va. 158, 33 S. E. 95; *Atlantic, etc., R. Co. v. Delaware Const. Co.*, 98 Va. 503, 37 S. E. 13; *Clark v. Franklin*, 7 Leigh 1; *Kern v. Zeigler*, 13 W. Va. 707; *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. 1013.

But, if the defendant prevents him from rebuilding and completing the work according to contract, he is not entitled to the contract prices for the work remaining to be done, but only to damages for being deprived of the benefit of the contract. *Clark v. Franklin*, 7 Leigh 1.

Contract to Roof Building.—A mechanic who contracts to put a tin roof on a dwelling house at so much per square, if such house is consumed by fire before the roof is completed, without his fault, is entitled to recover on quantum meruit for the work done under the contract. Such a contract is not one of risk or hazard, and the contractor is not an insurer of the property against destruction from fire, storm, or other causes. *Hysell v. Sterling Coal, etc., Co.*, 46 W. Va. 158, 33 S. E. 95, citing 7 Am. & Eng. Ency. Law 152.

c. Act of Law.

Where one contracts with another to cut a quantity of logs at a certain price, and deliver them to him at a certain price, but is prevented from doing so because of an injunction issued against the party to whom he agreed to deliver the logs, the contractor can recover the contract price, less the expense necessary to deliver them. *Patton v. Elk River Nav. Co.*, 13 W. Va. 259.

The recognizance is that the principal shall appear before the circuit court at a certain time to answer a charge of felony. At the time he was required to appear he was in the penitentiary, having been tried, convicted and sentenced for another felony. Afterwards, and before a judgment on the scire facias against his bail, his time under his sentence expires, and he is sent back to the jail of the county in which he was to appear for trial before the circuit court; and he is tried and acquitted. The prisoner's confinement in the penitentiary having rendered it impossible for him to appear at the court at the time prescribed by the recognizance, it constitutes a good defense for the bail to the scire facias. *Caldwell v. Com.*, 14 Gratt. 698.

In *United States v. Van Fossen*, 28 Fed. Cas. 358; *Caldwell v. Com.*, 14 Gratt. 698, is cited as approving the proposition that where the performance of the condition of a recognizance becomes impossible by the act of God, or of the law, or of the obligee, the default is excused.

d. Act of Party.

It is settled law that where a party to a contract absolutely repudiates it, by denying its existence, it excuses the other party from making any tender of performance on his part. *Barnes v. Morrison*, 97 Va. 378, 34 S. E. 93; *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 542, 47 S. E. 279.

If during performance of a contract, or after the time for performance arrives, one of the parties, by word or act, openly and clearly refuses to perform his promise in whole or in part, the other party is thereupon exonerated from performing his part of the contract. *Gross v. Lewis*, 54 W. Va. 433, 46 S. E. 174.

A covenantor is excused from performing his part of an agreement when the other party hinders the performance. And when so hindered, the covenantee will be estopped from setting

up the default of the covenantor. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480; *Gas Co. v. Wheeling*, 8 W. Va. 369; *Kern v. Zeigler*, 13 W. Va. 716.

"With this notification in writing from the defendant, asserting its discharge from all liability to further prosecute the work and furnish the material under the contract, why should the plaintiff be required to go to the trouble and large expense of restoring the original part of the building as he proposed to do, and again make demand of the defendant to proceed to prosecute the fulfillment of his contract, only to be told on such demand that he had been duly notified of the attitude of defendant with respect thereto, and again refuse to proceed with the work under its contract? A renunciation of a contract is a breach thereof." *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. 1019.

On the 1st of May, 1779, C. having sterling money in Jamaica, B. agreed, in writing, to give, on receipt of C.'s bills for the same, his bond, for payment of £700 current money, for each £100 sterling, payable with interest from the date of the bills, if honored; and when notice of payment of the sterling money should be received, the current money due, on account of it, to be put into loan office treasury notes, on interest, by B., and delivered to C.; but if the bills were not honored, the drawer was not to be liable to damages, and B. was to forward the bills, by the earliest conveyance, to Jamaica for payment. This was not a sale of the sterling money, unless the bills were honored. And if B. sold the bills, before acceptance, he violated the contract, and could not insist upon performance, by C. afterwards, to whom, a subsequent delivery of the certificates, without informing him of the circumstances, was no payment. *Beall v. Cockburn*, 4 Call 162.

e. Inability to Perform.

An ice company, undertaking to fur-

nish ice to another company from day to day out of its surplus product, which was not to interfere with a previous contract to furnish ice to a third company, is not relieved of liability for failure to comply with such undertaking by the mere fact that it did not have a surplus on hand; but, knowing that the buyer was bound, subject to a penalty, to furnish the ice to others, it was its duty to exercise ordinary diligence in keeping a surplus on hand. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 285, 38 S. E. 141. See *James River, etc., Co. v. Adams*, 17 Gratt. 427.

In an agreement between a canal company and a contractor for building a dam, the company is to furnish the cement upon the written order of the contractor; but "if from any cause the company shall not be able to supply it as required, they shall not be responsible for any damages arising to the contractor from the want of the same." It is not a sufficient excuse for failing to furnish the cement that the company had not a sufficient quantity on hand to supply it as required. It was their duty to use due and reasonable diligence to obtain and keep on hand a sufficient supply for that purpose. Their failure to do so is a breach of the covenant, for which the contractor may recover damages. *James River, etc., Co. v. Adams*, 17 Gratt. 427.

If a person engage to do service which he can not perform, his incompetence is cause for discharge. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 214.

f. Death.

Where a conveyance to the grantor's sons is made in consideration of the grantee's maintenance and support of the grantor, and the sisters of the grantee until they get married, the death of the grantor and his wife does not release the grantee from the obligation to maintain a sister who remains unmarried. *Ralphsnyder v. Ralphsnyder*, 17 W. Va. 28.

7. Waiver.

See ante, "Waiver or Abandonment," VI. See generally, the title **WAIVER**.

Failure to perform a contract as made may be waived if the other party afterwards accepts performance. *Scott v. Norfolk, etc., R. Co.*, 90 Va. 241, 17 S. E. 882.

Defendant agrees to assign, transfer and deliver a title bond to plaintiff; defendant gives an order on third persons requiring them to deliver the bond to plaintiff, and containing an assignment thereof to him; and this order is given by defendant, and accepted by plaintiff, in lieu of an actual delivery of the bond. Held, the delivery of the order was tantamount to a delivery of the bond, and a full performance of the contract on defendant's part, whether plaintiff obtained the bond or not. "The question presented by the second bill of exceptions is more difficult. The first count in the declaration goes distinctly enough for the failure to deliver the bond according to contract. Now, I think, there can be no question, that as to this count, the evidence was conclusive against the plaintiff. For, certainly, if the defendant did draw and deliver the order to the plaintiff, and the plaintiff did accept the same in the place of actual delivery into his hands, of the title bond itself, it was a sufficient fulfillment of the contract to deliver, and a discharge of the defendant in this action. The original contract to deliver was satisfied and at an end, whatever other rights might have become vested in the plaintiff by the act done in satisfaction." *Daniels v. Conrad*, 4 Leigh 401.

B. BREACH.

1. Right and Power Distinguished.

A party to a contract has the power to violate the contract, and for such violation courts of law can only award compensatory damages, but he has no right to violate it. The violation is not

a contractual right. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

"Either party to a contract, however solemn its character or binding its form, has the power to violate it, and the courts of law give no redress to him who is injured, except compensatory damages; but it is not accurate, in law or in morals, to say that a party has a right to break his contract. It would be to assert that it is legally right to do what is legally wrong. A person bound by a contract to do or not to do a thing may find it to his advantage not to keep his engagement, for the obligation may be more onerous than the damages likely to be imposed for its breach, but the violation of the contract can not be regarded as a contractual right." *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

2. Failure or Refusal to Perform.

Failure to Purchase.—Where A furnishes money to B to purchase a tract of land for A, B and C, but B fails to make the purchase, it is a breach of the contract, to be redressed by a suit upon the contract; and the right of action accrues from the failure to purchase. *Calvert v. Bowdoin*, 4 Call 217.

Oil and Gas.—S. purchased of A. seven-eighths of the undivided one-half interest of A. in the oil in and under 243 acres of land, and paid \$300 cash therefor; and, as part of the terms and conditions of sale, S. was to begin to operate, mine, and bore for oil and gas within and under said tract of land, free of cost to A., within sixty days, and complete one well thereon in one year, unavoidable delay and accidents excepted; and, if oil be found thereon in paying quantities, then, after the said first well was completed thereon, S. should immediately commence and drill other wells thereon as should seem necessary to protect the oil and gas in and under the said tract of land, and should also deliver as royalty to the credit of A., free of cost to him, the one-half of the one-eighth of all the

oil produced and saved from the said land, in pipe lines or tanks, and pay to him the one-half of \$300 per year for the gas from each and every well drilled thereon, producing gas, the product from which should be marketed. Held, that the remedy for violation of said conditions of the sale is not by way of forfeiture of the rights of S. to bore or drill for oil on the land or any part of it, but by an action or proceeding for damages caused by such breach. *Ammons v. South Penn Co.*, 47 W. Va. 610, 35 S. E. 1004.

Refusal to Receive Goods Purchased.

—The obligation to deliver property under a contract implies the correlative obligation to receive; and, therefore, the refusal to receive is a breach of the contract. *Ragland v. Butler*, 18 Gratt. 323; *James v. Adams*, 16 W. Va. 246. See the title SALES.

B. contracts to sell the merchantable pine timber on certain land, and saw it into lumber; pile the said lumber openly with sticks, and deliver it in Richmond. One count says the lumber was piled openly with sticks; another count says the lumber delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. Held, one count avers the refusal of R. to receive the lumber. The obligation to deliver implies the correlative obligation to receive; and the refusal to receive is therefore a breach of the contract. *Ragland v. Butler*, 18 Gratt. 323.

Refusal of Joint Purchaser to Divide.

—If two persons as individuals agree to purchase personal property jointly, and divide it between them, and the property is purchased by one of them, who thereafter refused to divide with the other, the latter may sue the former at law to recover damages for the breach of the contract. *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93.

Contract to Loan Money.—While an action for damages for refusal to execute a consummated contract to loan

money lies as in other cases, it must be a complete and consummated contract. *Wells v. Ins. Co.*, 41 W. Va. 131, 23 S. E. 527.

"It is not necessary to say how far the very unusual action for damages for refusal to comply with a consummated contract to make a loan may be sustainable, or what the measure of recovery (*Sedg. Dam.* § 622; *Turpie v. Lowe*, 114 Ind. 37, 15 N. E. 834; *Stanley v. Nye*, 51 Mich. 232, 16 N. W. 387), but I can safely say that where there is no completed contract to loan, no action can be maintained. Such is the case here, clearly, under the evidence." *Wells v. Michigan Mut., etc., Co.*, 41 W. Va. 131, 23 S. E. 527.

3. Renunciation.

a. In General.

A renunciation of a contract is a breach thereof. *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. 1019.

A party may notify the other party to the contract that he will proceed no further in its execution, and then it is for such party to accept the situation and terminate all relations, sue for the breach, or negotiate other terms for the performance of the duties imposed by the violated contracts. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

"If, during the performance of a contract, or after the time for performance arrives, one of the parties, by word or act, openly and clearly refuses to perform his promise in whole or in part, the other party is thereupon exonerated from performing his part of the contract, and is at once entitled to bring action. Thus, if a man order goods to be manufactured for him, and afterwards, and before all the goods have been made and delivered, refuses without cause to keep his promise, the seller may recover the damage thereby sustained, without making or tendering the rest of the goods. * * * To constitute a breach by renunciation, the repudiation of the contract must be

unequivocal and absolute. A mere assertion that the party will be unable to fulfill his promise, or that he intends in the future to refuse to perform it, is sufficient. There must be, in substance, an avowed determination not to abide by the contract. The renunciation must deal with the entire performance to which the contract binds the promisor, else it does not discharge the promisee. * * * The innocent party may, if he wishes, keep the contract alive for certain purposes, in spite of the others' renunciation of it; provided, always, that he must do nothing to increase the damages otherwise recoverable. In order that a mere notice of an intention not to perform may constitute a breach, the other party must act upon it. If the innocent party will not accept the other's renunciation, and continues to insist upon performance, the contract remains in existence for the benefit, and at the risk of both parties. Hammond on Contracts, ss. 454, 456." *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 542, 47 S. E. 279; *Gross v. Lewis*, 54 W. Va. 433, 46 S. E. 174.

"When the sacredness of contracts fairly entered into shall be disregarded, under any pretence, there will be an end of all confidence and protection of persons or property. And when a contract is broken up without a cause it places the injured party on the same grounds, in regard to an action for damages, as if he had performed the contract. The responsibility is thrown upon the wrongdoer, and if he be a public servant the public must suffer." *Kendall Bank Note Co. v. Commissioners*, 79 Va. 574.

"This letter is not a repudiation or renunciation of the contract. The language, 'We presume these are the logs you spoke to Mr. Whitmer about, when at Hendricks, when he distinctly stated to you that the company would in no manner, shape or form purchase any more logs, other than what they had purchased, as they were compelled to put their money into the railroad,' is

not such renunciation or repudiation of the contract as falls within the rule of law sought to be invoked by appellant." *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 543, 47 S. E. 279.

b. Accrual of Action.

Doctrine of Anticipatory Breach.—

Where there has been a distinct, unequivocal and absolute refusal on the part of one of the contracting parties to perform the contract on his part, the other may elect to sue on it at once, without waiting for the time of performance to arrive. *Mutual Reserve, etc., Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854; *Lee v. Mutual Reserve, etc., Ass'n*, 97 Va. 160, 33 S. E. 556; *James v. Kibler*, 94 Va. 165, 26 S. E. 417; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

When one party refuses to complete the contract, the other can sue for consequent damages at once. *James v. Adams*, 16 W. Va. 245; 3 Am. & Eng. Ency. Law, 908; *Johnson v. Burns*, 39 W. Va. 661, 20 S. E. 686; *Meredith v. Salmon*, 21 Gratt. 769; 1 Am. & Eng. Ency. Law 541; *Pancake v. Campbell Co.*, 44 W. Va. 82, 28 S. E. 719.

Where a party to a contract notifies the other that he does not intend to abide by or perform it, the other may bring an immediate suit for such damages as he may thereby have sustained, without waiting for the time of performance to expire. *Davis v. Grand Rapids School-Furniture Co.*, 41 W. Va. 717, 24 S. E. 630.

If a party to a contract absolutely repudiates it by denying its existence, the other parties are excused from making any tender of performance on his part. *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93.

An action on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract may be brought when the defendant refuses to accept the goods and repudiates

the contract, before the time has elapsed, which, under the special contract, he was allowed to pay the balance due under such contract. *James v. Adams*, 16 W. Va. 246.

Clark on Contracts, p. 648, says: "It may also happen that, in the course of performance of a contract, one of the parties may, by word or act, deliberately and avowedly refuse performance on his part. In such case the other party is exonerated from a continued performance of his promise, and is at once entitled to bring action." *Gross v. Lewis*, 54 W. Va. 433, 46 S. E. 174.

A contract to sell and deliver goods at a certain price, no goods to be delivered up to the first of August, 1893, but all to be delivered by June 1, 1894, gives the seller the right to deliver it as he may choose after August 1, 1893; therefore, an action by the seller against the buyer for breach of his contract to accept, may be brought on September 30, 1893, and the claim of the defendant that it is prematurely brought, because the contract contemplated a rateable monthly delivery from August 1, 1893, to June 1, 1894, is unfounded. *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. 719.

C. CONTRACTS OF DIFFERENT DATES.

See the title **MERGER**.

If two agreements of different dates, made between the same parties and covering the same subject matter, are inconsistent, the one earlier in date is impliedly discharged by the other. *Clark Con.* 611. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

D. MANNER OF DISCHARGE—SEALED CONTRACTS.

While "the general rule is that a contract must be discharged in the same form as that in which it was made," yet there are exceptions to said rule. "By the weight of authority, in this country, at least the rule does not

apply where a parol contract rescinding or modifying a contract under seal has been acted upon so that it would be inequitable to hold the parties to their original contract." *Clark Con.* 617. *Arbogast v. Mylius*, 55 W. Va. 101, 46 S. E. 809.

An oral release from a contract under seal is an ineffectual discharge from the contract where it has acted upon so that it would be inequitable to hold the parties to their original contract. *Arbogast v. Mylius*, 55 W. Va. 101, 46 S. E. 809.

VIII. Pleading and Practice.

See generally, the title **PLEADING**.

A. DECLARATION.

1. In General.

It is an elementary and fundamental rule in pleading that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, and the time and place and other facts and circumstances, with such precision, certainty and clearness that the defendant, thus informed of what he is called upon to answer, may be able to respond by a direct and unequivocal plea, with evidence to support it, and that the jury may be enabled to give a complete verdict upon the issue, and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. *White v. Romans*, 29 W. Va. 571, 3 S. E. 14; *Connolly v. Bruner*, 48 W. Va. 71, 82, 35 S. E. 927.

Where a declaration in a suit for damages for breach of contract avers a distinct promise, a valuable consideration therefor, and a breach thereof, it is sufficient. *Payne v. Grant*, 81 Va. 164.

A declaration is sufficient which sets out the contract sued on, states when and where it was made, and alleges all the circumstances necessary to support

the action with sufficient fullness, clearness, and precision to apprise the defendant of the grounds of the plaintiff's claim, and to enable the defendant to plead to it. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594.

Instances of Sufficient Declarations.

—"The first of these declarations, set out the written contract between the parties, and alleged that they had always been ready, and were still ready, to perform the contract on their part; but, that the defendant had failed and refused to pay the purchase money of the lot; but alleged no promise or assumpsit by the defendant. The second declaration follows the first, and is connected by these words; 'and afterwards, to wit,' etc., and alleges as assumpsit by the defendant, in consideration of a lot sold to him by the plaintiffs; and then follows a count upon a general indebitatus assumpsit, for money had and received. Then follows the assignment of breaches upon the two last counts, and the conclusion 'to their damage,' etc. To this declaration, or these declarations, the defendant pleaded nonassumpsit, and issue was joined. At a subsequent term, the plaintiffs had leave to amend their declaration, and the record proceeds, "which was accordingly awarded, and which declaration so amended, is in these words and figures, following, to wit." This declaration is perfect in all its parts, having the regular commencement, statement of the cause of action, and conclusion. It contains a single count upon an assumpsit, in consideration of the agreement set out in the declaration." *Bailey v. Clay*, 4 Rand. 347.

Contract to Drill Oil Well.—For declaration in an action based upon a verbal contract between the parties whereby plaintiff undertook to drill for defendants an oil well, held to contain sufficient averments, see *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927.

In an action for damages for failure

to carry goods at a rate agreed, an averment in the declaration that the plaintiff delivered the goods for shipment as he had agreed to do is a sufficient averment that the goods were furnished within a reasonable time after making the contract. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

2. Executory and Executed Contracts.

So long as a contract continues executory, the plaintiff must declare specially, but when it has been executed on his part, and nothing remains but the payment of the price in money by the defendant, the plaintiff may declare generally, using the common counts, or specially on the original contract, at his election. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104. See the title ASSUMPSIT, vol. 2, p. 1.

Contract Abandoned by Mutual Consent.—Where the contract, though partly performed, has been abandoned by mutual consent, the plaintiff may resort to the common counts alone for remuneration for what he had done under the special agreement. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

3. Oral or Written Contracts.

"The first error assigned is that the court overruled a demurrer to the declaration, consisting of the common counts and a count based on the contract. It is claimed that the special count is bad because it says and counts on both an oral and written contract. If so, it does not state any difference in legal effect between the oral and the written contract. Judging from the count we would say that there was an oral contract afterwards reduced to writing. I see no substantial objection to this. Besides, duplicity is no objection nowadays." *Barrett v. Raleigh Coal, etc., Co.*, 51 W. Va. 416, 41 S. E. 220.

4. Distributive Contracts.

Covenant between T. and W. T. agrees to transport for W. from his

works, from 1,200 to 5,000 barrels of salt annually for three years from date, water permitting, and insure the safe delivery of same to W., or his consignees, on the top of the bank of Tennessee river, at any point that W. shall direct, from Florence to the mouth of said river. For which W. agrees to pay T. 25 dollars per ton. T. reserves the privilege of delivering at Marathon one-third part of said salt; and for such part delivered at Marathon, W. is only to pay 22 dollars per ton. For all salt received by T. at the works and not delivered as above, T. is to allow W. 1 dollar, 25 cents, per bushel, and 46 cents for each barrel, except that for all salt lost by staving or sinking the boats used in the transportation thereof, T. is to be charged only 50 cents per bushel, and 46 cents for each barrel. Held, in asserting a breach of the contract by W., whether by refusing to pay for transportation, or by refusing to permit it, T. must confine himself to a single year, or declare distributively for several years. *White v. Toney*, 5 Gratt. 179.

5. Statement of Modified Contract.

Even where a subsequent oral modification of the prior written contract is sufficient to abrogate such written contract, the party relying on such oral modification to sustain recovery thereon, must set out in his pleadings the terms of such modification as fully and distinctly as is required where recovery is sought on the original contract. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

6. Collateral Facts.

a. In General.

Matters collateral to the fact in issue, and necessary to the right of the party, if they are omitted in the pleadings, can not be presumed to have been proved, and therefore their omission could not be cured by the verdict, at common law. *Bailey v. Clay*, 4 Rand. 346.

b. Matters of Inducement.

A contract which is a mere preamble or inducement to the consideration for the promise sued on, but is not the contract sued itself, such inducement need not be set out with great certainty but only in a general manner. *Davisson v. Ford*, 23 W. Va. 617.

Contract of Third Person.—A third person's contract may be stated as a matter of inducement, whilst the promise actually declared on is that of the defendant. *Payne v. Grant*, 81 Va. 164.

7. Matters in Defeasance.

Matter in defeasance of the plaintiff's action need not be stated in the declaration; wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a proviso, or a condition subsequent, it must, in its nature, be a matter of defense, and ought to be shown in the pleading, by the opposite party. It is sufficient to state in the declaration those parts of the contract whereof a breach is complained of; or, in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point for the failure of which he sues; and it is not necessary or proper to set out in the declaration other parts not qualifying or varying in any respect the material parts above mentioned. *Simmons v. Insurance Co.*, 8 W. Va. 474.

"It was held in the case of *Simmons*, cited, that 'Matter in defeasance of the plaintiff's action need not be stated in the declaration; wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a proviso, or a condition subsequent, it must, in its nature, be a matter of defense, and ought to be shown in the pleading, by the opposite party. It is sufficient to state in the declaration those parts of

the contract whereof a breach is complained of; or in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point for the failure of which he sues; and it is not necessary, or proper, to set out in the declaration other points, not qualifying or varying in any respect the material parts above mentioned. But if the defendant's promise, or engagement, whether it be verbal or in writing, or under seal, embody, or contain, as part of it, an exception or proviso, which qualifies his liability; or in certain instances renders him altogether irresponsible, so that he was not in law absolutely bound, the declaration must notice the exception, or proviso, or there will be a fatal variance; but it is not necessary to negative such exception or proviso by an averment in the declaration. Where, however, the proviso in a written instrument, is distinct from and not even referred to by the clause on which the debt is charged, it is considered matter in defeasance, etc., which ought to come from the other side, and then it need not be set forth by the plaintiff. It is also a general rule of pleading, that matter which should come more properly from the other side need not be stated." *Barber v. Fire, etc., Ins. Co.*, 16 W. Va. 658, 671.

B. contracts to sell the merchantable pine timber on certain land, and saw it into lumber; pile the said lumber openly with sticks, and deliver it in Richmond. One count says the lumber was piled openly with sticks; another count says the lumber delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. Held, by the contract, R. was to advance the freight, which was to be deducted when the note was given. It was not necessary to aver the payment of the freight by B. *Ragland v. Butler*, 18 Gratt. 323.

8. Exceptions and Provisos.

If the defendant's promise or engage-

ment, whether it be verbal or in writing or under seal, embody, or contain, as part of it, an exception or proviso, which qualifies his liability; or in certain instances renders him altogether irresponsible, so that he was not in law absolutely bound, the declaration must notice the exception or proviso or there will be a fatal variance; but it is not necessary to negative such exception or proviso by an averment in the declaration. Where, however, the proviso in a written instrument is distinct from and not even referred to by the clause on which the debt is charged, it is considered matter in defeasance, etc., which ought to come from the other side, and then it need not be set forth by the plaintiff. It is also a general rule of pleading that matter which should come more properly from the other side need not be stated. *Simmons v. Insurance Co.*, 8 W. Va. 474.

9. Allegation of the Promise.

See the title ASSUMPSIT, vol. 2, p. 33.

Pleading by Way of Recital.—In an action of assumpsit on a written agreement, there must be an express allegation of the promise, and a mere recital of the writing in *hæc verba* is not sufficient. *Burton v. Hansford*, 10 W. Va. 475, 477; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 527; *Woody v. Flournoy*, 6 Munf. 506; *Payne v. Grant*, 81 Va. 164.

In assumpsit upon a written agreement, an express promise ought to be laid in the declaration; a mere recital of the writing, though a true copy, is not sufficient. *Cooke v. Simms*, 2 Call 39; *Woody v. Flournoy*, 6 Munf. 506.

In an action on the case upon a note, there must be an express assumpsit laid in the declaration and a mere recital in *hæc verba* is not sufficient. For this proposition *Cooke v. Simms*, 2 Call 39, is cited and approved in the following: *Syme v. Griffin*, 4 Hen. & M. 280; *Woody v. Flournoy*, 6 Munf.

509; *Farmers' Bank v. Clarke*, 4 Leigh 609; *Burton v. Hansford*, 10 W. Va. 474, 477; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 527; *Hite v. Wilson*, 2 Hen. & M. 286; *Griffie v. McCoy*, 8 W. Va. 206; *Spiker v. Bohrer*, 37 W. Va. 258, 16 S. E. 577.

A declaration in an action on a contract, must charge the promise or undertaking of the defendant positively and not by way of recital only; for if the declaration be defective in this respect, it is a fatal error and not cured by the verdict. *Sexton v. Holmes*, 3 Munf. 566; *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355.

10. Allegation of Time or Date.

"The statement of the real or precise time, however, is not necessary even in criminal cases, unless it constitutes a material part of the contract, etc., declared upon, or unless the date, etc., of a written contract or instrument is professed to be described." 1 Chitty Pl., 16 Am. Ed. 272; *Stephen Pl.* 279. *County Court v. Hall*, 51 W. Va. 277, 41 S. E. 119.

Variance.—"It is also claimed that there is a variance between the contract alleged in the special count and the proof offered, but nothing is offered in respect to that claim except a mere assertion that there is a variance. The declaration alleges that the contract was entered into on the 20th day of February, 1897, and it is pointed out in the brief 'that there is no contract offered, dated on 20th day of February, 1897, but that on the contrary, all that is offered is simply a proposition on the part of the defendant, Hall, agreeing to pay the costs of the condemnation proceeding.' It is not claimed in the declaration that there was a written contract, as seems to be intimated in the brief. Hall's proposition is dated February 20, 1897. The record shows that the order of the county court, directing the dismissal of the suit, was made at the February term of the county court, 1897. The evidence of

Benjamin H. Woodford, a member of the county court, shows that Mr. Hall 'came before the county court and we made an agreement.' Taken the written proposition, the copy of the order introduced as evidence, and the testimony of Woodford, there is enough to warrant the jury in finding that there was a contract between the parties, such as is alleged in the declaration, and that it was made on the 20th day of February, 1897, as stated in the declaration, even if the time be material. Then, the order made by the circuit court shows that the plaintiff has complied with its part of the contract. This subsequent act of dismissal on the 12th day of November, 1897, in pursuance of the agreement so to do, is also averred in the declaration. The contract was executory, stipulating that each party should do something in the future. The only way to declare upon such a contract is to show that it was made and set out with certainty its terms, and then aver that the plaintiff has performed what he promised to do, and that the defendant has refused to do what it was agreed that he should do upon performance by the plaintiff of what he agreed to do. That is exactly what this declaration does and the proof conforms to its allegations. Although the documentary evidence does not show conclusively that the contract was made on the 20th day of February, 1897, that is wholly immaterial." *County Court v. Hall*, 51 W. Va. 277, 41 S. E. 119.

11. Consideration.

See the title ASSUMPSIT, vol. 2, p. 37.

a. Necessity for Pleading.

(1) In General.

It is well settled that the declaration in an action on a contract must allege a consideration for the promise, otherwise the declaration is demurrable. *Sexton v. Holmes*, 3 Munf. 566; *Moseley v. Jones*, 5 Munf. 23; *Southern*

R. Co. v. Willcox, 98 Va. 222, 35 S. E. 355; *Payne v. Grant*, 81 Va. 164.

An averment of a good and sufficient consideration for the promise imputed to the defendant, is an indispensable element of a good declaration in assumpsit. *Hopkins v. Richardson*, 9 Gratt. 485.

The want of a statement of a consideration for a promise is a capital defect in a declaration, not to be supplied by intentment. *Southern R. Co. v. Willcox*, 98 Va. 225, 35 S. E. 355.

At common law, in an action to recover money due by promissory note, not negotiable (the action being founded not on the note, but on the contract of which the note is evidence) it is indispensable to aver and prove a valuable consideration, as it is in actions on all unsealed contracts. *Jackson v. Jackson*, 10 Leigh 453.

(8) Particular Contracts Considered.

Claimant of the rights of a purchaser must aver in his declaration and prove that he gave a valuable consideration. *Gordon v. Rixey*, 76 Va. 694.

A contract of indemnity must be supported by a sufficient consideration, and the declaration setting out such contract must allege it. *Chapman v. Ross*, 12 Leigh 565. See the title INDEMNITY.

Guaranty.—A special count, that shows a consideration for a promise of one to guarantee the debt of another, and does not allege, that the other has not paid the debt, is fatally defective. *Winkler v. Chesapeake, etc.*, R. Co., 12 W. Va. 699. See ante, "Guaranty," II, B, 6, b, (2), (a). See also, the title GUARANTY.

Suretyship — Indulgence — Discharge of Sureties.—See the title SURETYSHIP.

In a bill filed by sureties seeking to be relieved from the obligation of their contract on the ground that indulgence has been given to the principal debtor by the creditor, the allegation must sufficiently show a binding considera-

tion for the agreement to give indulgence. If such allegations, when speaking of the consideration for such contract, are ambiguous and defective, they will be held insufficient to entitle the plaintiffs to any part of the relief prayed for. *Knight v. Charter*, 22 W. Va. 422.

Promise for Promise.—When the consideration for the defendant's contract consists of any agreement on the part of the plaintiff, it must appear from the declaration that such agreement was binding on the plaintiff at the time the defendant's promise was made; for, if it should appear from the declaration that the obligation was all on one side, the defendant's engagement would be nudum pactum, and the declaration consequently bad. *Sexton v. Holmes*, 3 Munf. 566; *Moseley v. Jones*, 5 Munf. 23; *Southern R. Co. v. Willcox*, 98 Va. 225, 35 S. E. 355, citing 1 Chitty on Pl. 301.

A declaration in assumpsit based on mutual promises, which fails to allege the promises made by plaintiff and that defendant "in consideration of such promises" undertook and promised to do the things alleged, is demurrable. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

"But it does not allege that the defendant in order to settle the intended suit and avoid litigation, made the proposition, nor the plaintiff accepted the proposition offered in full satisfaction of said claim for damages and released the said defendant from liability therefor in pursuance of such compromise and adjustment. The declaration fails to allege any consideration for the promises alleged to be made by the defendant; it is nowhere alleged that in consideration of alleged promises made or things done or to be done by plaintiff the defendant promised and undertook as in the declaration it is alleged. 1 Chit. Pl. (16th Ed.) 305." *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

"If there was any consideration for the lease, other than that mentioned in the lease, it was the duty of the plaintiff to allege it; otherwise, the contract itself is conclusive on this question." *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 929.

(3) Where Consideration Is Implied.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 415. See ante, "Presumption of Consideration," II, B, 6, c.

The drawing and delivery of a check implies the indebtedness of the drawer to the payee to the amount of the check, and in an action upon the check it is unnecessary to aver in the declaration any further consideration. Citing *Ford v. McClung*, 5 W. Va. 156; *Peasley v. Boatwright*, 2 Leigh 195; *Terry v. Ragsdale*, 33 Gratt. 342. *McCain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003.

Acceptance of an Order.—It is decided in *Hollingsworth v. Milton*, 8 Leigh 53, that if the acceptance of an order in writing is an obligation to pay within the statute (and it is so considered by the court) there is no necessity for setting out any other consideration except the fact of acceptance, which very strongly imports it.

Negotiable Instruments.—See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 486.

(4) Tort Actions.

It is not necessary that a declaration in an action on the case for tortious neglect shall contain an express averment of a consideration. The breach of a trust undertaken voluntarily is actionable; the pure trusting the party with the goods being a sufficient consideration. *Ferrill v. Brewis*, 25 Gratt. 765.

In an action against an attorney at law for malpractice in failing to conduct the case to the best of his skill and judgment, it is no ground for motion in arrest of judgment that no consideration was alleged in the declara-

tion. It is stated that the plaintiff then and there employed the attorney, which is tantamount to stating that the plaintiff was then and there bound to pay him for what he had undertaken to perform. But the most complete answer to the objection is, that the attorney undertook to conduct the suit, and in his management of it was guilty of such a neglect of duty as to subject the plaintiff, his client, to loss; after this it is not competent to him to allege want of consideration. *Stephens v. White*, 2 Wash. 203.

b. Manner of Pleading.

(1) In General.

The consideration, which is set forth in a declaration to support the defendant's promises sued upon, is not to be regarded as a mere inducement or preamble; but it forms an essential portion of the contract, on which its validity depends. It must therefore be truly stated and is required to be proven at the trial as stated, or the plaintiff must fail because of the variance. If an entire consideration be stated in the declaration as the basis of the defendant's promise, the entire consideration stated and not merely a portion of it must be proven at the trial, or the plaintiff must fail because of the variance. Or if the consideration named in the declaration consist of several different things, and but one of these things is proven to be the consideration the plaintiff must fail at the trial because of the variance. But if in a declaration several considerations are stated as the basis of the defendant's promise sued upon, some of which are void or frivolous, this is no ground for demurrer, and he may recover, though he fails to prove the void or frivolous considerations, if he proves those considerations which are good. *Davisson v. Ford*, 23 W. Va. 627.

Declaration Held Sufficient.—The following statement of the consideration in a declaration was held to be good on demurrer: "In consideration

that said plaintiff then and there undertook, promised and agreed to and with the said defendant to pay him, the said defendant, fourteen dollars per stack for each of seven stacks of hay; and also that he, the said plaintiff, then and there promised, undertook and agreed to and with the said defendant to pay him the like sum of fourteen dollars on certain conditions named; and that the said plaintiff also promised, undertook and agreed to and with the said defendant, that he, the said plaintiff, would cause to be driven and placed in the said defendant's possession and inclosure a sufficient number of cattle, etc.; the said defendant undertook and agreed to and with the plaintiff, etc.' The count proceeded then to set out in detail the promises of the defendant, the breach of which are complained of in the count. These several promises made by the plaintiff to the defendants are a good and sufficient consideration for the promises made by the defendant to the plaintiff." *Davisson v. Ford*, 23 W. Va. 625.

(2) Entire Consideration Must Be Stated.

In actions founded upon special contracts to recover damages for the failure and refusal to perform the same, generally, the entire consideration must be stated, and the entire act to be done, in virtue of such consideration. *James v. Adams*, 8 W. Va. 568.

"If an entire consideration be stated in the declaration as the basis of the defendant's promise, the entire consideration stated and not merely a portion of it must be proven at the trial, or the plaintiff must fail because of the variance. Or if the consideration named in the declaration consists of several different things, and but one of these things is proven to be the consideration, the plaintiff must fail at the trial because of the variance. * * * But if in a declaration several considerations are stated as the basis of the defendant's promise sued upon,

some of which are void or frivolous, this is no ground for demurrer, and he may recover, though he fails to prove the void or frivolous considerations, if he proves those considerations which are good." *Davisson v. Ford*, 23 W. Va. 617, 627.

c. Sufficiency of Consideration.

In General.—The declaration in an action on a contract must allege a consideration by making it appear that there was a detriment or loss to the plaintiff, or a benefit to the defendant. *Daniel v. Morton*, 4 Munf. 120.

Promise for Promise.—Every simple promise or agreement, to be enforceable, must be based upon valuable consideration, and when declared on, the promise or undertaking of the defendant must be charged positively and not by way of recital. The absence of such a charge is fatal to the declaration, and it not cured by verdict. If the consideration for the defendant's contract consist of an agreement on the part of the plaintiff, it must appear from the declaration that such agreement was binding on the plaintiff at the time the defendant's promise was made, else the defendant's promise is without consideration, and the declaration consequently bad. Section 3246 of the Virginia Code, 1904, does not apply to this case. *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355.

In framing a special count in assumpsit based on a promise by one party to pay money or do some act for the benefit of the other in consideration that the latter settle a controversy between such parties, the plaintiff must by way of inducement state a case which shows at least in a general way that the defendant was liable to him, when such liability is a consideration for the promise, the breach of which is a basis of the action. *Davisson v. Ford*, 23 W. Va. 617.

Bailments—Liability of Bailee—Mutual Promises.—Where a bailee of cattle having rendered himself liable to

his bailor, because as bailee he had failed to take that care of the property bailed as is required in bailments of such nature, whereby the cattle are injured by reason of his failure to exercise such care, by being run over by a railroad train, whose track they were upon through negligence of the defendant as such bailee, and as such bailee he was liable to the plaintiff for the damages which he had sustained by such injury to the cattle, and such bailee promises the bailor to pay him the value of the cattle to avoid litigation, the court held, that the statements of the declaration fall short of what is necessary to make this liability of the bailee sufficient to support his promise to pay the value of the cattle, the court assigning the following reasons: "The statements of the manner, in which the cattle got on the track of the Baltimore and Ohio railroad fail to show that the defendant had not used ordinary care as such bailee to preserve these cattle, and it is not alleged, that he did not use this ordinary care; had this been alleged it would it seems have been unnecessary to state more definitely the manner in which they got on the track. It does not appear, that the turning out of the cattle stated was an imprudent act or an act of negligence, for many prudent persons so turn out their cattle, and it may be that the place, where they were thus turned out, was miles away from the railroad track, and there was no probability, that they would wander on the track. It should at least have been alleged that this act was negligence or carelessness. There is also a failure to allege that they were killed on the track by unavoidable accident, which would have been proper to state; for if it should be shown, that they were killed in consequence of the negligence of the company, it would be the primary cause of the killing of the cattle, if they had merely wandered on the track when unenclosed. (*Blaine v. Chesapeake, etc., R. Co.*, 9 W. Va. 252.)

If this was the case, the railroad company, it seems to me; alone would be responsible for the damages done if it was the result of their carelessness. There is not even an attempt to set out the other requisites to make this first consideration good, as we have stated them above, but the declaration in this second count omitting them simply says: 'The said defendant in consideration of the contract aforesaid promised, etc.' Now I can not conceive how this previous contract of the defendant with the plaintiff could be a consideration for a new promise made by the defendant. I suppose he meant to say, that in consideration of the liability, which he had incurred by the breach of this contract. But he has not said so; and if he had, he has so described the breach, that, it seems to me, he fails to show that any liability for the loss of these cattle has been incurred by the defendant. In such cases the plaintiff should by way of inducement state at least in a general way a case, which shows a liability on the part of the defendant. But this he has entirely failed to do and the promise therefore so far as based on this first consideration was a nullity, the consideration being insufficient to sustain the promise." *Davisson v. Ford*, 23 W. Va. 617.

d. Variance.

See the title VARIANCE.

Variance between the consideration alleged and that proven is fatal. *Scott v. Baker*, 3 W. Va. 285.

In framing a declaration on a special contract it is necessary to set out the whole consideration, on which is based the defendant's promise, and it must at the trial be proven as stated, or the plaintiff must fail because of the variance. *Davisson v. Ford*, 23 W. Va. 617.

"The consideration, which is set forth in a declaration to support the defendant's promises sued upon, is not to be regarded as a mere inducement

or preamble; but it forms an essential portion of the contract, on which its validity depends. It must, therefore, be truly stated and is required to be proven at the trial as stated, or the plaintiff must fail because of the variance." *Davisson v. Ford*, 23 W. Va. 617, 627.

In an action of assumpsit on a special contract to recover damages the entire consideration and the entire act to be done must be stated in the declaration; and if the plaintiff's proof clearly and materially varies from the contract stated in the declaration, such proof should on motion of the defendant be excluded from the consideration of the jury. *Davisson v. Ford*, 23 W. Va. 617.

Motion to Exclude from Jury.—In an action on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract, the entire consideration and the entire act to be done in virtue of such consideration must be stated in the declaration substantially; and if the plaintiff's proof is of a contract which materially differs from that stated in the declaration, after the plaintiff's evidence has been all submitted, the court on the defendant's motion should exclude it from the consideration of the jury, if there be a manifest variance substantially between the contract proven and the contract stated in the declaration, when the evidence is viewed in a manner most favorable to the plaintiff, as on a demurrer to evidence by the defendant. *James v. Adams*, 16 W. Va. 245.

e. Motion in Arrest of Judgment.

It is ground for motion in arrest of judgment that a declaration is defective in not stating a sufficient consideration and promise; and the judgment of the lower court overruling such a motion will be reversed on writ of error. *Mosley v. Jones*, 5 Munf. 23.

f. Pleading by Way of Recital.

See generally, the title PLEADING. Every simple promise or agreement,

to be enforceable, must have a consideration to support it, and, when declared on, the promise or undertaking of the defendant must be charged positively and not by way of recital. The absence of such a charge is fatal to the declaration, and is not cured by verdict. *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355.

g. Curing Want of Statement.

Where a declaration is demurred to on the ground of the want of a statement of a consideration for the promise, and the same has been overruled, § 3246 of the Virginia Code of 1904, cures no defect, imperfection or omission therein, except such as could not be regarded on demurrer. *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355, citing 4 Min. Inst. 941.

12. Performance.

See ante, "Performance," VII, A.

13. How Much of Contract to Be Stated.

In declaring on a contract, it is sufficient to set out the substance and legal effect only of such parts of the contract as are necessary to entitle the plaintiff to recover. *Buster v. Wallace*, 4 Hen. & M. 82.

14. Definiteness and Certainty.

See generally, the title PLEADING.

a. In General.

It is an elementary rule in pleading that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty, and clearness that the defendant may be distinctly informed of the specific grounds of the action, and thus be enabled to answer by a direct and unequivocal plea with evidence to support it. *White v. Romans*, 29 W. Va. 571, 3 S. E. 14; *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927.

An alleged ground of objection to a declaration in an action on a contract that it does not state "when, where or

how" the contract sued on was made, is not well founded, if the declaration sets out the contract; states when and where it is made; and alleges all the circumstances necessary to support the action with sufficient fullness, clearness, and precision to apprise the defendant of the ground of the plaintiff's claim, and enable it to plead to the action. The object of a declaration is to set forth the facts which constitute the cause of action so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594.

b. Matters of Evidence.

The declaration in an action on a contract, must not set forth that which is merely evidence, in violation of the rule that whatever is alleged in pleading must be alleged with certainty. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

In actions on contracts it is unnecessary to allege in the declaration matters of fact, as for example whether or not a promise to pay another's debt is in writing as required by the statute. *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977.

c. The Consideration.

The declaration in an action on a contract must definitely set forth the consideration relied on to support the promise, so that the court may judge of its sufficiency. *Taliaferro v. Robb*, 2 Call 258.

d. Matters of Inducement.

Where a bailee has rendered himself liable to the bailor, because of a failure to take proper care of property entrusted to him whereby they are injured, and the dispute having arisen, to avoid litigation the bailee promised to pay the bailor the value of the property, if the latter promise is the one sued on, it is not necessary to set out the contract of bailment with any

great certainty, but only in a general way, because such former contract is not the one sued on but a mere preamble or inducement for the latter promise. *Davisson v. Ford*, 23 W. Va. 617.

e. Substance and Legal Effect.

It is not objectionable to set out the contract fully in the declaration, and in its very words. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

"It is the province of the pleader to set forth in the declaration in an action of covenant, or in any other pleading, the instrument sued on according to its legal construction and effect, or in its very words. In this instance the latter course was adopted." *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

But in declaring on a contract it is sufficient to set out its substance and legal effect. It is not necessary to state it in hæc verba. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209; *Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206.

An obligation to deliver, implies the correlative duty to receive; and the pleader was well justified to vary his allegations according to legal intentions, and to rely on this version of the contract. *Ragland v. Butler*, 18 Gratt. 333.

Contract to Sell Merchantable Pine Timber.—In a declaration on a contract to sell the merchantable pine timber on certain land, and saw it into lumber, a count averring that the lumber delivered was sawed from merchantable pine timber is good, without averring that the lumber was merchantable. *Ragland v. Butler*, 18 Gratt. 323.

"The first two grounds of demurrer may be considered together—the first alleging that the performance should have been alleged in the terms of the contract as set forth, namely, that the timber and not lumber was piled openly with sticks, etc.; and the second, that in the third, fourth and fifth

counts the delivery was averred in the language of the contract as of 'lumber sawed from merchantable pine timber,' without the epithet used in the second count of 'merchantable.' * * * In the averment of performance or breach the plaintiff has a right to conform to the legal effect and substance of the instrument he declares upon; and necessarily takes the hazard of any departure therefrom. The demurrer raises the question and devolves upon the court the construction of the instrument of which profert is made. There can, of course, be no error in counting on the delivery of the lumber in the language of the contract; can there be any in substituting 'lumber' for 'timber' in reference to the obligation to pile? If the latter term is assumed to mean the unsawed log or beam, it would stultify the parties to the contract, as there is neither sense nor object in piling such; and the first rule of legal construction is reasonableness; but if the context plainly demonstrate the terms to be interchangeable in that application, there is still less semblance of propriety in the objection." *Ragland v. Butler*, 18 Gratt. 332.

15. Duplicity.

See the title PLEADING.

A declaration in an action on a contract which sets out in one count two several causes of action, one on the contract made by the defendant with A., and the other on the contract made by the defendant with B. and C., violates the rule against duplicity. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

16. Surplusage.

See the title PLEADING.

Surplusage in a declaration is to be avoided. For example, setting out uselessly provisions of a contract, the violation of which part is not complained of; setting out the reasons assigned by the defendant why he is unwilling to comply with his contract; setting out the names of various agents of the de-

fendant who made certain contracts and their authority to make such contracts instead of stating the contracts according to their legal effect as made by the defendant. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

Nonpayment of Money.—B. contracts to sell the merchantable pine timber on certain land, and saw it into lumber; pile the said lumber openly with sticks, and deliver it in Richmond. One count says the lumber was piled openly with sticks; another count says the lumber delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. Held, in this case the contract was to pay on delivery by a note at sixty days. The count avers the refusal to give the note, and the refusal to pay the money after the sixty days. Held, if the non-delivery of the note was the sole gravamen of the action, the averment of nonpayment of the money was surplusage, and did not vitiate the count. But held further, that the agreement to give the note to pay at a specified time was, in legal intendment, an obligation to pay at that time if there was a failure to give the note. *Ragland v. Butler*, 18 Gratt. 323.

17. The Breach.

a. In General.

A declaration in a suit for damages for breach of a contract must aver a breach thereof. *Payne v. Grant*, 81 Va. 164; *White v. Romans*, 29 W. Va. 571, 3 S. E. 14; *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

b. Nonpayment.

(1) Actions for Recovery of Debt.

It is well settled that, in an action for the recovery of a debt, the plaintiff, in his declaration, must allege nonpayment of his debts, to every person who had a right to receive payment, either at the time it fell due or at any subsequent time. *Douglass v. Central Land Co.*, 12 W. Va. 508.

In assumpsit, if there be several counts in the declaration, the defendant

should be charged, as having failed to pay the several sums of money aforesaid, and every part thereof. If this be not done, but the breach charged at the end of the last count be, that he hath not paid "the said sum of money," and it appear, upon a demurrer to evidence, that all the evidence adduced by the plaintiff applies only to the first count, judgment ought to be given for the defendant. *Ellis v. Turner*, 5 Munf. 196.

For example, in debt on an assigned bond, the allegation must be that the debt has not been paid either to the obligee or to his assignee. *Braxton v. Lipscomb*, 2 Munf. 282. See *Mitchell v. Thompson*, 2 Pat. & H. 424.

So, also, in an action by a surviving executor for the debt due to the testator in his lifetime, the declaration must aver nonpayment to the testator or to the deceased executor or to the surviving executor. *Buckner v. Blair*, 2 Munf. 336.

Where two obligors executed a bond, and only one was sued, it was held, that the declaration must negative the payment by either obligor. *Hill v. Harvey*, 2 Munf. 525.

And in an action for a debt brought by a surviving partner, the allegation must be nonpayment to the two partners during the life of the deceased partner as well as nonpayment to the surviving partner. *Nicholson v. Dixon*, 5 Munf. 198.

It is also well settled that in an action on a bond to more than one obligee, nonpayment of the debt to all of the obligees ought, in substance, to be averred in the declaration. *Strange v. Floyd*, 9 Gratt. 476.

Sufficiency of Allegation.—A declaration which charges only that the defendant "hath and does refuse to pay," without alleging that he has not paid, is good upon general demurrer. *Cobbs v. Fountaine*, 3 Rand. 484. See *James v. Adams*, 16 W. Va. 257.

(2) Actions on Other Contracts.

It is neither necessary nor proper in

an action of assumpsit for the plaintiff to allege the nonpayment by the defendant of the damages resulting from the breach of the contract, when the contract is not to pay a debt. *Davisson v. Ford*, 23 W. Va. 617.

"There is nothing in the claim of the defendant's counsel that the first count should have alleged the nonpayment of the damages claimed. It is true that in Virginia and West Virginia it has been decided, that where an action is brought for a debt, whether it be brought in the form of debt or assumpsit, the declaration must allege the nonpayment of the sum of money claimed, but even this, though settled law in this state, is regarded elsewhere as unnecessary at least in debt, and the decisions in Virginia and West Virginia, though they firmly establish the law here, seem not consistent with correct rules of pleading. (*Douglas v. Central Land Co.*, 12 W. Va. 508, et seq.) But nowhere has it been held, or, so far as I know, even suggested that in an action of assumpsit based on a promise not to pay money but to perform some act, that it was either necessary or proper in the declaration to allege the nonpayment of the damages. Such an allegation, it seems to me, would be absurd; for the object of the suit is to recover the amount of these very damages, when they shall have been ascertained by a jury." *Davisson v. Ford*, 23 W. Va. 617, 626.

"But it is claimed, that there is no allegation, that the plaintiff performed the promises, which he made to the defendant, which were the consideration of the defendant's promises to the plaintiff. This count of the declaration does allege that the performance by the plaintiff of all of his promises made to the defendant, except that it does not allege the payment to the defendant of the sum of fourteen dollars per stack for the defendant's hay, which was by the defendant to be fed to the plaintiff's cattle. But this allegation would have been unnecessary

and improper, because by the agreement as stated in the declaration, no time being agreed on when it was to be paid, it was not payable, till the defendant performed what he agreed to do, feed this hay to the plaintiff's cattle, and this he never did according to the allegations of this count." *Davisson v. Ford*, 23 W. Va. 617, 625.

"But nowhere has it been held, or, so far as I know, even suggested, that in an action of assumpsit based on a promise, not to pay money, but to perform some act, it was either necessary or proper, in the declaration, to allege the nonpayment of the damages. Such an allegation seems to me to be absurd, for the object of the suit is to recover the amount of these very damages when they shall have been ascertained by a jury. While the allegation of the nonpayment of damages claimed for the nonperformance of an act may be neither necessary nor proper, and even absurd, as characterized by the learned judge, yet it is certainly harmless, and may well be regarded as surplusage, and does not render the declaration bad on demurrer." *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. 1018.

c. How Breach Assigned.

See the title BONDS, vol. 2, p. 550.

(1) Rule Stated.

It is a general rule that a breach of a covenant or other contract may be assigned in the very words of the contract. And that is generally the best and safest mode of assigning it. "In *Martyn v. Clue*, 83 Eng. C. L. R. 681, Lord Campbell said, in answer to an objection to an assignment of this kind: 'No authority was cited to show that an allegation of the breach following the words of the covenant was insufficient, and we find no principle for so holding. The defendant must be taken to have understood the application of the covenant he chose to make.'" *Smith v. Lloyd*, 16 Gratt. 311.

But it is not necessary in assigning breaches, to use the express words of

the contract, but they may be laid according to the intention of the party. *Hawkins v. Berkley*, 1 Wash. 204; *Buster v. Wallace*, 4 Hen. & M. 82.

"A breach need not be assigned in the words of a covenant, but may be assigned in equivalent words; as in *Fletcher v. Peck*, 6 Cranch's R. 87, 127, cited in 3 Rob. Pr. and 4 Rob. Pr. 6, where it was objected to the declaration that the covenant was that the legislature had a right to convey, and the breach was that the legislature had no authority to convey. Marshall, C. J., said: "It is enough that the words of the assignment show unequivocally a substantial breach. The assignment under consideration does show such a breach. If the legislature had no authority to convey, it had no right to convey." *Smith v. Lloyd*, 16 Gratt. 311.

In assigning a breach, it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. If, therefore, the declaration charge a covenant to sell to the plaintiff a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had no land at all" in the place specified. *Buster v. Wallace*, 4 Hen. & M. 82.

(2) Applications of Rule.

Building Contract.—Where declaration in an action on a contract to construct a portion of a railway, having set forth the same, alleges performance and acceptance of the work required thereby, and the refusal of the company to pay therefor, except on the estimates and certificates of its engineer made so plainly in violation of the terms and prices specified in the contract, as to amount to fraud; held, the declaration is sufficient in law. *Mills v. Norfolk, etc., R. Co.*, 90 Va. 523, 19 S. E. 171.

Contract for Sale of Land.—See the title VENDOR AND PURCHASER.

In an action upon a written agreement for the sale of a tract of land, setting forth that the vendor agreed to give the vendee possession, and a conveyance free of encumbrances, on or before a certain day; for which the vendee agreed to pay to the vendor part of the purchase money on the same day, and to give him for the balance a deed of trust, or such other security as he may require; and that the conveyance was not to be executed until the first payment was made and security given; the declaration, in behalf of the vendor, sufficiently charged a breach by stating that the plaintiff was, on that day, in lawful and peaceable possession of the land, and ready to give the defendant possession, with a proper conveyance, clear of all incumbrances, but that the defendant failed to make the payment and give the security. *Moss v. Stipp*, 3 Munf. 159.

(3) Assignment of Breach by Way of Recital.

See generally, the title PLEADING.

An assignment of breaches commencing and "whereas," etc., and continuing by way of recital to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer. *Syme v. Griffin*, 4 Hen. & M. 277; *Winston v. Francisco*, 2 Wash. 187; *Chichester v. Vass*, 1 Call 83; *Cooke v. Simms*, 2 Call 39.

But it has been said that since the anactment of the statute which abolished special demurrers, the formal objection that the declaration, in an action ex contractu, sets out the cause of action by way of recital, would be unavailing even if well founded. *Smith v. Lloyd*, 16 Gratt. 295.

(4) Cure by Verdict.

See the title AMENDMENTS, vol. 1, p. 359.

If the breach in a declaration is not sufficiently laid, and, therefore, would be bad on demurrer, it will, nevertheless, be cured by a verdict if the neces-

sary facts are stated, though imperfectly. *Horrel v. M'Alexander*, 3 Rand. 94.

Even if a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined on the plea that the defendant had not broken the covenant. *Buster v. Wallace*, 4 Hen. & M. 82.

It is not necessary, in assigning breaches, to use the express words of a covenant; and that the intention of the parties, to be collected from the instrument itself, may well be stated in assigning breaches, though not particularly expressed in the covenant. But admitting that, on a special demurrer, the assignment of breaches would have been adjudged insufficient, they are certainly good after a verdict. *Buster v. Wallace*, 4 Hen. & M. 90.

The distinction taken in *Chichester v. Vass*, 1 Call 83, and in *Fulgham v. Lightfoot*, 1 Call 250, is between necessary facts not being stated at all, and being imperfectly stated. In the first case, a verdict does not cure; in the second, it does. *Horrel v. M'Alexander*, 3 Rand. 101.

"If there is no complaint, he need not object, but on a final hearing is entitled to a judgment of dismissal, unless plaintiff asks leave to supply the defect. 'There is one principle, however, that pervades both cases at common law and under the statute. It is that, if plaintiff either states a defective title, or omits altogether to state any title or cause of action, neither the common law nor statute cures the error or omission; for the plaintiff need not prove more than is expressly laid in the declaration, or is necessarily implied from the facts which are stated. *Doug.* 658; *Saund. ubi supra*; *Bailey v. Clay*, 4 Rand. (Va.) 346. If he states a defective title, by his own showing he ought not to recover; if he states no title, the presumption is irresistible that he can not, upon the trial, have made out a case entitling him to a judgment, and therefore it will be ar-

rested. * * * But where he altogether omits to state any title or ground of action, it can not be presumed that he proved any at the trial, since he is bound to prove only what is laid in his declaration, or is necessary to any of the facts charged in it." *Morse v. Rector*, 44 W. Va. 202, 28 S. E. 765.

18. Variance.

See the title VARIANCE.

In an action on the case, the proof of the contract must conform to the contract laid in the declaration. *Harris v. Harris*, 2 Rand. 431; *James v. Adams*, 8 W. Va. 568; *M'Alexander v. Montgomery*, 4 Leigh 61.

It is a general rule that the contract must be stated correctly, and if the evidence differ, materially, from the statement, the whole foundation of the action fails, because the contract is entire in its nature, and must be proved as laid. *James v. Adams*, 8 W. Va. 568.

B. THE PLEA.

If the deputy sue the sheriff, for turning him out of office in violation of his contract, a plea, that the plaintiff has been guilty of a certain misfeasance and other specified improprieties in his office, from which he was therefore dismissed by the defendant, is a full answer to the declaration. *Hoge v. Trigg*, 4 Munf. 150.

In assumpsit, upon an agreement for delivery to the plaintiff of a quantity of merchantable flour barrels, at his, the defendant's, shop at W., at certain times, until the whole number should be delivered; with a stipulation, that if the plaintiff should not then and there be ready to receive them, the same should be counted out in the presence of J. A., who then resided at W., and be thereafter the property, and at the risk of the plaintiff; it is a good and sufficient plea in bar to the action, that the defendant was ready, at his shop at W., at the times appointed, to deliver the requisite number of barrels to the

plaintiff, who was not then and there ready to receive them; that, thereupon, the defendant, from time to time, counted out the barrels, according to the agreement, in the presence of J. A., until he moved away from W.; he, the defendant, at his said shop at W., at the times for delivery stipulated, had the number of barrels, required by the agreement, ready to be delivered to the plaintiff, and counted out for him, and then and there required the plaintiff to receive the same, which he entirely neglected to do. *Jones v. Stevenson*, 5 Munf. 1.

C. DEFENSES.

1. Failure to Perform.

See ante, "Performance," VII, B.

If the failure of the party suing on the covenant, to perform any of the acts which he had covenanted to perform, has been injurious to the other party to the covenant, he may set up this injury as a defense pro tanto to the action. *Todd v. Summers*, 2 Gratt. 167.

2. Opinions or Expectations of Defendant.

Any opinion or expectation of the defendants entertained at the time of the execution of the contract, which did not enter into nor constitute any part of the contract, and of which the other contracting party had no notice, can constitute no ground of defense to the action for breach of the contract. *Kendall Bank Note Co. v. Commissioners*, 79 Va. 573.

3. Agreement Not to Sue.

See the title RELEASE.

What Constitutes.—The following paper, viz.: "Received of John Jarrell, Jr., \$75, it being in full of all dues, debts and demands up to this day and date, March 22d, 1866. Hiram Bloss," must be regarded only as an agreement not to sue, and as an acknowledgment of the receipt of \$75. *Bloss v. Plymale*, 3 W. Va. 393.

Distinguished from Release.—In *Darrell v. Wendell*, 8 N. H. 369, it is said:

"A release is an absolute extinguishment of the debt, while a covenant not to sue is not such an extinguishment, and is never a technical release and will never be construed as a release, unless, it gives the covenant right of action, which will precisely counter-vail that to which he is liable, and unless also it was the intention of the parties that the last instrument should defeat the first. Courts in this way overlook the precise character of the instrument in order most readily to secure the design of the parties." Same doctrine and language by Marshall, C. J., in *Garrett v. Macon*, 2 Brock. 185, 6 Call 308; *Bloss v. Plymale*, 3 W. Va. 393.

Must Be Unconditional.—"It was early held, that the absolute release of one joint trespasser discharged all the rest who participated in the act, and such is still the rule. But the release pleaded as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged without condition or exception. *Frink v. Green*, 5 Barb.; *DeZlug v. Bailey*, 9 Wend. 336; *Rowly v. Stoddard*, 7 Johns. 207. So strictly are these technicalities adhered to that no release is allowed by implication; it must be the immediate result of the terms of the instrument, which contains the stipulation; hence it is, that a covenant not to sue one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others." *Bloss v. Plymale*, 3 W. Va. 405.

Agreement Not to Sue for Limited Time.—An agreement between a creditor and debtor not to sue another for a limited time does not bar an action at law, because this does not amount to a release, but a covenant only. But the rule is otherwise where the covenant is never to sue, because this is equivalent to a release of the party. *Ward v. Johnson*, 6 Munf. 6; *Harns-barger v. Kinney*, 13 Gratt. 521; Trem-

per *v. Hemphill*, 8 Leigh 626; *Waggner v. Dyer*, 11 Leigh 391; *Glenn v. Morgan*, 23 W. Va. 470. See the title SURETYSHIP.

Personal to Covenantee.—"In the case of *Lacy v. Kynaston*, 1 Lord Raymond 689, reported also in 12 Modern 548, it was held, that a covenant not to sue was personal to the covenantee only, and could not be set up against the other joint parties. And though such covenant might operate as a release between the parties to it to avoid circuity of action, yet it could extend no further. *Farrell v. Forest*, 2 Saunders, p. 48, note 1." *Bloss v. Plymale*, 3 W. Va. 405.

D. DEMURRER.

See the title DEMURRER.

A declaration showing on its face that plaintiff had first violated the contract is bad on demurrer. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250.

It is a cardinal rule of the law of pleading that a demurrer admits only such facts as are sufficiently or well pleaded. It does not admit that the construction of a written instrument as averred in the pleading, when the instrument is set forth in the pleading, and can be inspected, is the true one; nor that the purpose ascribed to the parties thereto, when the same is not justified by its language, is correct; nor that a parol understanding, which varies or contradicts the written instrument set out in the pleading and on which it is founded, is competent or admissible. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

IX. Parties.

See generally, the title PARTIES.

A. IN GENERAL.

The party with whom a contract is made may maintain an action at law thereon in his own name, and, if the recovery be for the benefit of another, that fact may be set out in the declaration, or endorsed on the writ or the declaration, but the statement or en-

dorsement is unnecessary, and is no part of the record, and the fact that the contract sued on is set forth in the declaration and does not disclose the beneficial interest of the party for whose benefit the action is brought, does not show a variance between the declaration and the contract, and is no ground for a demurrer. *Consummers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879, citing *Clarkson v. Doddridge*, 14 Gratt. 42; *Fadeley v. Williams*, 96 Va. 397, 31 S. E. 515.

B. PRIVITY.

No action can be maintained for a breach of a contract by a stranger, for lack of privity between the parties. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816.

Where the action is only for the breach of a contract, only the parties to it, or their privies, can maintain it. Strangers can not sue for its negligent breach. *Peters v. Johnson*, 50 W. Va. 647, 41 S. E. 190.

Only the parties to a contract can sue for damage from its breach; but where in executing it things of imminently dangerous character are used, from which injury may probably happen to others, the law places him who executes the contract under duty to so perform it as not to injure strangers to it, and such strangers may sue for damage coming to them from its negligent performance. *Peters v. Johnson*, 50 W. Va. 644, 1 S. E. 190.

Assignments.—Where a note, not negotiable, is endorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, before the act of Virginia assembly of 1807, because there was no privity of contract or consideration. *Caton v. Lenox*, 5 Rand. 31; *Dunlop v. Harris*, 5 Call 16. See also, *Bronaugh v. Scott*, 5 Call 88. See the title ASSIGNMENTS, vol. 1, p. 786.

Assignment of Bonds.—A being indebted to B transfers, without written assignment, two bonds due by C to A.

In a conversation between B and C, the latter promises to pay the amount of the bonds when they should become due. This conversation was previous to the transfer. When the bonds become due, B brings an action against C on the bonds, in the name of A. C pleads non est factum, and B is cast in the suit. B then sues C on his promise to pay the bonds. Such action may well be maintained. *Cleaton v. Chambliss*, 6 Rand. 86.

Landlord and Tenant.—Where a landowner makes a contract with a railroad company to fence its right of way through his lands, and subsequently the landowner leases the land for a year to a tenant for farming purposes, and at the date of the lease the fence erected along the right of way by the railroad is in bad condition, and down in several places, the tenant can not maintain an action for damages on the contract. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816.

C. CONTRACTS FOR BENEFIT OF THIRD PERSONS.

1. Rule at Common Law.

The common-law doctrine is that an indenture is only available to the parties to it, and their privies and third persons can maintain no action of covenant thereon, although made for their benefit. *Jones v. Thomas*, 21 Gratt. 96. See *Ross v. Milne*, 12 Leigh 204; *Davis v. Commonwealth*, 13 Gratt. 151; *Boyles v. Overby*, 11 Gratt. 202; *Sangster v. Commonwealth*, 17 Gratt. 130; *Clarkson v. Doddridge*, 14 Gratt. 42; *Garland v. Richeson*, 4 Rand. 266; *Henderson v. Hepburn*, 2 Call 241; *Willard v. Worshan*, 76 Va. 392; *Newport News v. Potter*, 122 Fed. 321 (construing Va. Statute).

But in a West Virginia case the court was of opinion that the suit could be maintained at common law. It was said: Generally, he for whose interest a promise is made, may maintain an action upon it; although the promise be

made to another and not to him. *Nutter v. Sydenstricker*, 11 W. Va. 536. See *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 448.

2. Rule by Statute.

But by statute in Virginia and West Virginia it is provided that an immediate estate or interest in, or the benefit of a condition respecting any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise. West Virginia Code, 1899, ch. 71, § 2; Virginia Code, 1904, § 2415.

"We think the statute was enacted for a double purpose. One was to change the rule of the common law that one not a party to a deed inter partes could not sue for a breach of a covenant therein made for his benefit. The other purpose was to change the common-law rule that a suit for breach of a covenant made with two persons for the benefit of one of them must be jointly brought by both the covenantees." *Newport News v. Potter*, 122 Fed. Rep. 326.

The section of the West Virginia Code means, as if written as follows, including the words in parenthesis: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon," etc. *Johnson v. McClung*, 26 W. Va. 659.

Under the statute, if the promise is made for the benefit of another, though not made with him, he may maintain

an action thereon. *Johnson v. McClung*, 26 W. Va. 659.

Under the West Virginia Code of 1868, which provides that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such persons may maintain in his own name any action thereon which he might maintain in case it had been made with him only," it has been held, that in case of a contract equally for the benefit of several neither could sue. *Johnson v. McClung*, 26 W. Va. 659, cited in *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

But § 2415, Va. Code, 1904, was clearly not intended to change that part of the rule that only a person named or definitely pointed out in a deed as the beneficiary can sue thereon; and this was not its effect. The statute does not enable one who is not a party to the deed to maintain an action thereon, unless he is plainly designated by the instrument as the beneficiary, and the covenant or promise is made for his sole benefit. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899, citing *Johnson v. McClung*, 26 W. Va. 659; *Stuart v. James River, etc., R. Co.*, 24 Gratt. 297.

"If one of the objects of the statute was to abolish the distinction between deeds inter partes and deeds poll in the respect referred to, and to bring the former within the rule of the common law applicable to the latter, it was clearly not intended to change that part of the rule that only a person named or definitely pointed out in a deed as the beneficiary can sue thereon, and this was not its effect. The statute does not enable one, who is not a party to the deed, to maintain an action thereon, unless he is plainly designated by the instrument as the beneficiary, and the covenant or promise is made for his sole benefit. As was said by Judge Anderson in *Stuart v. James River, etc., R. Co.*, 24 Gratt. 297, the rule of the common law in this re-

spect has not been changed by the statute." *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

Insurance Contracts.—Under § 2415 of the Virginia Code of 1904, any person having an interest in property insured, though no party to the policy, may institute and maintain an action in his own name to the extent of the loss occasioned him by its destruction; and an objection, that as the contract, although made for his benefit, was not made with him, he could not sue in his own name, but only in the name of the person with whom the contract was made, can not be sustained. *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S. E. 120, citing *Clemmitt v. New York Life Ins. Co.*, 76 Va. 361.

"Sole Benefit."—In a federal decision the court held, that the words, "sole benefit" in § 2415 of the Virginia Code, 1904, are not to be construed as relating to the covenantor, but as relating to the other joint covenantee. *Newport News v. Potter*, 122 Fed. 321. Compare *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

Suit on Bond.—T. executed his bond as follows: "March 12th, 1863. I hereby bind myself, my heirs, etc., to pay — the amount of principal and interest due from J. on the tract of land purchased by him of W. and wife. Witness my hand and seal the day and date above;" and he delivered it to J. Held, J. might maintain an action of covenant on the bond against T. *Jones v. Thomas*, 21 Gratt. 96; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 360; Va. Code, 1873, ch. 12, § 2; *Willard v. Worsham*, 76 Va. 392.

Evidence.—One not a party to a deed inter partes, nor a privy to such party, and not named nor definitely pointed out in it as the beneficiary, can not sue thereon, either at common law or under the Virginia statute, Code 1887, § 1415, entitled "When a person not named a party, or named jointly with others may take or sue under instru-

ment," where it is said: "An immediate estate or interest in or the benefit of a condition respecting any estate may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Nor is extrinsic evidence admissible to show that the covenant sued on was made solely for his benefit. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899. See *Ross v. Milne*, 12 Leigh 204, 37 Am. Dec. 646; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355; *Norton v. Rose*, 2 Wash. 233; *Jones v. Thomas*, 21 Gratt. 96; *Willard v. Worsham*, 76 Va. 392, citing *Stuart v. James River, etc., R. Co.*, 24 Gratt. 294; *Johnson v. McClung*, 26 W. Va. 659, construing the West Virginia statute on this subject.

X. Evidence.

A. THE CONTRACT.

At the trial of an action of trespass on the case for breach of a contract in writing signed by the defendant, and binding him to build on a lot and pay ground rent for a term of years, the contract is admissible as evidence in behalf of the plaintiff, although it may have been a mere memorandum of an agreement to be afterwards substituted by a formal lease. *Bohn v. Newton*, 81 Va. 480.

B. LETTERS.

See the titles DOCUMENTARY EVIDENCE; RES GESTÆ.

Letters written long after a contract has been broken, which contain mere statements of one party's view of the differences between the parties, and the expression of a desire to have them

adjusted, constitute no part of the *res gestæ*, and are not admissible in evidence in an action to recover damages for a breach of the contract. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

C. OFFER AND ACCEPTANCE.

Evidence of Acceptance of Offer.—See ante, "Evidence of Acceptance," II, A, 2, f.

The burden of proof that a proposal to sell land has been accepted, rests upon the party claiming to have accepted the same. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 855.

The burden of proof that notice of the acceptance of a proposal to sell land has been communicated to the proposer within the time limited, rests upon the party claiming to have accepted the same. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743.

D. PAROL EVIDENCE OF CONSIDERATION.

See ante, "Parol Evidence," II, B, 6, i.

XI. Questions of Law and Fact.

The fact of the execution of a contract is a question for the jury to determine. *Bowyer v. Knapp*, 15 W. Va. 277.

Offer and Acceptance.—See ante, "Offer and Acceptance," II, A, 2.

"If one makes to another an offer, verbal or written, direct, by letter or by telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding

no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract; and the question of the sufficiency of the transaction to work this result is of law for the court" *Bish. Cont.*, § 322. See *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Pom. Cont.*, § 169; 3 *Amer. & Eng. Ency. Law*, 841; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 251.

Whether an offer has been accepted in reasonable time, is, in cases of doubt, a question for the jury. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

Interpretation and Construction.—As has been stated already, the interpretation and construction of contracts are governed by legal rules and therefore, are exclusively within the province of the judge. See ante, "Interpretation and Construction," IV.

Legality of Contract.—See the title **ILLEGAL CONTRACTS**.

When a question arises as to the legality of a written contract, it is for the court, and not the jury, to decide. *Hines v. Board of Education*, 49 W. Va. 426, 38 S. E. 550.

XII. Interference with Contract.

See the title **TORTS**.

If one wantonly and maliciously, whether for his own benefit or not, induce a person to violate his contract with a third person to the injury of that third person, it is actionable. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 612, 40 S. E. 591.

Contracts in Restraint of Marriage.

See the titles **ILLEGAL CONTRACTS**; **MARRIAGE**

Contracts in Restraint of Trade.

See the title **RESTRAINT OF TRADE**.

Contracts of Affreightment.

See the title CARRIERS, vol. 2, p. 688.

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See the titles BAILMENTS, vol. 2, p. 223; MASTER AND SERVANT.

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I. Definitions and General Principles.

A. DEFINITIONS.

Contribution.—As subrogation is the means of procuring for the surety indemnity from the principal, so contribution, founded on the same principle, equalizes cosureties, by obliging such as have paid nothing, or less than their shares, to indemnify such as have paid more. *Rosenbaum v. Goodman*, 78 Va. 121.

The doctrine is not founded on contract, but is the result of general principles of justice and equity on the ground of equality of burden and benefit. *Rosenbaum v. Goodman*, 78 Va. 127; *McMahon v. Fawcett*, 2 Rand. 514, 530. See post, "Between Cosureties," II, A.

Contribution is not due, by reason of any contract, express or implied. But, when any burthen ought, from the relation of the parties, or in respect of property held by them, to be equally

borne, and each party is in *æquali jure*, i. e., liable from the same circumstances existing as to both, contribution is due, unless the claim to contribution has arisen out of some actual fraud, or voluntary wrong, in which the party claiming contribution has participated. The mere nonperformance or violation of a civil obligation, is not such a wrong, as will condemn a claim to contribution. *Thweatt v. Jones*, 1 Rand. 328, 332.

Whether the doctrine of contribution "is the result of a general equity which equalizes burdens and benefits," or originates in a contract which the law implies, that the joint promisors, at the time of the giving of the joint obligation, mutually promise each other that if one is compelled to pay more than his proportion of the joint debt, the other will indemnify the one so paying to the extent of the excess over his just proportion, it is equally clear that the payment must have been made upon a debt for which the defendant was legally liable at the time of the payment, and which the obligor who pays was compellable to pay. *Turner v. Thom*, 89 Va. 745, 747, 17 S. E. 323.

B. WHEN CREDITOR MAY RESORT TO THE SURETIES, OR ANY OF THEM.

The creditor may proceed at law against the principal and the sureties in the first instance, and obtain a judgment and execution against them jointly. Nor will a court of equity interfere by injunction in such case, except under peculiar circumstances, the general rule being that "the creditor is under no obligation to look to the principal debtor or to his property, or to exhaust his remedies against the latter before resorting to the surety." *Penn v. Ingles*, 82 Va. 68, citing *Meade v. Grigsby*, 26 Gratt. 612; *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. 257. See *Call v. Ruffin*, 1 Call 333; *McMahon v. Fawcett*, 2 Rand. 514, 530.

So, where H., with B. as his surety,

executes his bond to M., executor, for land purchased of him by H., and which H. afterwards conveys to O., M. recovers judgment upon the bond against H. and B., and B. pays the debt, M. assigning it to him without recourse; on a bill by B. against O. and H. to subject the land to satisfy the debt, whether B. claims as assignee or as a security who has paid the debt, M. is not a necessary party. B. is entitled to have the land sold to pay his debt without proceeding first against H.; especially as O. did not ask for such a decree in the court below. *Omohundro v. Henson*, 26 Gratt. 511.

And, under certain circumstances, the sureties on the bond of a personal representative, may be sued in equity for the liabilities of their principal, before the remedy against the latter's heirs and personal representatives has been exhausted. *Lacy v. Stamper*, 27 Gratt. 42; *Barnes v. Trafton*, 80 Va. 534; *Horton v. Bond*, 28 Gratt. 826; *Franklin v. Depriest*, 13 Gratt. 257. Too onerous terms should not be imposed on the creditor. He ought not to be delayed in his recovery until he has pursued the personal representatives of the principal to the utmost limit of litigation. *Dabney v. Smith*, 5 Leigh 13; *Lacy v. Stamper*, 27 Gratt. 42.

The circumstances in the last-named case were, that the litigation had been long, extending over twelve years, and the legatees seeking to recover from the executor what was due them under the will, were the widow and minor children of the testator, who had been, nearly ever since, living in want and destitution. The decree appealed from was not final and the sureties could obtain all the relief they were entitled to by cross bill or otherwise in the same suit, and the court intimates that if they had made a reasonable payment into bank of what was required by the decree, the plaintiffs would have been compelled to wait for the balance till opportunity was afforded the sureties to proceed against the parties supposed

to be primarily liable; the court disclaims intention to lay down any general rule, and distinguishes *Aylett v. King*, 11 Leigh 486, and *Roberts v. Colvin*, 3 Gratt. 358.

In *Dabney v. Smith*, 5 Leigh 13, the parties primarily liable were dead and the creditor was not compelled to have the accounts of their administrators settled in order to a decree against them personally. "This would have been too onerous on creditor."

Creditor with Surety's Money in His Hands.—*Quære*, whether or not creditor with surety's money or its equivalent in his hands, will be compelled, without resorting thereto, first to exhaust his remedies against principal. *Southall v. Farish*, 85 Va. 409, 7 S. E. 534, citing *Meade v. Grigsby*, 26 Gratt. 612; *Penn v. Ingles*, 82 Va. 65; *Dabney v. Smith*, 5 Leigh 18; *Horton v. Bond*, 28 Gratt. 815; *Bell v. McConkey*, 82 Va. 176; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531.

Creditors Must Not Be Delayed or Hampered.—And in a suit in equity to subject the land of a judgment debtor to judgments against him, which are numerous, and in favor of different persons, the fact that in one of the debts he is a surety with other solvent sureties of an insolvent principal does not require that lands of the solvent cosureties be brought into the case, and subjected to pay a portion of that debt, though those cosureties are parties by reason of the right to contribution, nor require a decree of contribution therein. *Farmers' Bank v. Woodford*, 34 W. Va. 481, 12 S. E. 544.

This would put too great a burden on the creditors here. But the court disclaims holding that, in a proper case, equity would not require it to be done. *Farmers' Bank v. Woodford*, 34 W. Va. 481, 12 S. E. 544.

These cosureties were made parties, and were necessary parties, because they were sureties, and for several reasons, and, being parties, when the debt was established and its amount fixed,

the decree would be conclusive as between them as to those points, and, in any suit which might arise between them afterwards to enforce contribution, it would have its legal effect; but there was no call on the court to declare in the decree that there was a right of contribution, or to bring in lands of other debtors because of that right and settle the liens on them. The facts on which such contribution rests were not in the bills, and could not be based on the pleadings as between plaintiffs and defendants. The bill does not state the relation of surety and principal, or that the cosureties owned land. *Farmers' Bank v. Woodford*, 34 W. Va. 481, 12 S. E. 547.

Creditors Not Concerned Therewith.

—This right to contribution is an equity existing between the sureties, springing from their relation to each other as regards the debt, and the creditor has nothing to do with it, and certainly is under no obligation to enforce it for the benefit of the sureties as between themselves. He has no relation to it, save that it grows out of his debt. *Farmers' Bank v. Woodford*, 34 W. Va. 481, 12 S. E. 546.

C. WHEN CREDITOR COMPELLED TO RESORT TO PRINCIPAL, OR ALL THE SURETIES.

Burden Placed Where It Belongs in First Instance.—"While it is true that the sureties as well as their principal are all bound by the complainant's judgment, and he has the undoubted right to resort for satisfaction to the property of each and all of them, in equity, in a suit in which all the parties are alive and before the court, the court will respect the equities of the parties inter sese, and administer them upon the principles peculiar to that forum as far as can be done without too great delay, and without prejudice to the rights of the creditor. The principal debtors' land should first be subjected to the exoneration of the lands of the

sureties. (*Horton v. Bond*, 28 Gratt. 815, 825.) And where all the sureties are before the court the entire burden should not be thrown upon one of them. (Citing) *Gentry v. Allen*, 32 Gratt. 254, 261." *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 560. See also, *Udike v. Lane*, 78 Va. 137; *Stovall v. Border Grange Bank*, 78 Va. 195; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531; *Womack v. Paxton*, 84 Va. 24, 5 S. E. 550; *National Bank v. Bates*, 20 W. Va. 222; *Muse v. Friedenwald*, 77 Va. 63; *Penn v. Ingles*, 82 Va. 68; *Wytheville, etc., Co. v. Frick Co.*, 96 Va. 141, 30 S. E. 491; *West v. Belches*, 5 Munf. 187.

But this rule will not be carried to the extent of delaying the creditor indefinitely. *Bell v. McConkey*, 82 Va. 176; *Martin v. South Salem Land Co.*, 97 Va. 349, 33 S. E. 600.

In *Bentley v. Harris*, 2 Gratt. 357, it is put on the ground of waiver by the creditor of his rights.

So, upon a bill by a judgment creditor to subject the lands of a principal and his sureties, after the lands of the principal debtor are sold and applied pro tanto to the satisfaction of the judgment, the portion of the judgment which each surety should pay should be ascertained, and a separate decree should be made against each surety for his said portion and upon his failure to pay it, for a sale of his land. And if either of the sureties should fail to pay the decree against him, and his land when sold does not satisfy the decree, the amount of the deficiency should be apportioned among the other sureties, with decree against them in same form, and so on until judgment is satisfied or all the lands of all the sureties are sold. *Horton v. Bond*, 28 Gratt. 816; *Dobyns v. Rawley*, 76 Va. 539; *Redd v. Ramey*, 31 Gratt. 265. See *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370, where the entry of a decree, void for want of service of process, was just ground of complaint to a cosurety decreed against.

Equality between Cosureties to Be Preserved if Possible.

—It is error to decree against the land of one surety, on a bond with a deceased principal, alone for the whole amount of the judgment, until an inquiry had been made as to whether there were lands held by the other sureties which might be subjected to satisfy their portion of the judgment, all being before the court. *Gentry v. Allen*, 32 Gratt. 254; *Stovall v. Border Grange Bank*, 78 Va. 196; *Horton v. Bond*, 28 Gratt. 815. See also, *Hall v. James*, 75 Va. 111; *National Bank v. Bates*, 20 W. Va. 222; *First Nat. Bank v. Parsons*, 42 W. Va. 154, 24 S. E. 554.

Erroneous Decree against Surety.

—It is error to decree the sale of the surety's land before inquiry as to whether the principal has not land first liable. *Dillard v. Krise*, 86 Va. 410, 10 S. E. 430; *Ewing v. Ferguson*, 33 Gratt. 548; *Womack v. Paxton*, 84 Va. 9, 5 S. E. 550.

A decree should not be made against the representative of the surety of a guardian until the account of the administratrix of the guardian is settled, and an inquiry is directed to ascertain whether any estate, real or personal, of the guardian remains. *Roberts v. Colvin*, 3 Gratt. 358. Here the suit for an account of the guardianship had lingered along for twenty-four years, and the decision was said, in *Lacy v. Stamper*, 27 Gratt. 42, to be intended to rest on its own peculiar circumstances and not to overrule *Dabney v. Smith*, 5 Leigh 13.

Effort Must Be Made to Collect from Primary Debtor First.

—Where an executor dies indebted to his testator's estate, but leaving assets sufficient to discharge the debt, which are received by his executor, who, instead of making payment to the legatees of the first testator, distributes the assets among the legatees of his own testator, the surety of the first executor is responsible for the amount due to the first testator's legatees, but equity will not sub-

ject him to the payment thereof, until the legatees of the first executor, who received the assets of his estate, and the sureties of the second executor, have been brought before the court, and an effort to collect from them the amount due has proved unavailing. *Aylett v. King*, 11 Leigh 486; *Dabney v. Smith*, 5 Leigh 18, distinguished.

D. DEATH OF PARTY LIABLE TO CONTRIBUTION—EFFECT.

The right to contribution ought not to be considered as impaired by the fact (if it really existed in this case) that one of the parties and his estate was absolved by this death from all liability to the party injured. He who claims contribution, does not claim by substitution to the rights of the party whose demand he has satisfied, but upon the broader principle, that he who has exclusively borne the burthen which ought to have been borne jointly with another, is entitled to be rateably indemnified, as in the case of party walls, and average in cases of loss at sea. *Thweatt v. Jones*, 1 Rand. 328, 334.

E. ENTITLED TO CREDITOR'S PRIORITIES.

Two of the sureties of a United States collector, who has made default, and died insolvent, are entitled to be subrogated to the right of priority of the United States, in the payment of the debt; when they have paid it, as against the estate of another surety who had died before the insolvency of the collector. *Robertson v. Trigg*, 32 Gratt. 76. See post, "Mode and Time of Enforcement," III, A, 2.

"A surety who has paid a debt, for which he is bound with others, is entitled to be subrogated to all the rights of the creditor against either the principal debtor or cosureties, to the extent of their liability. *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335." *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

F. REMEDIES IN EQUITY AND AT LAW COMPARED.

See post, "Actions," IV, A.

1. Contribution.

The doctrine of contribution among sureties being found rather on principles of equity and natural justice than upon any notion of mutual contract, express or implied, it is true it may be enforced at law, although no positive contract between the sureties can be shown, but the principles and the measure of relief afforded in the court of equity are different from those of the law courts. Thus, if one of the several sureties be insolvent, and another pays the debt, he can at law recover from the other solvent sureties only their original quotas without regard to the share of the insolvent surety. But in equity the share of the insolvent surety will be apportioned amongst those who are solvent. *Tarr v. Ravenscroft*, 12 Gratt. 652, 653; *Robertson v. Trigg*, 32 Gratt. 76; *Preston v. Preston*, 4 Gratt. 88.

So, if one surety die, the remedy at law lay only against the survivors; but a court of equity would compel contribution from the estate of the deceased surety. *Tarr v. Ravenscroft*, 12 Gratt. 652, 653.

And in *Wayland v. Tucker*, 4 Gratt. 267, it was said that "no adequate relief could have been afforded at law; as the security can only recover at law the aliquot portions of each security. But in the present case as there were three securities and the cosecurity was insolvent, a resort to a court of equity was necessary to apportion his share among the two remaining sureties."

See *Thweatt v. Jones*, 1 Rand. 328, 333, where it is said: "Courts of law enforce contribution only in cases where a contract between the parties to that effect may be presumed; but courts of equity indulge in a larger jurisdiction, and admit contribution whenever the parties were originally subject, jointly, to the burthen, and are in

æquali jure, and where the party claiming the assistance of the court, is not precluded, by his own turpitude, from receiving it."

Contribution is one ground of equity jurisdiction and relief. *Neff v. Baker*, 82 Va. 401, 4 S. E. 620.

Contribution between Legatees—Choice of Remedies.—A creditor, having obtained a judgment against an executor as such, and sued out a *fi. fa. de bonis testatoris*, which proved ineffectual, may either resort to his action at law to establish a devastavit, or file a bill in equity against the executor and legatees, for an account of assets, and proportional contribution to pay the debt. *Sampson v. Payne*, 5 Munf. 176. See *Burnley v. Lambert*, 1 Wash. 312.

Effect of Assumption of Jurisdiction by Courts of Law.—The jurisdiction now assumed by courts of law to enforce contribution in some cases, does not affect the jurisdiction originally belonging to a court of equity. *Wayland v. Tucker*, 4 Gratt. 267; *Cabell v. Megginson*, 6 Munf. 202; *Tinsley v. Oliver*, 5 Munf. 419.

2. Exoneration.

Principal and Sureties—Rights of Sureties.—Where a defaulting, insolvent ex-sheriff, with the proceeds of taxes collected by him, has taken up a large number of county orders, and, instead of having them credited as payments on his arrearage, is engaged in secretly selling and transferring them to various persons, who are trying to collect them again from the county, at the instance of the sureties of such ex-sheriff, a court of equity will interfere, and compel the application of such orders to the relief of such sureties. *Maxwell v. Miller*, 38 W. Va. 261, 18 S. E. 449.

Sureties on Official Bond Seeking Exoneration, Where Bond Is Joint Only.—If an official bond, given by a sheriff and his sureties before the act of 1786, be so worded as not to be joint and several, but joint only, a court of chan-

cery is the proper tribunal to give the sureties relief against the estate or the sheriff after his death, upon their being compelled to pay a sum of money for a delinquency of such sheriff in his lifetime. *Mountjoy v. Banks*, 6 Munf. 387.

Against Principal's Estate.

Remedy in Equity against Principal's Estate to Surety Paying Judgment.—A surety in a bond, having paid to the creditor the amount of a judgment against him thereupon, may file a bill in equity (without having made a motion or brought any action in law), against the administrator and heirs of the principal obligor; for the purpose of establishing his demand; of having an account of the personal and real estates; and of being permitted to stand in the place of the obligee in the bond, so as to be paid out of the real estate, in default of the personal. *Tinsley v. Oliver*, 5 Munf. 419. See post, "Actions," IV, A.

G. EQUITABLE RELIEF BEFORE PAYMENT OF LIABILITY—BILL QUIA TIMET.

A surety is entitled, the debt being due, to come into equity by a bill *quia timet*, against the creditor and the debtor, and compel the latter to make payment of the debt so as to exonerate himself from his responsibility. He may enforce for his exoneration, any liens of the creditor on the estate of the principal; and if the latter be dead, may bring any suit in equity which the creditor could bring for a settlement of the administration account of the estate of the decedent, and for administration of the assets, whether legal or equitable. *Stephenson v. Taverners*, 9 Gratt. 404, 405; *Call v. Scott*, 4 Call 402; *Kent v. Matthews*, 12 Leigh 573; *Penn v. Ingles*, 82 Va. 71; *Meade v. Grigsby*, 26 Gratt. 612; *Mattingly v. Sutton*, 19 W. Va. 27; *Watson v. Wigginton*, 28 W. Va. 575; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172. See the title QUIETING TITLE. See now the statute au-

thorizing surety to require creditor, by notice, to sue debtor. Va. Code (1904), §§ 2890, 2891; W. Va. Code (1899), ch. 101, §§ 1, 2. See the title SURETYSHIP.

But surety is entitled only to such security as the creditor has against the principal. *Barton v. Brent*, 87 Va. 390, 13 S. E. 29.

The only difference is that he must bring the creditor into court along with him, in order that he may receive the money when it is recovered. *Stephenson v. Taverners*, 9 Gratt. 404, 405; *Call v. Scott*, 4 Call 402.

A surety upon the purchase money bonds given for a tract of land, against whom judgments have been recovered on the bonds, no conveyance having been made for said land, may go into a court of equity to subject the land to the payment of the debt, before he has been compelled to pay it himself. *Hatcher v. Hatcher*, 1 Rand. 53.

H. RIGHT TO CONTRIBUTION AND EXONERATION AS OFFSETS.

Contribution—Against Assigned Bond.—The principal and two of three sureties in a bond became insolvent, and the other surety paid the debt, having previously executed his bond for less than half the first bond, to one of his cosureties, who had conveyed it in trust for his creditors. After the payment of the first-mentioned debt by the solvent surety, judgment being rendered against him on his own bond, which he enjoined, claiming to offset it by his cosureties' portion of the debt he had paid, he is entitled in preference to the assignee of his bond, and to relief in equity, notwithstanding the judgment at law. *Wayland v. Tucker*, 4 Gratt. 267.

Exoneration.—A payment by the surety to the creditors may be set off in an action by the principal against the surety, although not made until after suit brought. * * * And a court of equity will not permit a plain-

tiff at law to enforce against the defendant the collection of a debt, when the defendant stands as surety for the plaintiff to an amount greater than that sued for, unless the plaintiff will fully indemnify the defendant against his liability as his surety, more especially if the plaintiff is shown to be insolvent. *Mattingly v. Sutton*, 19 W. Va. 31.

And where the obligee in defendant's bond, payable January, 1820, after it became due assigned it to plaintiff; but before notice of the assignment, defendant became the obligee's surety on another bond, payable in 1822, and he became insolvent, defendant is entitled, in equity, to set off the amount of the latter bond, on which he was surety, though not due, against his own bond in the hands of the plaintiff assignee. *Feazle v. Dillard*, 5 Leigh 34; *Gordon v. Rixey*, 86 Va. 853, 11 S. E. 562.

I. WHAT STATE LAW GOVERNS DISTRIBUTIONS.

Where heirs and legatees have received their shares of a decedent's estate under the laws of Louisiana, their right to hold and enjoy the same, and their liability to make contribution for the payment of debts must be regulated and controlled by the same law. *De-Ende v. Wilkinson*, 2 Pat. & H. 663. See the titles CONFLICT OF LAWS, ante, p. 100; EXECUTORS AND ADMINISTRATORS.

J. RIGHT OF CONTRIBUTION UNAFFECTED BY COMPROMISE.

See the title COMPROMISE, ante, p. 37.

Where a creditor has compromised with one of several joint obligors, under §§ 2857, 2858 and 2859 of the Code of Virginia, 1887, and received his full share of the obligation and released him, the right of contribution between the (other) joint obligors is not, under said sections, impaired by such compromise. *Penn v. Bahnson*, 89 Va. 253, 15 S. E. 586. Section 2859, above construed, is as follows: "Right of con-

tribution not affected. Nothing contained in the three preceding sections shall affect or impair the right of contribution between joint contractors and co-obligors."

By the terms of § 2859 of the Code of Virginia, 1887, the release of a surety by compromise with the creditor can not affect or impair the right of any other surety, who may have been required to pay more of the debt than was so released, to call on him for contribution. And when a surety has conveyed all his property in trust to secure ratably all his debts, said property is liable to contribution to his cosurety. *Yuille v. Wimbish*, 77 Va. 308.

II. Contribution.

A. BETWEEN COSURETIES.

1. On What Founded.

See ante, "Definitions," I, A.

The right of one surety to call upon his cosurety for contribution, like the right of all the sureties to call upon the principal for indemnity, arises from a principle of equity, growing out of the relation which the parties have assumed towards each other; the equity springs up at the time of entering into that relation, and is fully consummated when the surety is compelled to pay the debt. *Wayland v. Tucker*, 4 Gratt. 268, cited with approval in *Tate v. Winfree*, 99 Va. 255, 37 S. E. 956; *McMahon v. Fawcett*, 2 Rand. 514, 529.

The claim of one security for contribution from his cosecurities, upon which the demand of the appellant is based, is the creature of the courts of equity. "It is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it." *L. C. B. Eyre in Dearing v. Earl of Winchelsea*, 2 Bos. & Pul. 270, 1 Lea. Ca. Eq.; *Claybrook v. Scott*, 1 Va. Dec. 319.

Contribution among sureties is founded in natural justice and the equitable principle of equality of burden and benefit. If one of a number of sureties discharge the common bur-

den, the others are bound to contribute equally to his relief, in the event of the insolvency of the principal; and if any of them are insolvent, their shares must be apportioned among those that are solvent. *Preston v. Preston*, 4 Gratt. 88; *Wayland v. Tucker*, 4 Gratt. 267; *Robertson v. Trigg*, 32 Gratt. 76; *Gentry v. Allen*, 32 Gratt. 254; *Harnsberger v. Yancey*, 33 Gratt. 527; *Pace v. Pace*, 95 Va. 794, 30 S. E. 361; *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848. See also, *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142.

Where the evidence clearly proves that the plaintiff paid the money upon a judgment rendered against him and the defendant as cosureties, and it appears from the facts and evidence that the circuit court ought to have given judgment for the plaintiff against the defendant for one moiety of the judgment so paid, it is error for the court to find for the defendant and render judgment in his favor. *Applegate v. Hinkson*, 8 W. Va. 594.

Must Be Bound for Same Principal and Same Engagement.—It is essential that they should be "cosecurities for the same principal and for the same engagement." *Claybrook v. Scott*, 1 Va. Dec. 320. See post, "Common Interest or Liability," II, A, 4.

When such is the case, and one of the cosecurities has paid the debt, his right to contribution becomes absolute, and this upon a principle of natural justice, that when all are equally bound, the burden should be borne not by one alone, but by all equally. The right to contribution is therefore stated to depend upon the principles of equity, and not upon contract, except as it may be so represented upon the implied knowledge of those principles; and it was upon the implied assumption then arising that Lord Eldon, in *Craythorne v. Swinburne*, 14th Vesey 164, justified the jurisdiction of courts of law upon this subject. *Claybrook v. Scott*, 1 Va. Dec. 320; *Robertson v. Trigg*, 32 Gratt. 76; *Applegate v. Hinkson*, 8 W. Va.

594; *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 648.

Court Looks to the Real Transaction.

—In ascertaining whether such cosecurityship exists as to give the right to contribution, the court looks to the real transaction. The liability depends not on its form, but its essence, and parol evidence is admissible to show what the contract was, out of which the alleged liability to contribution arises. *Claybrook v. Scott*, 1 Va. Dec. 320, citing *Harrison v. Lane*, 5 Leigh 418. See *Boulware v. Hartsook*, 83 Va. 679, 3 S. E. 289.

Thus, where there were two bonds, with a different principal and surety in each, and both were sued upon and a decree rendered in the consolidated causes against both principals and both sureties, and an appeal taken by all the defendants from said decree, the superseas bonds were only executed by one of the principals and his surety (with other new sureties). The decree being affirmed, it was held, that the surety in the original bond who joined in the appeal bond was entitled to contribution from the surety upon the other bond, who did not join in the appeal bond, as cosecurity on the original contract, for the amount paid on the said appeal bond. *Harnsberger v. Yancey*, 33 Gratt. 527.

It sufficiently appears from the record that the surety on the appeal bond who was also one of the original sureties, with his co-obligors, gave the appeal bonds not merely for himself and in his own interest but also in the interest and behalf of all the appellants, including the other principal and his surety on the original bond, and with their sanction and approval. *Harnsberger v. Yancey*, 33 Gratt. 527, 541.

While the other surety continued to be surety for the amount decreed against him and his principal, yet, by the execution of the bond with his concurrence, the obligors (except such principal) became thereby not sureties for or instead of him but sureties with

him; that is, cosureties for the amount of the decree against him, and are entitled, not to full indemnity from him (as in the claim against the other principal) for what was paid by them on the bonds and applied to his relief on the decree, but to contribution of an equal share of what was so paid and applied; and to enforce such contribution they are entitled to the same rights and remedies, by subrogation against their cosurety, as a surety, under like circumstances, would be entitled to against his principal. *Harnsberger v. Yancey*, 33 Gratt. 527, 543, citing *Robertson v. Trigg*, 32 Gratt. 76, 85, 86.

Contribution and Exoneration Distinguished.—Where judgment is recovered, and a fi. fa. sued out against D, a principal debtor, and A and B his sureties, and the fi. fa. levied on the goods of D, the principal, who gives a forthcoming bond in which A and B and another person, E, are bound as D's sureties; and on execution of the forthcoming bond, E is compelled to pay the debt; E is cosurety with A and B, for D, in the forthcoming bond, not surety for A and B as well as D, and therefore E is entitled only to contribution from A and B as cosureties, not to full indemnity from them as principals. *Langford v. Perrin*, 5 Leigh 552. Observe that a large majority of the cases of contribution are between cosureties, and the general requirements that must be fulfilled in order to its application to that relationship, obtain very generally in the other relationships to which it is applicable.

2. Who are Cosureties Entitled to Contribution.

Those bound for the same thing, though by different instruments, at different times and without one another's knowledge, are cosureties, and will be made, in equity, to contribute. *Rosenbaum v. Goodman*, 78 Va. 121; *Corprew v. Boyle*, 24 Gratt. 290, 292; *Harrison v. Lane*, 5 Leigh 414. See post, "Common Interest or Liability," II, A, 4.

And one who has induced another to sign as surety, promising to indemnify him against loss, who afterwards takes up and pays the obligation, is to be considered one of the sureties, although the transaction was without the knowledge of the other sureties, and he is entitled to contribution from such prior sureties. *Stout v. Vause*, 1 Rob. 169.

Cosurety, Though Subsequent in Time.—And so, if there be two parties bound as principal and surety for a debt or other engagement, and a third party afterwards, at the request of the principal, bind himself as surety for such debt or engagement, the two sureties, in the absence of any agreement to the contrary, become cosureties of the same principal and for the same debt or engagement. In either case, to establish the relation predicated, it is not necessary to show an express request by direct proof. Circumstances may be shown from which a request may be fairly and reasonably inferred. *Harnsberger v. Yancey*, 33 Gratt. 540; *Perrins v. Ragland*, 5 Leigh 552.

Knowledge of Each Other's Suretyship Immaterial.—It is of no consequence whether one surety knew that the other had signed it or not, for where successive indorsers all indorse for accommodation of the maker, though at different times and without communication or mutual understanding, they are in equity cosureties and subject to common contribution. *Stovall v. Border Grange Bank*, 78 Va. 188; *Stout v. Vause*, 1 Rob. 179; *Rosenbaum v. Goodman*, 78 Va. 121.

Signing as Surety Prima Facie Evidence of Suretyship.—The addition of the word "surety" or "security," to the signature of a bond, is prima facie evidence of the suretyship, though it may be rebutted by proof to the contrary. *Boulware v. Hartsook*, 83 Va. 684, 3 S. E. 289; *Harper v. McVeigh*, 82 Va. 751, 1 S. E. 193.

And the addition of the word "surety" or "security," to the signature of a

bond, while prima facie evidence of the suretyship, may be rebutted by proof to the contrary, and especially by proof that the party claiming to be surety got the benefit of the money individually, or as partner in a firm into whose business it went. *Boulware v. Hartsook*, 83 Va. 684, 3 S. E. 289; *Harper v. McVeigh*, 82 Va. 751, 1 S. E. 193.

Forthcoming Bond—Obligee Here Also a Surety Having So Signed.—A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor, as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety, of a motion for award of execution upon the bond, against them, but the notice does not mention the obligee as a co-obligor. The bond is a valid bond to bind the other surety, but he is only liable as a cosurety with the obligee, and if the principal creditor proves insolvent, the surety may be relieved to the extent of one moiety of the debt, either by bill in equity, or by motion under the statute for the relief of sureties. *Booth v. Kinsey*, 8 Gratt. 560.

Cosuretyship a Matter of Contract.—But the sureties on the official bond of a deputy sheriff can not claim contribution from the sureties on a second and supplemental bond of the same form and nature, given later, and containing a memorandum to the effect that it should not be resorted to as long as the sureties in the first bond should be residents of the state and it should appear that complete indemnity could be had without resorting thereto. *Harrison v. Lane*, 5 Leigh 414; *Cornwall v. Boyle*, 24 Gratt. 284.

Surety of a Surety.—One who has executed a bond as surety for the principals therein, is not entitled to call for contribution, he having satisfied the bond, upon another party thereto who signed, not as cosurety with himself, but as surety for him as well as for

the principals. It is further said, by way of dictum, that the same would have been true, even if it had been a true cosuretyship, because he had voluntarily and without the knowledge of his principals executed his bond for the amount of the indebtedness, and later for a new consideration to himself, viz., extension of time of payment, executed his notes for the balance remaining due, which was accepted in discharge of his principal's indebtedness. *Singer Mfg. Co. v. Bennett*, 23 W. Va. 16; *Stout v. Vause*, 1 Rob. 179.

3. Diligence to Charge Principal.

A court of equity will not compel a security in a bond to contribute to the relief of his cosurety who has been forced to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent. *McCormack v. Obannon*, 3 Munf. 484, cited with approval in *Galt v. Calland*, 7 Leigh 603, saying that it is not necessary that insolvency should be established by action at law.

4. Common Interest or Liability.

Where Not for Same Principal and Same Engagement.—Where the obligee in a bond assigned same to S. agreeing in writing as follows: "I have this day passed to S. the bond (describing it), for which I bind myself and my heirs to said S. as one of the securities," the original security on the bond, paying the debt upon insolvency of the principals, could not enforce contribution against him as cosurety, their suretyship not being for the same principal and for the same engagement. *Claybrook v. Scott*, 1 Va. Dec. 316.

Sureties with Distinct Obligations Not Entitled.—L. bought goods of E. just before he was adjudicated bankrupt. The marshal seized them, claiming sale fraudulent, and L. gave a forthcoming bond for them, with R. as surety. The sale being held fraudulent, L. appealed, with new sureties

on the appeal bond, and lost. He then appealed to the United States supreme court, and lost again, with another appeal bond and new sureties. By this time the goods were squandered and R., forced to pay their value, sued the appeal bonds sureties for indemnity, which was denied because those sureties were not cosureties of R., being bound for wholly distinct things; R. being bound for the delivery of the goods on the decree of the court, they only for the damages and costs resulting from L.'s failure to prosecute his appeals to the reversal of the decrees appealed from. *Rosenbaum v. Goodman*, 78 Va. 121.

And so, although those bound for the same thing, though by different instruments, at different times and without one another's knowledge, may still be cosureties, it is not so where the obligations are for wholly distinct things, though arising from same principal indebtedness. *Rosenbaum v. Goodman*, 78 Va. 121; *Langford v. Perrin*, 5 Leigh 552; *Givens v. Nelson*, 10 Leigh 382.

For the right of mutual contribution exists only amongst those who are cosureties—that is, sureties for the same thing, and bound for the discharge of the same duty, whether by the same or different instruments, at the same or different times, and with or without the knowledge of one another. *Harrison v. Lane*, 5 Leigh 414, 600; *Stout v. Vause*, 1 Rob. 179; *Rosenbaum v. Goodman*, 78 Va. 127.

Where nearly a month after the protest of a negotiable note on which two makers are bound, one of the makers, for the purpose of paying the note, executes his two negotiable notes, dated on the day of their execution, and with one exception endorsed by new endorsers, and has the same discounted and the proceeds placed to his personal credit in bank, and out of the money thus obtained pays the original note by his individual check, and the note is marked paid by him and delivered to

him, and assigns the same to the endorser of one of the new notes, this is not a renewal of the first note, but an independent transaction, and the assignee of that note is entitled to demand of the other joint maker of it the payment of one-half therefor for the sole benefit of such assignee, and to the exclusion of the other endorsers of the new notes. *Conrad v. Smith*, 91 Va. 292, 21 S. E. 501.

And where the obligations of the different classes of sureties are for wholly distinct things, and have no relation to, nor operation upon one another, though they may arise out of the same principal indebtedness, there is no claim from one class upon the other either for contribution or indemnity. *Rosenbaum v. Goodman*, 78 Va. 121, 27.

And if there be one set of sureties bound for a debt, and then the obligee takes another bond, as collateral and supplemental security, these last obligors binding themselves to pay if the principal and sureties in the first bond fail, this bond will bind them no further than they have contracted. This is of the very essence of the contract; and the case of *Craythorne v. Swinburne*, 14 Ves. 160, is express to this point. Nor is the taking such second bond a fraud upon the obligors in the first; it does not increase their burden, or in any way change their situation. *Harrison v. Lane*, 5 Leigh 414, 417.

Contribution Denied Where Forthcoming Bond Is Given to Save Principal's Property.—Here one of the sureties in the original bond, who went upon the forthcoming bond as surety for his principal was held to have no right to contribution from another surety in the original bond, who had nothing to do with the forthcoming bond, because the latter was discharged from liability by the levy of the execution sued out for the original debt on the property of the principal debtor, and the forthcoming bond taken under that execution. *Langford v. Perrin*,

5 Leigh 552. See *Lusk v. Ramsay*, 3 Munf. 417.

Where the debt for which a surety was bound was discharged by the levy of an execution sued out for that debt on the property of the principal debtor, and a forthcoming bond taken under that execution, the surety was no party to that proceeding, and to hold that he was not discharged, would put this surety in a strange situation; he was willing to go a certain length, but we would say he shall go all lengths. *Langford v. Perrin*, 5 Leigh 552.

But where the new surety on the forthcoming bond is compelled to pay the debt, he is a cosurety with the other sureties therein, parties to the old bond, and not surety for them, and so is entitled to contribution alone from them, not exoneration. *Langford v. Perrin*, 5 Leigh 552.

In *Harnsberger v. Yancey*, 33 Gratt. 540, it is said: "But where there is a judgment or decree against a principal debtor and his surety, and a third party at the instance of the principal and for his sole benefit and without the assent of the surety, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment or decree and thus prejudice the rights of the first surety, the equity of the latter is superior; and it seems to be well settled that in such case the second surety would not be entitled to contribution from the first, and there is much authority for the proposition that the first would be entitled to indemnity from the second. This principle has been applied to injunction bonds, bail bonds, prison bounds bonds, forthcoming bonds, and appeal bonds." Citing *Langford v. Perrin*, 5 Leigh 552; *Douglass v. Fagg*, 8 Leigh 588; *Givens v. Nelson*, 10 Leigh 382; *Stout v. Vause*, 1 Rob. 169; *Robinson v. Sherman*, 2 Gratt. 178; *Bentley v. Harris*, 2 Gratt. 357; *Leake v. Ferguson*, 2 Gratt. 419; *Preston v. Preston*, 4 Gratt. 88. See also, *Dent v. Wait*, 9

W. Va. 45. But this principle does not apply where the forthcoming bond is given for the surety's own property, which has been levied on, and contribution is enforceable against the sureties in the original bond by the one paying the debt. *Preston v. Preston*, 4 Gratt. 89.

The rule supposes that the first surety does not sanction the interposition of the second. It does not apply, therefore, where the surety in the second bond becomes bound for a purpose in which both the principal and prior surety concur, in which they both have an interest, where the prior surety's assent is given expressly or clearly to be inferred. *Harnsberger v. Yancey*, 33 Gratt. 527, 541.

Thus, a judgment, having been recovered against one surety, and an execution levied on his property, he executes a forthcoming bond with another of the sureties, against whom no judgment had then been obtained, as his surety in the forthcoming bond; and the bond is forfeited. The surety in the forthcoming bond, having paid the debt, is entitled to contribution from the other sureties in the original bond. *Preston v. Preston*, 4 Gratt. 88.

But as to the rule of contribution if the surety, who is the principal in the forthcoming bond, becomes insolvent, see post, "Measure of Contribution," II, A, 6. His surety can not recover from other sureties in the original bond, any of such principal's proper share.

5. Payment or Discharge of Common Liability.

Obligor Paying Must Be Compellable to Pay—Co-Obligor Legally Liable.—To entitle one joint obligor to recover from his co-obligor money paid by him in excess of his proportion, the payment must have been made upon a debt for which the later was legally liable at the time of the payment, and which the obligor paying was compellable to pay, and not upon

a debt that was barred as to the obligor sought to be charged, and who may be, as in the case here, a personal representative, forbidden to pay, under Va. Code, § 2676, without making himself personally liable to extent of such payment. *Turner v. Thom*, 89 Va. 745, 17 S. E. 323.

Must Be Involuntary Satisfaction by One of Claim for Which Another Is Equally Liable.—M sold land to H and executed to him a bond with A and B as sureties, by which he bound himself to convey the land to H by a good deed with general warranty, and to indemnify him against the title or claim of any other person to said land, M afterwards selling another part of the same tract to A. Suit was brought by a prior mortgagee of the whole against A to foreclose the mortgage, and under a decree in that suit, to which H was not a party. A paid off the mortgage debt. Pending the suit, A purchased of H his land. The breach of the condition of M's bond was not established so as to entitle A to proceed thereon for contribution to the satisfaction of the mortgage debt against his co-surety B, M being insolvent, for both tracts of land owned by A were subject to the lien, and the decree was to sell the first tract, not that in reference to which the bond was executed. That tract was not noticed and H was not a party nor affected thereby, and the court said there had been no breach of the condition by the assertion of any claim against that tract, H could not recover, and his assignee, A, was, in no better position, certainly. *Quære*, as to what would have been the effect of making H a party defendant. *Henkle v. Allstadt*, 4 Gratt. 284.

6. Measure of Contribution.

Sureties May Claim Benefit of Securities Held by Their Cosureties.—"Sureties are not only entitled to contribution as between themselves personally, for moneys paid in discharge of the common debt, but they may also

claim the benefit of all securities which any one of their number may have taken for his indemnity; and if a surety who seeks contribution has been reimbursed part of what he has paid, either by the debtor himself, or through a counter security, or from any source, he must give credit for the amount reimbursed, and can only claim contribution for the balance. From these principles it follows, as a necessary corollary, that if one surety purchases in the common debt for less than its nominal amount he can only claim contribution of a cosurety for the amount actually paid by him." *Tarr v. Ravenscroft*, 12 Gratt. 642, 653. See also, *Strother v. Mitchell*, 80 Va. 157; *McMahon v. Fawcett*, 2 Rand. 514; *Thorntons v. Fitzhugh*, 4 Leigh 216, 220.

It is a settled principle of equity that if one of several cosureties subsequently take a security from the principal, for his own indemnity, it enures to the common benefit of all the sureties. If, therefore, the principal convey property by deed of trust expressed for the benefit of one of the sureties only, the others have an equity to come upon it, to the same extent that he can. *West v. Belches*, 5 Munf. 187; *McMahon v. Fawcett*, 2 Rand. 514; *Boughner v. Hall*, 24 W. Va. 249, 264; *Yuille v. Wimbish*, 77 Va. 308.

And where one surety has possessed himself of the property which was the primary security for the payment of the debt, by purchase at an irregular bankrupt sale of the property of the principal debtor, the debt must be considered as extinguished by the passage of this property into his hands charged with the lien of such judgment debt, and such surety is not entitled to contribution from the other surety for such debt. *Boulware v. Hartsook*, 83 Va. 679.

Only Actual Payments Recoverable.

—A sheriff, being in arrears for the state revenue for the year 1856, with certain of his sureties on his official

bond, borrowed two thousand, five hundred dollars, to be used in paying said revenue, and one of said sureties, by the consent of all the others, received the amount of said loan and applied a part thereof to pay said revenue and retained the residue. The surety was afterwards compelled to pay the balance due upon said loan and sued his cosureties for contribution. He must account for the proceeds of said loan remaining in his hands at the time he paid the debt; and he is only entitled to contribution upon the balance of the debt so paid by him. *Boughner v. Hall*, 24 W. Va. 249, 250.

And where the sheriff, the plaintiff, and other cosureties of his entered into an agreement under seal with the creditor that the creditor would pay for the sheriff two thousand, five hundred, dollars on the revenue for 1856, which they agreed but failed to repay, and creditor sued and recovered against the surviving obligors in said agreement a judgment, which was afterwards paid by one of said sureties, who sued his cosureties for contribution; it was held, that notwithstanding the said judgment it was competent for the cosureties to make defense to such suit by showing that the said two thousand, five hundred, dollars borrowed, was, with the consent of sheriff and of the cosureties, at that time paid by the lender to the surety paying, to be applied upon said revenue, and that when he paid the debt a large portion of said loan remained in his hands, for which he must account, and he was only entitled to contribution for the balance of the debt. *Boughner v. Hall*, 24 W. Va. 249, 250.

For if a surety, who seeks contribution, has been reimbursed part of what he has paid by the debtor himself, or through a counter security, or from any source, he must give credit for the amount reimbursed, and can only claim contribution for the balance. *Boughner v. Hall*, 24 W. Va. 249, 263.

Contribution Denied Where Surety Was Indebted to Principal.—Where surety pays a portion of note after judgment has been rendered against him alone thereon, if such payment was made by him when he was indebted to the principal in the note, in an amount sufficient to pay the judgment so obtained against him, he is not entitled to contribution from his cosureties. *Neely v. Bee*, 32 W. Va. 519, 9 S. E. 898.

A surety is entitled to the benefit of any indemnity or security held by his cosurety; and if the cosurety has it in his power to pay off and discharge the indebtedness for which they are jointly liable out of money or other thing belonging to the principal, and fails to do so, he can not call upon his cosurety for contribution. *Neely v. Bee*, 32 W. Va. 519, 9 S. E. 898.

Surety Must Avail Himself of Any Security He Holds.—Where several sureties have a common security from their principal, but before it is realized they are sued and ratably contribute to pay the debt, one surety, who has gotten a decree against the principal for what he paid and obtained a bounds bond from him, which is forfeited, is bound to proceed thereon against the sureties therein, and can only resort to the common security for any deficiency in his recovery from them. *Givens v. Nelson*, 10 Leigh 382.

How Apportioned between Sureties.—One surety of an insolvent principal is entitled to contribution from his cosureties; and if all the sureties are solvent, each is bound for his share of the sum advanced and paid to relieve them from a common burden. *Preston v. Preston*, 4 Gratt. 88.

In Case of Insolvency.—The general rule is, that if one surety is insolvent his share shall be apportioned among the solvent sureties. *Preston v. Preston*, 4 Gratt. 88; *Robertson v. Trigg*, 37 Gratt. 76; *Harnsberger v. Yancey*, 33 Gratt. 527; *Pace v. Pace*, 95 Va. 794,

30 S. E. 361; *Wayland v. Tucker*, 4 Gratt. 267.

But where one surety, against whom judgment has been recovered and on whose property an execution has been levied, executes a forthcoming bond with another of the sureties, against whom no judgment had been obtained, as his surety in the forthcoming bond, and their bond is forfeited and he becomes insolvent, the surety in the forthcoming bond, who has paid the debt, will not be entitled to recover from the other sureties in the original bond any part of the share of his principal in the forthcoming bond—who was also a surety in the original bond—because by executing the forthcoming bond he released the property of that surety and to that extent injured his other cosureties. *Preston v. Preston*, 4 Gratt. 88. Cited with approval in *Harnsberger v. Yancey*, 33 Gratt. 527, and *Dent v. Wait*, 9 W. Va. 46, 48. But he will be entitled to recover what he has paid for the others. *Preston v. Preston*, 4 Gratt. 88.

Liability Limited by Amount for Which He Is Bound.—The right to contribution is not affected by the cosureties being bound jointly or severally; or by the same or different instruments; or at the same or different times; or for the same or different amounts, except that when the amounts are different, a cosurety can not be required to contribute beyond the sum for which he was bound, nor does it matter whether the cosureties were aware of their being such. *Claybrook v. Scott*, 1 Va. Dec. 319.

Can Only Recover Excess.—When surety has paid more than his portion of a joint debt, he can demand contribution from his cosurety, but only for the excess he paid over his portion. *Gordon v. Rixey*, 86 Va. 853, 11 S. E. 562.

Debt Paid by Cosurety of Decedent—For What He May Prove.—The liabilities of the estate of a decedent,

and the rights of his creditors, are fixed by his death. If at that time a creditor has the right to prove against his estate a debt for which the decedent and another are bound as sureties, and subsequently the cosurety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full. *Pace v. Pace*, 95 Va. 792, 30 S. E. 361.

7. Release of Liability.

See post, "Between Indorsers," II, D.

Release by Illegal but Partly Executed Agreement.—Where a sheriff commits a default, and the sureties on his bond, after paying his liabilities, proceed against him by indictment for embezzlement, and afterwards an agreement is entered into between the sureties who paid off said liability, and the father of said sheriff, who was also one of his sureties, that, if he will pay them a certain sum of money, said criminal proceedings shall be stopped, and said father be released from further liability to his cosureties,—if such agreement is so far executed that the money is paid, and the pro rata share of said father on the liability of said surety is paid, and accepted by said cosureties, in a chancery suit brought by said cosureties against said father to make him contribute further, under the circumstances of the case, equity will leave the parties where it finds them, and the plaintiff's bill will be dismissed. *George v. Curtis*, 45 W. Va. 1, 30 S. E. 69.

Effect of Compromise as Release.

The right of contribution between joint obligors, under §§ 2856, 2857, 2859, Va. Code, 1904, is not impaired by the fact that the creditor has compromised with one of such joint obligors and received his full share of the obligation. *Penn v. Bahnson*, 89 Va. 253, 15 S. E. 586.

Release of One Surety without the Other's Consent.—Where A was surety for two principals, and B was surety for all three, and, on default of the principals, A gave his notes in discharge of their indebtedness which were accepted by the creditor without the consent of B, B was in equity discharged from all liability. But his discharge did not inure to the benefit of A, who stood in the relation of a principal debtor to the creditor and to B, not as a cosurety with him. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

B. BETWEEN TENANTS IN COMMON, JOINT TENANTS AND COPARCENERS.

1. For Improvements.

Joint Tenants—Improvements of Common Property.—A joint tenant who improves the common property at his own expense is entitled, in a partition suit, to compensation for the improvements, whether the cotenant assented thereto or not. But such an outlay does not in strictness constitute a lien on the estate, and this allowance is made, not as a matter of legal right, but merely from the desire to do justice between the parties, and hence will be so estimated as to inflict no injury on the cotenant. *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840; *Chinn v. Murray*, 4 Gratt. 348. See the title JOINT TENANTS AND TENANTS IN COMMON.

See *Ruffner v. Lewis*, 7 Leigh 720, 743, for what improvements and expenses compensation will be allowed. Also, *Graham v. Pierce*, 19 Gratt. 28.

But no action of assumpsit can be maintained to recover any part of the cost of improvements made by one cotenant. The other is under no obligation to contribute to them, and a cotenant can not recover from his fellow tenants a share of the expense incurred by him in making improvements on the common property, in the absence of an express assent on their part, or of such circumstances or deal-

ings between the parties as will convince the court that an understanding existed to the effect that the expenses were to be repaid. *Ballou v. Ballou*, 94 Va. 352, 26 S. E. 840.

Priority of Creditors.—When two joint tenants of real estate agree with each other, that one shall, with his own money, erect improvements on real estate jointly held, and have a lien on the interest of the other, for the money so expended, the agreement, with the actual erection of the improvements by the one and the acquiescence of the other, constitutes such a lien as will be recognized and enforced in a court of equity. But such a lien is not valid, and will not be enforced in favor of the tenant who erects the improvements, against a creditor of the other, who has caused his interest in the property to be attached, or a purchaser under such attachment; whether the creditor attaching, or the purchaser under the attachment, have notice of the previous equitable lien or not. *Houston v. McCluney*, 8 W. Va. 135.

But the rule as to priority is different where it is an encumbrance such as a vendor's lien that was paid by the joint tenant, for in that case he will have priority over a creditor who is not a purchaser without notice of the encumbrance. *Tompkins v. Mitchell*, 2 Rand. 428.

Contribution for Improvements between Cotenants, etc.—W. Va. Doctrine.—"I think it can be safely laid down, that, with the exception stated (a mill or a house), no joint tenant, tenant in common, or parcener can compel his cotenant to make improvements, or maintain an action against him personally to compel him to contribute to the expense of improvements made by him upon the estate, without his consent, express or implied, or fix it as a lien on his interest in the estate. One can not improve his fellow out of his estate. He has voluntarily put improvements on land of another, knowing his right, and he can not im-

pose a debt on him or his estate, without his consent. It is not the case of one making improvements in good faith believing the land to be his. The common law denied such a one relief, and it is only allowed by statute. Code, ch. 91. It seems that where a tenant in common or joint tenant is called on for rents and profits in equity, he may deduct ordinary repairs on the principal that he who asked help from a court of equity, must do equity. Where partition is made, the part improved should, if not prejudicial to others, be allotted to the one who made improvements, estimating its value without improvements. But if this can not be done, he to whom the improvement falls does not have to pay for it." (It is on this point the West Virginia rule is different from that in Virginia.) "Where improvements are made with consent of the cotenants, they are personally bound, and the demand is a lien on their shares. *Houston v. McCluney*, 8 W. Va. 135; *Freem. Coten. § 262.*" *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 749; *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. 427.

Where, however, the property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out of the proceeds that amount by which the property, at the date of sale, remains enhanced in value from the improvements, not their original cost. *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746.

2. For Repairs.

"The rule applicable in the matter of repairs is different from that in the case of improvements. In the former case the weight of authority is that, when the repair of joint property is necessary to its use and preservation, one joint tenant, when his fellows refuse to unite, may have the property repaired and sue for compensation, but we have been referred to no authority which holds that this can be done in

the case of improvements." *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840.

3. For Incumbrances.

The right of a cotenant, who discharges an incumbrance upon the common property, or pays more than his share of the purchase price, to rateable contribution from his cotenants, is said to arise out of the trust relationship which exists among joint owners of property, rather than by way of subrogation. But whatever may have been its origin, the doctrine is firmly established by the authorities. *Grove v. Grove*, 100 Va. 556, 42 S. E. 312; *Tompkins v. Mitchell*, 2 Rand. 428. See the title LIMITATION OF ACTIONS.

As to priorities between claims for contribution to discharge of incumbrances, and creditors, see ante, "For Improvements," II, B, 1.

C. BETWEEN FUNDS JOINTLY LIABLE.

Contribution between Realty and Personality to Pay Debts.—In the case of *Perrin v. Lomax*, 2 Rob. 133, where an entire estate had been conveyed by deed of trust to pay the debts of the grantor therein, and for other purposes, with plenary powers to the trustee in dealing with the estate to support the grantor, his wife and family, etc. (see syllabus of the case), it was held, among other things, that when, the grantor and his wife being dead, the succession to the realty and personality fell into different channels, the equity arose that the owners of realty and personally should contribute rateably to the burthen of paying the debts remaining unsatisfied at the widow's death. See the titles EXECUTORS AND ADMINISTRATORS; WILLS.

Owners of Land Bound by Recognizance.—Thus, if the conusor dies, having sold a part of the lands bound by the recognizance to several purchasers, and leaving a part to descend to his heir, the heir is not entitled to

contribution against the purchasers, because he is not in *æquali jure*; but the purchasers are (without contract, express or implied), entitled to contribution against each other, without regard to the time or order of the purchases. *Thweatt v. Jones*, 1 Rand. 328, 332.

Grantees of Land Charged with Support.—Where a father conveys his land to his two sons in equal shares, on condition that they should share equally in his support during his lifetime, retaining a lien therefor in each deed; and after the death of one of the sons the other supported his father until his death, one-half of the expense of such support should be paid by contribution from the land of the son who did not contribute thereto. *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377.

D. BETWEEN INDORSERS.

An indorser on a negotiable note is not liable for contribution—like a surety on nonnegotiable paper—to a prior indorser, without an agreement to be equally bound, which must be proved by the person asserting it. *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515; *Farmers' Bank v. Vanmeter*, 4 Rand. 553. See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

Joint Indorsers One of Whom Is Released.

One Having Sold Out to the Other.—P. owned \$37,500 of stock for which he paid \$17,500 in cash, the balance being issued on the betterments to the corporation's property, to pay for which its notes, indorsed by P. & S. and another stockholder, were outstanding and unpaid. S. bought P.'s stock "on the basis of cost" and \$5,000. In another similar contract, S. used the same expression, which he interpreted as an assumption of the other party's liabilities as to said corporation, and P. was cognizant of that interpretation. S., who afterwards paid off said notes and sued P. as his coindorser for contribution, is bound by his own interpretation to treat P. as released from

all liability as respects said notes. *Peyton v. Stuart*, 88 Va. 50, 13 S. E. 408.

E. BETWEEN JOINT MAKERS OF NOTE OR ASSIGNEES.

Nearly a month after the protest of a negotiable note on which two makers are bound, one of the makers, for the purpose of paying the note, executes his two negotiable notes, dated on the day of their execution, and, with one exception, indorsed by new indorsers, and has the same discounted and the proceeds placed to his personal credit in bank. Out of the money thus obtained he pays the original note by his individual check, and the note is marked paid by him and delivered to him, and he assigns the same to the indorser of one of the new notes. This is not a renewal of the first note, but an independent transaction, and the assignee of that note is entitled, as successor to the rights of his assignor who had paid the whole note, to demand of the other joint maker of it the payment of one-half thereof for his sole benefit, to the exclusion of the other indorsers of the new notes. *Conard v. Smith*, 91 Va. 292, 21 S. E. 501. See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

F. BETWEEN INSURERS.

The doctrine of contribution applies in cases of double insurance, where the engagements of the insurers are for the same person, upon the same subject matter, and against the same risks. It rests upon the principle of natural justice, that where there are several persons bound for the same person and same engagement, that all of them should contribute pro rata to the satisfaction or extinguishment of the common burden. *Conn. F. Ins. Co. v. M. & M. Ins. Co.*, 1 Va. Dec. 592. See the title **FIRE INSURANCE**.

G. BETWEEN LEGATEES AND DEVISEES AND EXECUTOR.

Contribution Where Whole Estate Is Charged with Debts.—Where testator has charged his whole estate with the

payment of his debts, and there is a deficiency in the residuum to pay the debts, equity will apply the maxim that equality is equity and enforce a rateable contribution thereto from the property devised and bequeathed. *Elliott v. Carter*, 9 Gratt. 541; *Murphy v. Carter*, 23 Gratt. 489; *Cockerille v. Dale*, 33 Gratt. 49. See the titles **EXECUTORS AND ADMINISTRATORS; WILLS**.

And where a testator's real property had been conveyed by deed of trust to pay debts and support the family, an equity arose out of the provisions of the trust deed, so soon as the succession to the realty and the personalty so fell into different channels, that the owners of the realty and personalty should contribute to the burthen of paying the debts remaining unsatisfied at the widow's death, in proportion to the value of their respective interests; and the exercise by the trustee of the authority and discretion vested in him, should not have the effect of disturbing the due apportionment of that burthen amongst those several interests. *Perrin v. Lomax*, 2 Rob. 133, 134. See ante, "Between Funds Jointly Liable," II, C; post, "Between Realty and Personalty of a Decedent," III, C.

Executor Not First Appeal from Decree against Him.—If, without fraud or collusion, a decree be rendered, by a court of competent jurisdiction, against an executor, he may bring his suit in equity against the legatees, for contribution to satisfy such decree, without paying the money himself, and without having appealed to a superior court, though requested and advised to do so. *Bower v. Glendenning*, 4 Munf. 218.

To Raise Portion of Posthumous Child.—The portion of a prætermitted posthumous child, unprovided for by settlement, is not to be raised by a division of the estate, into equal parts, but by the devisees and legatees and those claiming under them. *Armistead v. Dangerfield*, 3 Munf. 20. See Va.

Code (1904), § 2528. This statute provides for any child born since will was made. The former statute only provided for posthumous children. See *Yerby v. Yerby*, 3 Calt 334.

It was first enacted December 5, 1794, and did not apply to the will of a testator dying prior to that date. *Savage v. Mears*, 2 Rob. 570.

Any provision for a child which shows that it has not been forgotten, is sufficient to prevent the application of the statute. *Allison v. Allison*, 101 Va. 538, 44 S. E. 904.

Between Devisees or Lands Bound by Bond.—When lands held by several devisees in the same will, are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees (or the money received, or claimed, in lieu thereof), rateable proportions, and not against the land of one only, with liability to that one to sue the others for contribution. *Foster v. Crenshaw*, 3 Munf. 514; *Mason v. Peter*, 1 Munf. 437. And the decree should not be joint, but pro rata. *Mason v. Peter*, 1 Munf. 437.

Contribution among Devisees to Pay Debts of Decedent.—The court should subject each devisee for his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land not sold in the first instance for the payment of his or her proportion of the debt. If the land still held by one of them does not discharge his or her proportion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her proportion thereof, and so on until the whole debt is paid or the whole land sold. *Lewis v. Overby*, 31 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367.

Realty Not Charged with Debts by Will—No Contribution from Other Devisees to Pay a Subsequent Incumbrance on Realty Devised.—The Vir-

ginia Code, 1887, § 2665, making all real estate of any person who may die intestate, or which, though he die testate, is not charged with the payment of his debts, assets for payment of debts in the order in which personalty is to be applied, merely abolishes the distinction existing at common law between record and specialty debts and simple contract debts, and makes the real and personal estate liable for all debts, but does not alter the order of the liability of decedent's assets; and hence it does not alter the assets applicable to the payment of a subsequent incumbrance on a part of lands devised, so as to give the devisee thereof contribution from the devisees of other realty. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108; *McCandlish v. Keen*, 13 Gratt. 615, 630; *Peirce v. Graham*, 85 Va. 227, 235, 7 S. E. 189; *Elliott v. Carter*, 9 Gratt. 541; *Edmunds v. Scott*, 78 Va. 720. But it is said, obiter, that where a testator, subsequent to the execution of his will, places an incumbrance upon a part of the lands devised, but by his will directs that his real estate shall be chargeable with the payment of his debts, not only the incumbered part, but all his real estate, must contribute to the payment of such incumbrance. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

Nor to Pay Legacies.—And legatees have no right to call upon a devisee to contribute to the payment of their legacies, unless the real estate devised be expressly charged. *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

In Case of Insolvency.—And the whole of the real estate of which the decedent died possessed is liable for his debts; and if one of the heirs or devisees has aliened or wasted his part of the estate, and is insolvent, the others must contribute rateably to make up the deficiency, according to the value of the lands descended. *Ryan v. McLeod*, 32 Gratt. 374; *Lewis v. Overby*, 31 Gratt. 601; *Hopkirk v. Dennis*, 2 Munf. 326; *Leake v. Leake*, 75 Va. 794.

Devise Conditional on Support of Mother.—Where there is no provision in a will, devising land to two children on condition that they support their mother for her life if she resided with them, for either of them to provide for her away from his home, if one is to take care of her and keep her at his home, and the other contribute to the expense thereof, it must be by contract or mutual arrangement between them. *Isner v. Kelly*, 51 W. Va. 82, 41 S. E. 158.

As long as one is ready and willing to take and care for her, it being a matter of choice with her as to where she will reside, he can not be compelled to contribute to her support elsewhere. *Isner v. Kelly*, 51 W. Va. 82, 41 S. E. 158.

Choice of Remedies.—See ante, "Contribution," I, F, 1.

H. BETWEEN PARTNERS.

See the title PARTNERSHIP.

In General.—It is well settled that one partner who has paid out of his own means debts of a partnership of which he is a member, may, upon a settlement of the partnership accounts, have contribution from the other partners of their due proportion of the debt so paid. *Sands v. Durham*, 98 Va. 394, 36 S. E. 472. This case was reheard and is reported again in 99 Va. 263, 38 S. E. 145. There it is held, it having been denied at the first hearing, that the right of subrogation, as a means to enforce contribution, obtains in favor of one partner, who is not in arrears to the firm, against the real estate of his copartner, in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability, the partnership having been dissolved, the social assets exhausted and a settlement of the partnership accounts having been had.

There Must First Be a Settlement of Accounts.—A partner who takes exclusive possession and control of the

assets of a firm, on its dissolution, and undertakes to close up the business, is not entitled to contribution from a partner for firm debts paid by him, without making a settlement of partnership accounts. *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Compton v. Thorn*, 90 Va. 653, 19 S. E. 451.

Laches.—And when a partner waited for twenty-six years after the firm ceased to do business before seeking to subject the land of his copartner, long deceased, to contribution, he was held to be barred by his laches in failing to prosecute his claim within a reasonable time, and in the lifetime of other parties who had knowledge of the facts. *Compton v. Thorn*, 90 Va. 653, 19 S. E. 451. See post, "Suits for Contribution among Cosureties," IV, B, 1.

Retiring Partner.—Where a member of a firm retires by consent, a new firm composed in part of members of the old firm receiving the assets thereof, and the retiring partner, together with some of the copartners, satisfies a judgment obtained against the old firm for a debt contracted prior to his retirement, in seeking contribution from the partners not so aiding in satisfying such judgment, the retiring partners should first seek the assets of the old firm received by the new one, and if they are not sufficient he is entitled to a contribution from the solvent copartners of the old firm. *Hobbs v. Wilson*, 1 W. Va. 50.

When a member of a copartnership retires with consent of the remaining partners, they are bound to save him harmless, so far as the assets of the partnership will extend, but no farther. *Hobbs v. Wilson*, 1 W. Va. 50.

Gambling Partnerships.—Equity will not lend its aid to either partner in a gambling partnership, on transactions arising out of such partnership, for contribution or reimbursement from the other party. *Watson v. Fletcher*, 7 Gratt. 1. See the title GAMBLING CONTRACTS.

I. PARTY WALLS.

See the title PARTY WALLS.

There Must Be Express or Implied Adoption of the Wall—Liability to Pay Therefore Runs Not with Land.—In 1844 a foundation wall was built, one-half of which projected or extended on the adjacent lot; no contract was made between the lot owners as to the cost of such building. In 1860 the party controlling the adjoining lot erected a house, using the walls so projecting, and the vendee of the party who originally built the wall brought a suit in chancery for contribution, claiming one-half of the cost of erecting it. No proof of a contract to pay for the erection of one-half of the wall being produced, it only became a party wall from continued use after it was adopted by the adjacent lot holder; but no liability arose from such adoption to pay for the original construction sixteen years prior, nor could arise except by express agreement. *List v. Hornbrook*, 2 W. Va. 340. A contract to pay could not be implied from mere assent to the building of the wall, if it existed, and such a contract would be purely personal and would not run with the land. *List v. Hornbrook*, 2 W. Va. 340.

But see *Thweatt v. Jones*, 1 Rand. 332, where it is said, by way of illustration, if there be a common partition wall between two coterminous tenants and it become ruinous, and one, in spite of the prohibition of the other, pulls it down, and rebuilds it, he is entitled to contribution for the expense.

Keeping in Repair.—After a wall obtains the character of a party wall—as in this case, perhaps, when the house was built on the adjacent lot, joined to it, and it became the subject of common use, and enjoyment—equity will raise the duty and liability to contribute to keep the same in repairs. *List v. Hornbrook*, 2 W. Va. 345.

J. BETWEEN REMAINDERMEN, AND LIFE TENANT AND REMAINDERMEN.

See the title REMAINDERS, RE-

VERSIONS AND EXECUTORY INTERESTS.**For Taxes between Remaindermen, Denied under the Circumstances.**

Where one of several remaindermen had rented the property from the life tenant at a price more than sufficient to satisfy the taxes and had paid the taxes, the other remaindermen had the right to presume that he was paying them for the life tenant, and he can not call on them for contribution. *Downey v. Strouse*, 101 Va. 226, 43 S. E. 348.

Between an Estate and Its Life Tenant—Claim against Estate.

—Where a testator devises and bequeaths his estate to his wife for life, remainder to others, and the wife was executrix, and a claim arises against testator's estate upon a covenant, which is ascertained after the death of the tenant for life and executrix, the tenant for life's estate is not bound to contribute to the payment of such debt, it not having been ascertained or payable in her lifetime, or to keep down the interest thereof. *Poindexter v. Green*, 6 Leigh 504.

K. BETWEEN SUCCESSIVE GRANTEES OF ENCUMBERED LANDS.

Contribution to Pay Judgment Lien on Land Sold.—See the titles JUDGMENTS AND DECREES; MARSHALING ASSETS AND SECURITIES.

L. BETWEEN WRONGDOERS.

General Rule.—When parties are equally bound to bear a burthen, and are in *æquali jure*, that is, liable from the same circumstances existing as to both, contribution is due of right, in equity. This general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution, forfeits such right, if the joint liability arose from an act *malum in se*, a fraud or voluntary tort, in which he participated; when it is shown that the parties were originally equally bound, and stood in *æquali jure*, the party who has paid all,

is entitled of course to contribution, unless it be shown on the other side, that his right has been forfeited as aforesaid, by his own wrongful act. *Thweatt v. Jones*, 1 Rand. 328, 334.

It is admitted to be an universal principle, that where two or more persons have jointly committed a tort, no court of justice, either of law or equity, will interfere to enforce contribution among the participators in the tort. *Thweatt v. Jones*, 1 Rand. 328, 340.

Wrong Must Be Malum in Se.—The act which precludes a party from the right to claim contribution from those who are equally liable to the burthen as himself, must be malum in se. as actual fraud or voluntary wrong. *Thweatt v. Jones*, 1 Rand. 328, 332.

The reason why the law refuses its aid to enforce contribution amongst wrongdoers, is that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences; a reason, which does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties. *Thweatt v. Jones*, 1 Rand. 328, 332.

So, "if judgment be against two disseisors in assize for the land and damages, and one disseisor dies, the execution shall not be awarded against the surviving disseisor, who was party to the wrong, but as well the heir as the disseisor shall be charged;" and, a fortiori, if the surviving disseisor had paid the damages, he ought to have contribution against the representative of the deceased disseisor. *Thweatt v. Jones*, 1 Rand. 328, 332.

And if there be a joint failure in two or more bailees to comply with a contract of bailment, which failure does not arise ex maleficio, it seems to be clear law, that one of them, who may have been compelled to pay all the damages recovered, may resort to the others for contribution. If it were otherwise, it would produce great in-

justice. *Thweatt v. Jones*, 1 Rand. 328, 340.

Allowed for Nonperformance of Civil Obligation.—In equity, contribution may be claimed by one inspector of tobacco, against his coinspector, for the amount of a judgment had against the former, for failing to deliver tobacco, when legally demanded, which judgment he has discharged, when the failure does not proceed ex maleficio, or from some actual fraud, or voluntary wrong. The mere nonperformance or violation of a civil obligation, is not such a wrong, as will condemn a claim to contribution. But it is incumbent on the party asking relief, to show that he is innocent of such imputations. *Thweatt v. Jones*, 1 Rand. 328.

The principle has never been held to extend to the nonperformance of a contract. *Thweatt v. Jones*, 1 Rand. 328.

M. BETWEEN DONEES IN DEEDS SET ASIDE AS VOLUNTARY.

Where a decree is rendered on behalf of a creditor, against several voluntary donees of the debtor, a court of equity should decree contribution among them, so that each man should only pay his just proportion of the debt. But, all the donees should be liable for the failure of any one to pay his proportion, until the debt is completely discharged, as far as he has received the funds of the donor. *Chamberlayne v. Temple*, 2 Rand. 384.

III. Exoneration.

A. BETWEEN PRINCIPAL AND SURETY.

1. Nature and Foundation of Right.

A principal for whom another, at his request, undertakes as surety, although such principal's name does not appear in the obligation given by the surety, is as much bound to indemnify such surety for what he pays on the obligation as if his name appeared in it as principal, and the surety in such case is entitled by subrogation to enforce

for his exoneration or indemnity all the rights, remedies, and securities of the creditor against the principal debtor. Upon this principle the case of *Enders, etc., v. Brune*, 4 Rand. 438, was decided. And in applying the principle the rule is broad enough, it is said, to include every instance where one pays a debt for which another is primarily answerable, and that should in equity and good conscience have been discharged by him. *Harnsberger v. Yancey*, 33 Gratt. 527; *Cranmer v. McSwords*, 26 W. Va. 412; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172; *Woods v. Douglas*, 46 W. Va. 657, 33 S. E. 771.

A surety who pays the debt of his principal, upon the plainest principles of natural reason and justice, has a right to be reimbursed by him. And this principle is recognized by both courts of law and equity. There is an implied contract of indemnity between the principal and his surety, which obliges the former to reimburse the latter who has paid his debt; and the courts of equity will substitute him to the remedies and securities of the creditor for his indemnity; and this not upon the ground of contract, but upon a principle of natural equity and justice. *Kendrick v. Forney*, 22 Gratt. 748; *Butler v. Butler*, 8 W. Va. 674. See *Conrad v. Buck*, 21 W. Va. 410; *Baxter v. Moore*, 5 Leigh 219; *Tompkins v. Mitchell*, 2 Rand. 428; *Woods v. Douglas*, 46 W. Va. 657, 33 S. E. 771; *Nebergall v. Tyree*, 2 W. Va. 474; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848.

Parties May Fix Their Liability by Agreement.—It is competent for the principal obligors in a bond to contract that as between themselves, one shall be the principal and the others his sureties and as such entitled to be subrogated to the rights of the creditor against him as their principal. *Buchanan v. Clark*, 10 Gratt. 164.

Reversal of Relation by Agreement.

—Where the accommodation indorser or surety of a note, on which judgment has been obtained, purchases real estate from the principal debtor who retains a lien for the purchase money, and it is a matter of contract between them, at the time of the sale, that the indorser or surety shall assume the payment of the judgment, the relation of the parties inter se is changed. The indorser or surety becomes the real debtor, and the principal debtor the surety; and the latter has the right to require that the lien of the judgment shall be enforced for his exoneration against the real debtor. *Rhea v. Preston*, 75 Va. 757.

Fact of Suretyship May Be Shown.

—B. being indebted to D. and J. being indebted to B., thereupon J. and B. and three others, of whom M. was one, join in a bond for the debt to D. It appears, that M. executed the bond at B.'s request and as surety for him; D. brings suit on the bond, and in the event recovers the whole debt from M. It was held, that M. was entitled to recover the whole amount by him paid, from B., he being as to M. the principal debtor, and his case was relievable in equity. *Baxter v. Moore*, 5 Leigh 219.

And where there were two bonds, with a different principal and surety in each, and both were sued upon and a decree rendered in the consolidated causes against both principals and both sureties, and an appeal taken by all the defendants from said decree, the supersedeas bonds were only executed by one of the principals and his surety (and other new sureties). The decree being affirmed, it was held, that the surety in the original bond who joined in the appeal bond was entitled to indemnity from the other principal for the portion credited to him as derived from the said bond. *Harnsberger v. Yancey*, 33 Gratt. 527.

The other principal never ceased to be principal debtor for the amount decreed against him, and the obligors in

the bonds, by virtue of their undertaking with his approval, became his sureties for said amount, and, on familiar equitable principles, are entitled to indemnity from him for whatever they paid for him on the bonds, and, by subrogation, to stand in the shoes of the creditor (the receiver) and enforce for their relief all the liens and securities of said creditor against said principal debtor. *Harnsberger v. Yancey*, 33 Gratt. 527, 543.

2. Mode and Time of Enforcement.

See the title SUBROGATION.

Retention of Funds.—A surety has in respect of his liability the right of a creditor as against his principal, and upon the insolvency of the principal debtor he may retain any funds belonging to such debtor by way of indemnity against his liability. *Mattingly v. Sutton*, 19 W. Va. 31.

Entitled to Creditor's Rights against Principal.—A surety in a forfeited forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt. *Hill v. Manser*, 11 Gratt. 522; *Robinson v. Sherman*, 2 Gratt. 178; *Preston v. Preston*, 4 Gratt. 88; *Dent v. Wait*, 9 W. Va. 41; *Leake v. Ferguson*, 2 Gratt. 419; *Garland v. Lynch*, 1 Rob. 545; *Rorer v. Ferguson*, 96 Va. 411, 31 S. E. 817; *Cooper v. Daugherty*, 85 Va. 343, 350, 7 S. E. 387. See *Clevinger v. Miller*, 27 Gratt. 740, applying the same rule to sureties generally; *Neal v. Buffington*, 42 W. Va. 330, 26 S. E. 173; *Powell v. White*, 11 Leigh 309.

But a sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time, of the judgment on which it is founded, or of the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise. *Clevinger v.*

Miller, 27 Gratt. 740. See the title SUBROGATION.

Surety in Injunction Bond Paying Debt Entitled to Exoneration from Debtor, and to Claim Lien of Judgment.—A judgment debtor having obtained an injunction to the judgment, which was afterwards dissolved, and the surety in the injunction bond having been sued thereon, and judgment recovered against him, which he has discharged, he is entitled to the benefit of the creditor's judgment lien. *Rodgers v. McCluer*, 4 Gratt. 81.

Entitled to Cosurety's Lien against Principal.—To prevent circuity of action and attain the ends of natural justice, a court of equity will completely indemnify one of the sureties in a bond, by means of a lien, on the property of the principal obligor, existing in favor of the other surety; notwithstanding he has himself relinquished a lien on the same property, originally created for his indemnification. And, for this purpose, the court will compel the creditor (all the parties interested being before it) to resort to that property, in the first place, for satisfaction of his debt. *West v. Belches*, 5 Munf. 187; *M'Mahan v. Fawcett*, 2 Rand. 514, 529.

Both upon principle and authority, the cosureties have a right to throw the whole burthen of the debts upon the subject mortgaged to one of their body for his security, and where the principal has given to two of the cosureties a deed of trust on land, for their indemnity, if the whole money be made out of either of them, the land must be bound for the whole, to indemnify them. *M'Mahan v. Fawcett*, 2 Rand. 514, 529.

Principal's Property.—While a surety is entitled to exoneration out of any property belonging to his principal, it is only out of such property, and where a principal has conveyed away land in consideration of the payment by the donees of certain liens thereon, and another lien was recited as having been

assigned to such donees, but they had not assumed to pay it, and it was no part of the consideration for the land, when it turns out that such lien was paid, a surety of the donor is not entitled to exoneration out of such land, to the extent of such lien. *Jones v. Covington*, 84 Va. 778, 6 S. E. 212.

Subordinate to Creditor's Rights.—

But a right of a surety being a debt is always subordinate to that of the creditor, so far as enforcing his right to exoneration out of property on which the creditor has a further lien is concerned, and exoneration by subrogation will never be enforced to the prejudice of the creditor. *Grubbs v. Wysors*, 32 Gratt. 129; *Sherman v. Shaver*, 75 Va. 1. See the title SUBROGATION.

Diligence in Enforcement of Collateral.—Where a surety upon a note was compelled to pay the entire debt, and two notes which had been assigned to his executors by the principal and the other surety to indemnify his estate, proved worthless by reason of a failure of consideration, the question of diligence on the part of such executors is not material in a suit brought by such surety for reimbursement. *Taylor v. Cox*, 32 W. Va. 148, 9 S. E. 70.

Sureties of Fiduciary—Devastavit—Recourse to Rights of Legatees.—If the sureties of a delinquent fiduciary pay the amount of the devastavit to the legatees, they are entitled to be substituted to the rights of the legatees against the party uniting with the fiduciary in the breach of trust. *Pinckard v. Woods*, 8 Gratt. 141; *Jones v. Clark*, 25 Gratt. 667; *Asberry v. Asberry*, 33 Gratt. 471; *Sherman v. Shaver*, 75 Va. 5, 11.

Exoneration of Bona Fide Purchasers Out of Property Subject to Lien Which Deprived Them of Their Land.—While a mortgagee of lands and slaves, can not be compelled to resort to a sale of the slaves before he shall disturb the possession of bona fide purchasers of the lands from the mortgagor, the decree against such pur-

chasers ought to permit them, after satisfying the claim of the mortgagee, to seek indemnity out of the mortgaged slaves, or the estate of the mortgagor, or any other person liable to such demand, so far as the mortgagee might be able to charge such party, or otherwise. *Mayo v. Tomkies*, 6 Munf. 520.

Surety Need Not First Appeal from Decision Fixing His Liability.—See *Taylor v. Cox*, 32 W. Va. 148, 9 S. E. 70, where it is held, that the executors of a deceased surety on a note, to whom other notes had been assigned to indemnify the estate of the surety, he having been forced to pay the note, need not appeal from a decision of a lower court rejecting the judgment on one of said notes which they had sought to prove for their use in said court, before resorting to the property of the principal for reimbursement.

Surety Need Not Await Suit.—Surety may, at any time, voluntarily pay the debt after it is due; and he is at once entitled to his action, but such payment must amount to a satisfaction of the original debt and a release and discharge of the principal debtor therefrom. *Féamster v. Withrow*, 12 W. Va. 654; *Clevinger v. Miller*, 27 Gratt. 740, 743; *Cranmer v. McSwords*, 26 W. Va. 416.

3. Interest or Liability Only Secondary—Another Primarily Liable.

First Surety Entitled to Indemnity from Later Surety.—“Where there is a judgment or decree against a principal debtor and his surety, and a third party at the instance of the principal and for his sole benefit, and without the assent of the surety, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment or decree and thus prejudice the rights of the first surety, the equity of the latter is superior; and it seems to be well settled that in such case the second surety would not be entitled to contribution from the first, and there is much authority for

the proposition that the first would be entitled to indemnity from the second. This principle has been applied to injunction bonds, bail bonds, prison bounds bonds, forthcoming bonds, and appeal bonds. *Langford v. Perrin*, 5 Leigh 552; *Douglass v. Fagg*, 8 Leigh 588; *Givens v. Nelson*, 10 Leigh 382; *Stout v. Vause*, 1 Rob. 169; *Robinson v. Sherman*, 2 Gratt. 178; *Bentley v. Harris*, 2 Gratt. 357; *Leake v. Ferguson*, 2 Gratt. 419; *Preston v. Preston*, 4 Gratt. 88." *Harnsberger v. Yancey*, 33 Gratt. 540, 541; *Sherman v. Shaver*, 75 Va. 10; *Coffman v. Hopkins*, 75 Va. 645; 3 Min. Inst. (3d Ed.) 421.

The rule supposes that the first surety does not sanction the interposition of the second. It does not apply, therefore, where the surety in the second bond becomes bound for a purpose in which both the principal and the prior surety concur, in which they both have an interest, and where the assent of the prior surety is expressly given, or is clearly to be inferred from the circumstances. *Harnsberger v. Yancey*, 33 Gratt. 541.

See, as to what constitutes the relation of cosurety, *Langford v. Perrin*, 5 Leigh 552. And see ante, "Who Are Cosureties Entitled to Contribution," II, A, 2.

Exoneration of One Set of Sureties by Another Set Primarily Liable—Insolvency of Principal.—Land of executor, in arrears to legatees of testator, was sold in suit on his executorial bond, for enough to pay their demands, and he became purchaser and gave bond with sureties. Failing to pay the bond, his executorial sureties had to pay the legatees. The latter, being only secondarily bound, and having paid what the sureties for the purchase money were primarily bound to pay, are entitled to be substituted to the legatees' rights, and to be compensated by those primarily bound. Insolvency of principal debtor is sufficiently shown by the sale of his lands at auction and the return of execution unsatisfied. *Hanby v. Henritze*, 85 Va. 177, 7 S. E. 204.

4. Payment or Discharge of Such Liability.

a. Must Be Actual.

Before a surety is entitled to be subrogated to the rights of the creditor he must have paid or satisfied the debt of the principal. The mere execution of a bond to a creditor is not sufficient, unless it be accepted in satisfaction of the debt of the principal. There must be satisfaction by the surety. *Combs v. Candler*, 95 Va. 7, 27 S. E. 815; *Feamster v. Withrow*, 12 W. Va. 654; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172, where it is held, that on part payment, or even without that when the debt is due, he may sue the creditor and principal debtor in equity to compel exoneration, and enforce the creditor's liens. See also, *Barton v. Brent*, 87 Va. 390, 13 S. E. 29.

Satisfaction of Debt Must Be Clearly Shown.—The surety, if his action is brought before the debt is actually paid in money or its equivalent, such as personal or real property, can not recover against his principal in an action at law for money paid by him as his surety, unless he clearly proves that his said negotiable note was accepted and received by the creditor, by express agreement, in absolute and complete satisfaction and discharge of the pre-existing debt, and of the principal debtor therefrom. *Feamster v. Withrow*, 12 W. Va. 654.

Onus of Proving Payment.—Where surety is seeking subrogation for his indemnity against his principal, the onus of proving the payment, so as to entitle him to the relief he asks, rests on him. *Barksdale v. Fitzgerald*, 76 Va. 892.

b. Must Not Be Mere Volunteer.

Subrogation is not applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable; but it will be applied, whenever the person claiming its benefit has paid a debt for which another was primarily answerable, and

which he was compelled to pay in order to protect his own rights or save his own property. *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Janney v. Stephen*, 2 Pat. & H. 11; *Neely v. Jones*, 16 W. Va. 625, 635; *Clevinger v. Miller*, 27 Gratt. 740. See *Douglass v. Fagg*, 8 Leigh 588.

A surety who pays money voluntarily on a judgment absolutely barred, loses his remedy against his principal; but a payment can not be said to be voluntary, as long as the judgment can be enforced in any way, either by scire facias or action of debt. *Randolph v. Randolph*, 3 Rand. 490.

Ratification by Debtor.—It is well settled that a stranger, who pays the debt of another without his knowledge and authority, can not sue the debtor for money paid for his use, unless the debtor has ratified the act of the stranger by promising to repay him the amount, or in some other manner. But if, after the stranger pays the debt, the debtor ratifies the payment, as by relying on this payment as a payment when sued upon the debt, or in any other manner, he will be liable in action of assumpsit brought by the stranger against him for money paid at his request for his use, the subsequent ratification being equivalent to a previous request. *Neely v. Jones*, 16 W. Va. 636; *Lipscomb v. Winston*, 1 Hen. & M. 453; *Clevinger v. Miller*, 27 Gratt. 740. See *State v. Baltimore, etc., R. Co.*, 41 W. Va. 93, 23 S. E. 681.

Administrator Overpaying a Creditor's Dividend Can Not Recover from Surety of His Intestate.—An administrator, with money of his decedent, pays on a note made by his decedent, as principal, with sureties, an amount in excess of the sum applicable out of the assets to that debt, under the mistaken belief that he was surety in such note, and that the estate would pay a somewhat larger per cent. of its liability than it did. He brings in his own

name an action of assumpsit against a surety to compel the surety to refund the amount so paid in excess of the rateable share of the assets applicable to such debt. He can not recover of the surety, being in the position of a stranger who has paid the debt of another without request, or subsequent ratification. *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394.

Surety Reimbursing Stranger Who Has Paid Debt.—Where stranger has paid principal's debt, and surety reimburses him, surety becomes entitled to recover the amount from principal. *Harper v. McVeigh*, 82 Va. 751, 1 S. E. 193.

5. Measure of Recovery.

a. Only Indemnity Can Be Claimed.

Surety Paying in Depreciated Currency.—If the surety pays the debt of his principal in depreciated currency, or depreciated notes of banks or other institutions, the general rule is, that he can recover only the value thereof at the time he paid the debt for his principal; and the criterion is the market value. *Kendrick v. Forney*, 22 Gratt. 748; *Butler v. Butler*, 8 W. Va. 676; *Feamster v. Withrow*, 12 W. Va. 611; *Feamster v. Withrow*, 9 W. Va. 296.

Contract for Indemnity Only.—The rule is certainly too well settled to be controverted, nor is it disputed that the contract between the principal and the surety is for indemnity only, and, therefore, if the surety discharges an obligation for a less sum than its full amount, he can only claim against the principal the sum so paid. *Southall v. Farish*, 85 Va. 406, 7 S. E. 534; *Kendrick v. Forney*, 22 Gratt. 748; *Butler v. Butler*, 8 W. Va. 674; *Feamster v. Withrow*, 9 W. Va. 316; *Feamster v. Withrow*, 12 W. Va. 611; *Matthews v. Hall*, 21 W. Va. 514; *Tarr v. Ravenscroft*, 12 Gratt. 653; *Cromer v. Cromer*, 29 Gratt. 284. So, where one is compelled to pay a bond a second time, having paid with notice to one who had no right to it, he can only have a decree against the

man so paid, for what he actually paid him, with interest, though it be less than the face of the bond. *Pickens v. McCoy*, 24 W. Va. 344.

The implied contract is for indemnity only, and the surety will not be allowed to speculate out of his principal. If he obtains credit without pecuniary loss or damage he can not recover therefor. *Matthews v. Hall*, 21 W. Va. 510.

Where Surety Has Compromised the Liability and Taken Assignment.—And where exoneration is sought by a surety from the party primarily liable for what he has had to pay, having compromised the claim for less than was actually due, he can only demand indemnity for what he has actually paid, with interest, though he may have taken an assignment in full of the claim. *Blow v. Maynard*, 2 Leigh 29.

Value of Payment to Surety the Criterion.—Insolvent bank holds judgments against principal and surety and deposits of surety on which it pays sixty per cent., but which third party had contracted to take at par. The surety paying judgments with his deposits, under agreement with principal to repay the face value of the deposits so used, is entitled to receive face value of the deposits; though the general rule is that if surety discharges the debt for less than its full amount, he can only claim against principal the sum paid. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534.

b. Interest and Costs.

The fact that the bank refused to transfer the sureties deposits to the contractor for the purchase thereof until the judgments were paid, did not make the principal's agreement to repay the amount at its face value, without consideration. *Southall v. Farrish*, 85 Va. 403, 7 S. E. 534.

And whether or not the deposits transferred by surety were a valid set off in the hands of the transferee against the latter's indebtedness to the bank, was immaterial in the determining the

value of the deposits to the surety. *Southall v. Farrish*, 85 Va. 403, 7 S. E. 534.

Right to Recover Interest.—It is the settled law that where a surety pays the debt of his principal he is entitled at once, upon such payment, to an action for the amount paid including principal and interest, and if payment is not made then by the principal, the surety is entitled to interest on the whole sum paid. *Cranmer v. McSwords*, 26 W. Va. 416; *Feamster v. Withrow*, 12 W. Va. 611; *Blow v. Maynard*, 2 Leigh 29; *Butler v. Butler*, 8 W. Va. 674.

Right to Recover Costs.—Whether the surety who has paid costs on account of the debt of his principal, can recover such costs from the principal, depends upon the circumstances of each case. But the principal is not liable for costs and expenses unnecessarily incurred by the surety in litigation carried on by him in order to get rid of his liability or defeat the efforts of a party seeking to enforce it. Surety must show that the litigation was entered into in good faith and on reasonable grounds, and was a measure of defense necessary to the interest of both parties, and was calculated so to result *Cranmer v. McSwords*, 26 W. Va. 417; *Butler v. Butler*, 8 W. Va. 674. See the title COSTS.

Surety in Forthcoming Bond.—The surety in a forthcoming bond given by one debtor, who has become insolvent, is entitled to recover from the other original debtors the principal, interest, and costs of the original judgment, but not the costs incurred by the execution and forfeiture of the forthcoming bond. *Robinson v. Sherman*, 2 Gratt. 178.

Right to Recover Costs in Each of Several Motions.—A surety having paid five several sums of money for his principal, may maintain five several motions, and recover several judgments, for the debts, and for the costs of each motion. *Ayres v. Lewellin*, 3 Leigh 609.

B. AMONG LEGATEES, DEVISEES AND EXECUTOR.

See the title WILLS.

Between Executor and Devisees.—

Where the executors have been held liable for an unpaid debt of their decedent, not having exacted a refunding bond on distributing the personal property, and all the parties being before the court, the executors are entitled to have the devisees to whom they paid over the proceeds of the personal property, subjected in the first place to pay the amount to the creditor. *Lewis v. Overby*, 31 Gratt. 601; *Watts v. Taylor*, 80 Va. 627; *Max Meadows Land, etc., Co. v. McGavock*, 96 Va. 131, 30 S. E. 460; *Bower v. Glendening*, 4 Munf. 219, where it is held that he need not actually have paid the sum decreed against him, before suing the legatees, and need not appeal from the decree, although requested and advised so to do.

Exoneration of Legacies Out of Realty—Renunciation of Will by Widow.—Where a widow renounces the will which devised the real estate to her for her life and then to a son, and claims her legal rights, the two-thirds of the land remaining after assignment of her dower should be applied to indemnify the legatees of the personal estate, for the loss they had sustained by her renunciation of the will and claim of her third of this personal estate, and for this purpose the said two-thirds of the land should be rented out, and the proceeds applied to their satisfaction, until said satisfaction was complete or until the death of the widow, whichever should happen first, when it would be delivered to the devisee in remainder under the will. *McReynolds v. Counts*, 9 Gratt. 242; *Findley v. Findley*, 11 Gratt. 436; *Mitchells v. Johnsons*, 6 Leigh 461 (here devisees also were so exonerated); *Morris v. Garland*, 78 Va. 226; *Kinnaird v. Williams*, 8 Leigh 400; *Cowan v. Epes*, 2 Pat. & H. 520.

Waiver of Legacy—Legacy Goes to Disappointed Devisee.—Though a legatee under a will which devises away property belonging to him, elect to retain such property and to waive the legacy, the testator is not thereby rendered intestate as to the subject of such legacy, but it shall go to the disappointed devisee, in satisfaction of his loss. *Kinnaird v. Williams*, 8 Leigh 400.

C. BETWEEN REALTY AND PERSONALTY OF A DECEDENT.

Realty to Be Relieved by Personality.

—It is well settled—a rule of the equity courts almost universally recognized—that the personal estate of the deceased is the natural and primary fund for the payment of the debts; and the lands will not be charged without first taking an account of such personal estate, and directing it to be applied to that object. 2 Rob. Prac. 86; *Foster v. Crenshaw*, 3 Munf. 514; *Elliott v. George*, 23 Gratt. 780; *Edmunds v. Scott*, 78 Va. 728; *Laidley v. Kline*, 8 W. Va. 218; *New v. Bass*, 92 Va. 389, 23 S. E. 747; *Cranmer v. McSwords*, 24 W. Va. 599.

Deficiency of Personal Assets.—This exemption of real estate devised extends as well to the case of a deficiency of personal assets for the payment of legacies as of debts; the legatees having no right to call upon the devisee to contribute to the payment of their legacies, unless the real estate be expressly charged. *Elliott v. Carter*, 9 Gratt. 550; *Allen v. Patton*, 83 Va. 265, 2 S. E. 143. See the title EXECUTORS AND ADMINISTRATORS.

Effect of Conversion into Personality.

—Though, upon the widow's death, the succession to the realty fell into a different channel from the personal property, yet as the authority and discretion of the trustee in regard to sales of the property, whether real or personal, continued as before, no equity could arise between the realty and personality for reimbursement of one to the other,

neither being primarily, but the whole estate indiscriminately, subjected to payment of the debts by the provisions of the trust deed; which, and not the principles governing the administration of decedents' estates, must give the rule upon the subject. *Perrin v. Lomax*, 2 Rob. 133, 134. See the title **CONVERSION AND RECONVERSION**.

The conversion after testator's death, of part of the realty into personalty, being within the authority and discretion of the trustee, in a deed of trust conveying same, and made at a time when there was no conflict, but an identity of interest, amongst those entitled to the estate, can not, by reason of circumstances thereafter arising, furnish any equity for a reimbursement of the realty out of the personalty, or for contribution in favor of the former against the latter. *Perrin v. Lomax*, 2 Rob. 133, 134.

D. BETWEEN SUCCESSIVE ALIENEES OF PORTIONS OF THE SAME TRACT OF LAND, AND RETAINED PORTION.

It is well settled that where an entire tract is subject to an incumbrance, parts of it sold off are entitled to exoneration from what is retained by the grantor. And if he has retained none or not enough, each part is entitled to exoneration from what was aliened after it was sold off. The different tracts are to be subjected in the inverse order of their alienation. *Henkle v. Allstadt*, 4 Gratt. 284; *Jones v. Myrick*, 8 Gratt. 179; *Alley v. Rogers*, 19 Gratt. 366, 389; *Jones v. Phelan*, 20 Gratt. 242; *Miller v. Holland*, 84 Va. 656, 5 S. E. 701; *Gracey v. Myers*, 15 W. Va. 202; *Rodgers v. McCluer*, 4 Gratt. 81; *Smith v. Charlton*, 7 Gratt. 425; *Carrington v. Didier*, 8 Gratt. 260; *Conrad v. Harrison*, 3 Leigh 532; *McClung v. Beirne*, 10 Leigh 394; *Jones v. Phelan*, 20 Gratt. 229; *Whitten v. Saunders*, 75 Va. 563; *Renick v. Ludington*, 20 W. Va. 567; *Brengle v. Richardson*, 78 Va. 406; *Mc-*

Claskey v. O'Brien, 16 W. Va. 791. The rule is now statutory. Va. Code, § 3575; Code, W. Va. (1899), chap. 139, § 8. See *Harman v. Oberdorfer*, 33 Gratt. 497; *Beverley v. Brooke*, 2 Leigh. 425, was overruled by these later cases. See the titles **JUDGMENTS AND DECREES**; **MARSHALING ASSETS AND SECURITIES**.

E. BETWEEN VENDOR AND VENDEE.

When it is expressly or impliedly agreed that an incumbrance shall be deducted from the consideration, or paid by the purchaser, the vendor stands in the position of a surety, and is entitled to exoneration at the expense of the land. *Curry v. Hale*, 15 W. Va. 867.

Sale of Land—Agreement of Vendee to Pay Lien Thereon—Effect.—Where the vendee of land, under his contract with the vendor, is bound to pay a debt which is a lien on the land, he becomes principal debtor and his vendor surety only, and the latter, and the creditors who succeeded to his equities, have the right to require the land held by the vendee to be subjected to the satisfaction of the lien which rests upon it in exoneration of the lands subsequently aliened by the vendor and encumbered by a deed of trust. *Schultz v. Hansbrough*, 33 Gratt. 582, 583; *Douglass v. Fagg*, 8 Leigh 588.

F. OF INDORSERS.

The accommodation indorsers on a note due at bank, to secure whom and the bank, the maker had conveyed land by deed of trust with covenant of warranty for himself and heirs, with the trustees and the bank respectively, that he has an absolute estate of inheritance, may, having paid the note, and the trust land having been sold under a prior deed of trust, come into equity for satisfaction out of the real assets in the hands of the heirs, to the extent of the damages accruing from the breach of the ancestor's covenant. *Haffey v. Birchett*s, 11 Leigh 83.

Surety for Second Indorser Entitled to Indemnity from Prior Indorser.—A surety on an injunction bond for the second indorser of a negotiable note, who has been compelled to pay said note, is entitled to recourse against the first indorser to recover the amount so paid. *Chrisman v. Harman*, 29 Gratt. 494.

Such surety is not barred from such recourse by the fact that in a suit in equity, brought by the holder of such note against the maker and indorsers, a decree was rendered in favor of the first indorser. *Chrisman v. Harman*, 29 Gratt. 494.

Nor is such party barred of such recourse by the fact, that in another suit in equity, brought by the second endorser to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy, and others did not, and it not appearing for what cause the bill was dismissed. *Chrisman v. Harman*, 29 Gratt. 494.

As to exoneration of subsequent by prior endorser, see the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

IV. Actions, Parties and Limitations.

A. ACTIONS.

See ante, "Remedies in Equity and at Law Compared," I, F.

1. Joinder of Actions.

On a joint purchase by three, and several payments by two, the right of action of the latter against the third party for contribution, is several. *Armstrong v. Henderson*, 99 Va. 234, 37 S. E. 839; *Carthra v. Brown*, 3 Leigh 98.

2. Surety's Summary Remedy against Principal.

As to who are sureties, see the title SURETYSHIP.

Surety's Remedy against Principal for Money Paid.—"If any person liable

as bail, surety, guarantor, or endorser, or any sheriff liable for not taking sufficient bail, or the committee or heir, or personal representative of any so liable, pay, in whole or in part, any judgment, decree, or execution, rendered or awarded on account of such liability, the person having right of action for the amount so paid, may, by motion in the court in which the said judgment, decree, or execution was rendered or awarded, obtain judgment or decree against any person against whom such a right of action exists for the amount so paid, with interest from the time of payment, and five per cent. damages on said amount." Va. Code (1904), § 2893; W. Va. Code (1899), ch. 101, § 3, is very similar.

Construction.—And under the statute giving summary remedy to all sureties against their principals, no motion lies for sureties against devisees of their principals. *Bacchus v. Gee*, 2 Leigh 68.

Notice of Motion.—If the notice apprise the defendant of the grounds of the motion, it is sufficient. *Graves v. Webb*, 1 Call 443. But if it descend to particulars, the proof must correspond. *Drew v. Anderson*, 1 Call 51.

For What Entitled to Judgment.—The surety is entitled to judgment against the principal, for the same specific thing which he has been adjudged to pay himself. *Graves v. Webb*, 1 Call 443.

Pleading—How Notice of Motion Made Part of Record.—In the case of a summary motion by surety against principal, to recover money paid by the surety, under the statute, 1 Rev. Va. Code, ch. 116, if the defendant appears, and judgment be rendered, on a hearing of the parties, the notice of the motion is not a part of the record, unless it be made so by a bill of exceptions to the opinion of the court. *Ayers v. Lewellin*, 3 Leigh 609.

Federal Court Judgment.—It seems that the executors of a surety paying a federal court judgment for the surety

debt, can not recover it against a devisee of the principal debtor by motion, or any action at common law, in the general court, or any other court of law of this commonwealth. *Cabell v. Megginson*, 6 Munf. 202. But chancery had jurisdiction of a suit by the executors against the devisee of nearly all the debtor's estate, to recover of him the money so paid.

Remedy in Equity Unimpaired.—

Surety is entitled to his remedy in equity (without having made a motion or brought any action at law) against the administrator and heir of the principal obligor for the purpose of establishing his demand, etc. *Tinsley v. Oliver*, 5 Munf. 419; *Cabell v. Megginson*, 6 Munf. 202. See *Mills v. Bank*, 16 Gratt. 97; *Eppes v. Randolph*, 2 Call 125; *Mountjoy v. Bank*, 6 Munf. 387.

But such remedy is not so complete as that in equity, where accounts of the personal and real assets may be obtained, on oath, from the defendants. (Note in original edition.) *Tinsley v. Oliver*, 5 Munf. 419.

3. Remedy of One Surety against Another.

"If the principal debtor be insolvent, any surety, or his committee, or personal representative, against whom a judgment or decree has been rendered on the contract for which he was surety, may obtain a judgment or decree, by motion, in the court in which the former judgment or decree was rendered, against any cosurety, or his committee, or personal representative, for his share, in law or equity, of the amount for which the first mentioned judgment or decree has been rendered; and, if the same has been paid, for such share of the amount so paid, with interest thereon from the time of such payment." Va. Code (1904), § 2895. See W. Va. Code (1899), ch. 101, § 5.

Construction of Statute.—Unless such judgment has been rendered, a surety can not have judgment against co-

surety, except after due proof in proper proceedings to which he is a party. *Strother v. Mitchell*, 80 Va. 149.

Where principal is insolvent, surety, against whom judgment has been rendered, may have judgment against his cosurety for his share of the debt. But unless such judgment has been rendered, such surety can not have judgment against his cosurety. *Strother v. Mitchell*, 80 Va. 149.

If the principal creditor proves insolvent, the surety may be relieved to the extent of one moiety of the debt, either by bill in equity, or by motion under the statute for the relief of sureties. *Booth v. Kinsey*, 8 Gratt. 560.

The remedy given by the statute is cumulative. He has his common-law right of action, or he may proceed by motion. If he does resort to the latter remedy, the court has no more discretion to refuse to give judgment for such damages, than it has to refuse to give judgment for the amount paid with the interest. *Mills v. Central Sav. Bank*, 16 Gratt. 94, 97; *M'Mahon v. Fawcett*, 2 Rand. 514, 529.

4. Notice to Creditor to Sue Debtor.

See the title SURETYSHIP. See Va. Code (1904), §§ 2890, 2891; W. Va. (1899), ch. 101, §§ 1, 2.

B. PARTIES.

See the title PARTIES.

1. Suits for Contribution among Cosureties.

Widow of a Surety Claiming Dower a Necessary Party.

—In a suit for contribution it appears that one of the cosureties in the bond is dead, leaving a will authorizing his widow, the executrix, to sell the real estate, which she did, joining as widow in the deed to the purchaser, as she avers in her answer as such executrix, also averring that no dower had been assigned her. The answer being sworn to, and nothing appearing in the record to show that it is not true, the court erred in rejecting it, but should have allowed

it to be filed, and should have directed the widow to be made a party in her own right, and enquired into the fact, as to whether she was entitled to dower. *Bruce v. Bickerton*, 18 W. Va. 342.

Insolvent Deceased Cosureties—Personal Representatives.—In a suit for contribution it is not necessary to make parties to the suit the personal representatives of insolvent deceased cosureties, for whom the plaintiff has been compelled to pay money as a cosurety. *Bruce v. Bickerton*, 18 W. Va. 342; *Montague v. Turpin*, 8 Gratt. 453.

But in that case the plaintiff takes the risk of their insolvency being denied in the answer; and unless the allegation of insolvency is proved, when so denied, no decree can be rendered unless their personal representatives are before the court. *Bruce v. Bickerton*, 18 W. Va. 342.

Heirs at Law.—In a suit for contribution between sureties, when the bill alleges the insolvency of a cosurety, who is dead, and such allegation is not denied, but admitted, the heirs at law of such dead cosurety are not necessary parties to the suit. *Holsberry v. Poling*, 38 W. Va. 186, 18 S. E. 485.

Deceased Solvent Cosureties.—In a suit in equity for contribution it is generally necessary to have the personal representatives of every deceased solvent cosurety of the plaintiff before the court, and to settle the estates of such deceased parties, if need be, or if such deceased parties had no personal estate, but owned real estate, it would in such a suit be necessary to have the heirs of such deceased sureties before the court, to the end that the whole matter might be settled in one suit, and proper contribution made by each party or estate, real or personal, liable to contribution, unless the party claiming contribution, who is entitled thereto, elect to take a decree against the defendant sued in full discharge of his liability for the least amount, which he would be entitled to recover against

him, if all the sureties were solvent. *Bruce v. Bickerton*, 18 W. Va. 342.

Vendor, Holding Title, of Land Claimed by Wife of Surety.—Where a suit in equity is brought by one or more sureties against their cosureties to compel contribution, and a tract of land is sought to be sold as the property of one of said cosureties, which is claimed by the wife of said cosurety as having been purchased and paid for by her, although the title remains in her vendor, it is error to decree a sale thereof without making said vendor a party to the suit. *Holsberry v. Poling*, 38 W. Va. 186, 18 S. E. 485.

In a suit of this character, when the bill alleges the insolvency of a cosurety, who is dead, and such allegation is not denied, but admitted, the heirs at law of such dead cosurety are not necessary parties to the suit. *Holsberry v. Poling*, 38 W. Va. 186, 18 S. E. 485. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Suit Should Be in Real Surety's Name.—Where a person whose name was signed as surety was not the real surety, but merely so that the request of another, a suit by such other surety for contribution against cosureties, he having paid the liability, should be in his own name as well as that of nominal surety, and where it was brought in the nominal sureties' name, no lien was created upon the land of an absent defendant, who, before the bill was amended by making the real surety a party plaintiff, returned to the state and conveyed the land to a purchaser for valuable consideration. *Stout v. Gause*, 1 Rob. 169.

2. Suits for Contribution against Legatees and Distributees.

In a suit for contribution against legatees or distributees, the executor, or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party, unless it appear that the

account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees. *Hooper v. Royster*, 1 Munf. 119.

When Legatees Are Called upon to Refund.—Where legatees are called upon to refund at the suit of a creditor, the general principle is that all must be before the court and the burden apportioned among them if it can be done without material delay or injury to the creditor. But if some of the legatees are insolvent, the others will be required to make good the deficiency to the extent of what they have received. *Leake v. Leake*, 75 Va. 794; *Hopkirk v. Dennis*, 2 Munf. 326; *Chamberlayne v. Temple*, 2 Rand. 384; *Lewis v. Overby*, 31 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367.

3. Suit by Creditor.

Suit to Subject Deceased Surety's Land—Cosureties Necessary Parties.—His cosureties should be made parties before the land of one surety can be taken to pay a complainant's debt. His representatives have a right to contribution from his cosureties in the payment of the debt. *Hall v. James*, 75 Va. 114. See *Horton v. Bond*, 28 Gratt. 815, and cases there cited.

Void Decree—Right to Complain.—The cosurety being a necessary party to a suit to subject the land of a surety to a judgment against them and their principal, the first surety has a right to complain that the court entered a void decree against his cosurety without service of process. *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370.

4. Suit for Exoneration.

If A gives a mortgage to C to indemnify C against his endorsement for A, a bill of quia timet may be brought by C against A's representatives, for a decree that they shall pay B. and indemnify C against his endorsement, but B's representatives must be made parties to the suit. *Call v. Scott*, 4 Call 402.

C. FORCE OF JUDGMENT RELEASING ONE SURETY IN ACTION AGAINST ALL PARTIES.

B. brought her action against C., the principal, and C., H. and M., as sureties, on a note. M. denied making the note. Case tried by jury, H. taking an active part, consulting and as witness in behalf of plaintiff, seeking to hold M. liable on the note. Verdict and judgment for M. against B. for costs, while plaintiff recovered against the other defendants. H. paid the judgment of plaintiff in full, and sued M. for contribution as cosurety. Held, that H.'s right being only by subrogation to the rights of B., M. was not liable for contribution, not having been liable to B. on the note. *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911.

Representatives of Deceased Parties.

—The administrator and heirs of a deceased copartner are necessary parties to a suit for contribution by another partner against the estate of a third member of the same firm. *Compton v. Thorn*, 90 Va. 653, 19 S. E. 451.

D. LIMITATIONS.

See the title LIMITATION OF ACTIONS.

Recourse against Cosurety.—The statute of limitation applicable to the case of a surety who calls upon a cosurety for contribution is three years, and not the limitation which applies to the bond, note or other writing which they have been compelled to pay. *Tate v. Winfree*, 99 Va. 255, 37 S. E. 956.

When Cause of Action Arises.—Surety's claim on principal arises on actual payment of the joint obligation. *Harper v. McVeigh*, 82 Va. 751.

Contribution Not Barred by Statute of Limitations under Particular Circumstances.—One of two joint indorsers who held an assignment, to indemnify him for said endorsement among other liabilities, of the drawer, in 1756, took in the protested bill so endorsed and executed his own bond

for the balance due thereon. In 1768, he sued the other indorser for half of said balance, with interest. In the plea of the statute of limitations, he replied that he was employed many years in settling the principal's affairs, and the suit was within the time since the amount to be contributed had been ascertained. Plea overruled by county court and appeal to high court of chancery. The two chancellors being divided, case adjourned to court of appeals, who held that under the particular circumstances the statute should not bar, not having begun to run till the trust to pay the debts of the drawer was concluded. *Pendleton v. Lomax, Wythe 5.*

See remarks thereon of Wythe, C.,

criticising the decision. *Pendleton v. Lomax, Wythe 5.* See the principal cases, cited in *Field v. Harrison, Wythe 281.* See 3 Call 538, for the court's reasons.

Improvements—Joint Tenants.—The right to claim compensation for improvements made under the circumstances disclosed by the record does not arise until the suit for partition is brought, and the right to partition arises whenever the parties may choose to assert it. Statutes of limitation have no application to suits for partition, nor to the equity for compensation which arises only when the partition is asked for. *Ballou v. Ballou, 94 Va. 350, 26 S. E. 840; Grove v. Grove, 100 Va. 556, 42 S. E. 312.*

Contributory Negligence.

See the title NEGLIGENCE.

CONTROVERSY.—See the title APPEAL AND ERROR, vol. 1, p. 477.

In the fifth exception to § 23 of chapter 130 of the Code of West Virginia, the words in "an action or suit between husband and wife," are to be construed as synonymous with the words, "a **controversy** between the husband and wife," and therefore neither the husband nor wife was a competent witness for or against each other in a **controversy** between them, and a third party in any action, suit or other proceeding, although they may severally stand therein, as plaintiff and defendant. *Anderson v. Snyder, 21 W. Va. 633.* See also, the title WITNESSES.

As to whether a **controversy** implies not only a suit but a suit in which something is affirmed by one side and denied by the other, see *Hichman v. Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 656.*

CONVENIENCE.—If A promise B that, if he and A's daughter marry, "he will endeavor to do her equal justice with the rest of his daughters, as far as it is in his power with **convenience**;" and the marriage be afterwards had with his consent, the promise is sufficiently certain and obligatory. In such case, A has not his lifetime to perform it in; but, in a reasonable time after the marriage (taking into consideration his property and other circumstances), is bound to make an advancement to B and wife, equal to the largest made to his other daughters. *Chichester v. Vass, 1 Munf. 98.*

Convenience in the sense of reasonable time, see *Chichester v. Vass, 1 Munf. 98.*

CONVENIENT CERTAINTY.—In *Kemble v. Herndon, 28 W. Va. 530*, it is said: "According to my understanding of the law the statute having prescribed everything required to be inserted in a declaration in ejectment, and having gone further and stated the manner in which the premises claimed are to be described, we are not justified, when determining what is **convenient cer-**

tainty, in applying the strict rules of the common-law special pleading; but the **certainty** must be such as in the usual sense of the word is **convenient**."

In *Board of Education v. Crawford*, 14 W. Va. 799, it is said: "Here, then, one chapter requires the premises to be described, and the other requires them to be described with **convenient certainty**. The different phraseology employed does not indicate greater certainty of description in one case than in the other, for to describe a thing or place, and to describe it with **convenient certainty** would seem to mean the same."

CONVENIENT DISPATCH.—See *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 82.

CONVENIENT PLACE.—In *Powell v. Bentley, etc., Co.*, 34 W. Va. 804, 12 S. E. 1087, it is said: "According to our settled notions and habits, there are **convenient places**—one for the home, one for the factory; but, as often happens, the two must be so near each other as to cause some inconvenience. * * * **Convenient place:** But the term **convenient place** does not mean the one best for the profit and convenience of the owner of the offensive factory, but the one where it shall cause no actionable injury to others."

Conventional Subrogation.

See the title SUBROGATION.

Conversion.

See the title TROVER AND CONVERSION.

CONVERSION AND RECONVERSION.

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CROSS REFERENCES.

See the titles DEEDS OF TRUST; DESCENT AND DISTRIBUTION; EQUITY; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; HUSBAND AND WIFE; PARTITION; SEPARATE ESTATE OF MARRIED WOMEN; TRUSTS AND TRUSTEES; WILLS.

As to the wrongful conversion of personal property, see the title TROVER AND CONVERSION.

I. Conversion.

A. DEFINITION AND ORIGIN.

Definition.—Equitable conversion is a constructive alteration in the nature of property by which, in equity, real estate is regarded as personalty or personal estate as realty. This is the universally recognized definition of conversion throughout the United States and England. See 7 Am. & Eng. Ency. Law (2d Ed.) 464.

In *Tazewell v. Smith*, 1 Rand. 320, the court said: "It is an established principle, 'that money directed to be employed in the purchase of land, and land directed to be sold, and turned into money, are to be considered as that species of property into which they are directed to be converted.' * * * The important question in such cases is, whether the character of land or money is definitively and imperatively affixed, by the will, to the property; for, the character thus impressed upon it, will remain so impressed, until some person having a right to elect, elects to take it in its original character. Land, therefore, thus impressed with the character of money, will, until election be made to take it as land, pass as money, although it has not been actually converted into money."

Origin.—The doctrine of equitable conversion originated in the well-known maxim that "Equity looks upon that as done which ought to be done," and has become one of the most familiar and well-established principles of equity jurisprudence. *Com. v. Martin*, 5 Munf. 122; *McClanachan v. Siter*, 2

Gratt. 295; *Pratt v. Taliaferro*, 3 Leigh 428; *Davis v. Christian*, 15 Gratt. 11; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232.

In *Overton v. Maben*, 10 Leigh 615, the court said: "The whole equitable doctrine of the absolute conversion of land into money, rests upon the *jus disponendi*. *Cujus est dare, ejus est disponere*. But where there is no *jus disponendi*, there can be no equitable conversion by will."

Fiction of Courts.—This whole doctrine of equitable conversion, by which what is in fact land is treated as personalty, or money as realty, is merely a fiction of courts of equity, to give impress to property to carry out the intent of wills. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 434.

"In the case of *Fletcher v. Ashburner*, and various other cases, it is said, that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by contract, marriage article, or otherwise. The owner of the fund may make land money, or money land. The cases establish this rule universally." *Com. v. Martin*, 5 Munf. 121.

Where No Sale Has Been Effectuated.

—Where testator devises real estate to be sold and proceeds divided, the same is regarded in equity as personal

property, though no sale has been effected. *Harcum v. Hudnall*, 14 Gratt. 369; *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

Purpose of Conversion or Reconversion.—This rule of conversion or reconversion is one raised for the purposes of devolution of property, to settle, as between personal and real representatives, which shall take the property. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 434.

B. BY ACT OF PARTIES.

1. By Will.

a. In General.

By far the most usual way in which an equitable conversion is effected is by will. Where a will directs land to be sold, or money to be invested in land, a court of equity raises the fiction, to execute the intention, that at once, before sale, the land is held to be money, in the case of land directed to be sold, and, in the other case, that the money is, before actual investment, to be regarded as realty. *Harcum v. Hudnall*, 14 Gratt. 374; *Pratt v. Taliaferro*, 3 Leigh 419; *Ropp v. Minor*, 33 Gratt. 110; *McClanahan v. Siter*, 2 Gratt. 294; *Brown v. Miller*, 45 W. Va. 211, 31 S. E. 956; *Effinger v. Hall*, 81 Va. 107; *Carr v. Branch*, 85 Va. 602, 8 S. E. 476; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241; *Zane v. Sawtell*, 11 W. Va. 43; *Board v. Blair*, 45 W. Va. 825, 32 S. E. 208; *Bell v. Humphrey*, 8 W. Va. 19; *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 434.

In the case of *Tazewell v. Smith*, 1 Rand. 313, 10 Am. Dec. 533, a testator directed his real estate to be sold, and the money realized from such sale to be paid to particular persons. It was held, that persons designated took the property as personalty, according to the well-established doctrine of conversion.

Where a father willed a certain tract of land to his daughter with a provision that if she die without issue the tract should be sold and one-half of the proceeds given to the cause of domestic

and foreign missions and the other half to certain relatives; it was held, that the direction to sell the land upon failure of his daughter's issue, converted the land into personalty. *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. 121.

H. died in February, 1820; and by his will, among other things, gave a tract of land and grist mill thereon, to his wife during her widowhood; and at her death or marriage the same was directed to be sold; but not until his youngest child came of age; and the proceeds of the sale he directed to be equally divided among all his children, to them and their heirs. The widow renounced the provision made for her by the will. There were four children: E., who married L. in 1836, who died in 1842, and E. afterwards married S., and died in 1852, leaving S. surviving her; T., who died an infant, intestate and unmarried, before the youngest child came of age; M., who died in 1840, and bequeathed her share of the property to E.; and J., the youngest child, who came of age in 1839. L., after his marriage with E., and S. as the guardian and agent of J., rented out the land; and L. took one-third of the rents, and paid one-third to M. till her death, when he took two-thirds, and S., as guardian or agent of J., took the other third. After the death of L., E. and S. rented out the land, and took the rents in the same way; and after the marriage of E. with S., he rented it out, and took the rents in the same way until 1850, when W. was appointed the agent of J., and took his share of the rents. E. left one child by L. and two by S. J. seems to have lived in New Orleans. S. was the administrator of E., and S. S. was administrator of T., and administrator de bonis non of M. It was held, the land and mill is to be considered as money, and to pass as such to and from the legatees of H. *Harcum v. Hudnall*, 14 Gratt. 369.

Equitable Assets.—The proceeds of the sale of land, directed by the will of

a testator to be sold for the payment of his debts, are equitable assets, and should be distributed among all the creditors *pari passu*; nor are such assets proper subjects for the cognizance of a court of law. *Nimmo v. Com.*, 4 Hen. & M. 57.

Effect of Contest on Conversion.—

If it appears that the purpose for which an executor is authorized to sell the real estate of a testator is to carry into effect the provisions of the will, although the will contains a residuary clause disposing of the entire residuum of the estate, real and personal, yet the heir of the testator who is also a legatee under the will may contest the validity of the residuary clause of the will, and in the event of an adverse decision may appeal from it. The real estate, though sold and converted into money, retains its character of real estate for the purposes of the suit. *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. 446.

Expenses of Conversion.—Where a testator divides his whole estate without regard to its legal division into two parts called "personal fund," and "real estate," and it is plainly his intention gathered from the will, the codicils and other writings that such real estate shall bear the expense of the conversion thereof into money, equity will carry out such intention and charge such expenses to the proceeds of such real estate, although there is a general provision in the will for the payment of all debts from such personal fund. *Matthews v. Tyree*, 53 W. Va. 298, 44 S. E. 526.

b. Intention of Testator.

The criterion of the principle of equitable conversion by will, is the intention of the testator as evidenced by the provisions of the will. *Carr v. Branch*, 85 Va. 601, 8 S. E. 476.

Such intention may be effectively manifested either by an express direction for a conversion, or by the general purport of the will. The opinion of Lewis, P., in *Carr v. Branch*, 85 Va.

601, 8 S. E. 476, was as follows: "The question of conversion, according to all the authorities, depends on the intention of the testator, which need not be expressly declared, but may be derived from the general effect of the will. Hence, it has been held, that where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative. To the same effect is the decision of this court in *Ropp v. Minor*, 33 Gratt. 97, in which case Judge Burks, speaking for the court, said that the intention to convert may be implied without express words directing a sale. It is sufficient, he said, if such intention be clear."

In *Overton v. Maben*, 10 Leigh 609, a testator after directing that his property should be sold, bequeathed to his wife a specific legacy, "in addition to what the law allows her." It was held, the widow is entitled to the portion which the law allowed her, of the testator's estate, real and personal, as it stood at the testator's death, not to such portion as the law would have allowed her if the whole estate had been money.

For Purposes of Will Only.—Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of the purposes, to prevail as between the persons on whom the law casts the real and personal estate; namely, the heir and the distributee. *Fifield v. Van Wyck*, 94 Va. 561, 27 S. E. 446. See generally, the title WILLS.

And it seems to be established by the weight of authority that, where a testator directs his real estate to be sold, and the mixed fund arising from the proceeds of the realty and personalty to be applied to certain specified purposes, if any part of the disposition

fails, either because void ab initio or by lapse, then in proportion to the extent or amount which the real estate would have contributed to that disposition, the proceeds thereof retain the quality of real estate for the benefit of the heir, although the real estate has been in fact sold, and the money when paid over to the heir, has in his hands the character of money and no longer the character of real estate. *Fifield v. Van Wyck*, 94 Va. 562, 27 S. E. 446.

c. Discretionary Power to Sell.

A mere power of sale, leaving it discretionary with the executor or trustee whether he will do so or not, will not work a conversion, the duty to sell not being obligatory; however, where there is an actual sale under such power there will be a conversion from that time. See *Evans v. Kingsberry*, 2 Rand. 120, 14 Am. Dec. 779, where land directed to be sold on condition was held not thereby converted into personalty until a valid sale was actually made. See, to the same effect, *Woodward v. Woodward*, 28 W. Va. 200; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650.

d. Discretion as to Time and Manner of Sale.

In *Carr v. Branch*, 85 Va. 601, 8 S. E. 476, where the will directed the executors to sell "at such time as they may deem best," it was held, that a conversion took place. See also, *Ropp v. Minor*, 33 Gratt. 97; *Com. v. Martin*, 5 Munf. 117.

e. Sale at Future Time.

Even though a sale be directed to take place at a future date, a conversion is not thereby prevented. *Ropp v. Minor*, 33 Gratt. 97; *Harcum v. Hudnall*, 14 Gratt. 369.

f. Option Given Beneficiary.

Though an option is given the beneficiary to accept land at its appraised value, yet a direction for a sale of such land may work a conversion. *Pratt v. Taliaferro*, 3 Leigh 419; *Washington*

v. Abraham, 6 Gratt. 67; *Turner v. Dawson*, 80 Va. 841.

Testatrix devises land to be sold by her executors and the proceeds of sale to be equally divided between her daughter, F. A., and her granddaughter, L. T. H., but if her daughter, when of age or married, shall choose, she may take the land in fee, on paying half the value thereof to the granddaughter, according to valuation to be made by two of the executors on oath; F. A., the daughter, marries while yet an infant; at the instance of her husband two of the executors value the land; the husband pays half the value to the granddaughter, takes the land, and sells it as his own; the daughter never exercises, or attempts to exercise, the right of election given her by the will, and dies leaving her husband surviving, and issue. It was held, the character of money was impressed upon the subject by the will, and the husband was entitled to it, as personalty of his wife, *jure mariti*. *Pratt v. Taliaferro*, 3 Leigh 419.

Sale at Direction of Widow.—A provision in a will authorizing the executors to sell certain real estate on the request of the testator's wife, and to invest the proceeds, does not work a conversion of such realty, so that it will be treated as personal property for the purposes of administration, but the title thereto passes to the devisee, where the widow made no request. *Meade v. Campbell*, 2 Va. Dec. 669.

Legatees May Elect.—Where by the provisions of a will an equitable conversion of property takes place, the legatees have their election to take the property in its real state instead of under the provisions of the will. But the intention to elect must be clearly manifested, and all parties interested in the property must unite in the election. *Harcum v. Hudnall*, 14 Gratt. 368.

Evidence of Election.—Where a testator by his will directed that his land should be sold and converted into money, the fact that one of the heirs

allows the land to be rented out and receive rent during his lifetime, is not sufficient evidence of an election on his part to take the land as land. *Harcum v. Hudnall*, 14 Gratt. 368.

Infant or Trustee Can Not Elect.—

Neither the trustee nor the infant c. q. ts. can elect to take land devised to be sold as land. And a conveyance thereof by the executors to a stranger who immediately conveys it to the trustee for the purpose of vesting the latter with the legal title, can not operate as a conversion, or an election to take the property as land. *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

g. Time of Conversion.

Where the sale is obligatory upon the trustee or executor, a conversion by will takes effect from the death of the testator. *Effinger v. Hall*, 81 Va. 107.

When Child Becomes of Age.—

Where a will directed real property to be sold and converted into money, when a certain child became of age, it will be considered as money from the date the child became of age. And the interest which one of the children of the testator takes under the will being an interest in money, the proceeds of the sale of the property, whenever it shall be made, at her death passed to her husband, and nothing passed to her children as her heirs at law. *Harcum v. Hudnall*, 14 Gratt. 368.

2. By Contract.

a. Conveyance to Trustees.

A conveyance of land to trustees, with directions to sell and hold the proceeds for the benefit of the grantor or third persons, will work a conversion. *McClanachan v. Siter*, 2 Gratt. 294; *Zane v. Sawtell*, 11 W. Va. 43.

Investment of Trust Funds in Land.

—When funds received in express trust are invested in lands, the lands in which they are invested will be regarded as held under the same character of trust, being a substitute for the funds. *Crumrine v. Crumrine*, 50 W. Va. 226, 40 S. E. 341.

b. Partnership Property.

See the title PARTNERSHIP.

C. BY OPERATION OF LAW.

Judicial Sale.—See the title JUDICIAL SALES.

A conversion of land into money by mere act of the law, as by sale under decree of a court, works a conversion into personalty only so far as is necessary to accomplish the particular purpose of the sale. *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

"In 3 Pom. Eq. Jur., § 1167, it is laid down that, where land is sold by order of court, the surplus, after satisfying the purpose of the sale, is always regarded as real estate; and that it is a fixed principle, on which the court always proceeds, that the character of the property is changed only so far as necessary to accomplish the particular purpose of the decree." *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 999.

When a dead man's land is sold under mortgage, trust deed, judgment lien, or general creditors' suit, any surplus would go to that man's heirs or devisees, not personal representatives. So far it continues realty. But that surplus, as a part of the estate of the heir or devisee, is personalty. If he dies, it goes to his personal representative, because the decree passed title to land away from him, and vested right to the money in him. The decree converted land into money by its mere force. As to this the fact that the heir's title is by descent makes no difference from what it would be if he had acquired by deed. It is his land that is sold, and as to him it becomes personalty. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 434.

Lands of Infant or Insane Person.—

A judicial sale of land, as a general rule, converts it into personalty. If land be sold, under ch. s. 79, 83, W. Va. Code, 1891, belonging to an infant or insane person, the sale does not at once convert into personalty, but the proceeds remain realty until the infant

becomes of age, and, in the case of one insane, until he becomes capable of making a will, when they are to be regarded as personalty. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433. See also, *Vaughan v. Jones*, 23 Gratt. 447.

The real estate of R., a female infant, is sold under decrees of court, and turned over to V., her guardian, upon his giving bond and security for the faithful accounting therefor. In 1862, R. married B., to whom V. paid over the estate upon his giving security to indemnify V.; and, in 1864, R. died still under the age of twenty-one years, leaving a child which survived her for but a few hours; and her husband who survived the child. It was held, the proceeds of the real estate of R. descended as real estate, to her child, subject to a life estate in her husband; and upon the death of the child, it passed as real estate to the heirs of the child on the part of the mother. *Vaughan v. Jones*, 23 Gratt. 444.

Lands of Married Woman.—Where land was conveyed to a married woman in 1866 without anything in the conveyance to render it her separate estate, and was sold under a decree to pay a debt of the woman, the separate proceeds remain real estate. *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997. See generally, the title SEPARATE ESTATE OF MARRIED WOMEN.

Partition Sale.—Where court of equity causes land to be sold for partition, it leaves it to the party entitled to the proceeds, to designate whether he will hold them as personalty, or as realty. And when, for any reason, that party is incapable of making such designation, the court will hold them subject to all the incidents of realty. *Turner v. Dawson*, 80 Va. 841. See generally, the title PARTITION.

D.'s land was sold for partition, in suit for that purpose. One-third of proceeds was set apart for widow. D.'s daughter, A., was of age, unmarried, and a party to the suit, and afterwards

married T., and, without having had issue, died in widow's lifetime. After widow's death, T. sued to recover share of A., his deceased wife, in the third, claiming it had been converted into personalty. There was no evidence that A., whilst sui juris, ever elected, or that any election for her in her lifetime, whilst she was non sui juris, had been made, that said third should be personalty. It was held, said third of proceeds of sale in D.'s land is realty. *Turner v. Dawson*, 80 Va. 841.

Time of Conversion.—Where there is a sale of land by order of court, a conversion of the property takes place, to the extent necessary for the purposes of the sale, from the time of the order of sale. *Allan v. Hoffman*, 83 Va. 129, 2 S. E. 602.

An absolute order of sale, made within the jurisdiction of the court in an administration suit, operates as a conversion from the date of the order and before sale. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 434.

D. EFFECT OF CONVERSION.

In General.—The general effect of a conversion is to give to the property that character into which it is directed to be changed. Every conversion in the absence of something showing a contrary intent will be held for the purposes of the will only. *Fifield v. Van Wyck*, 94 Va. 561, 27 S. E. 446.

Prevents Escheat of Land.—A testator bequeathed to his brothers David and James (who were aliens), "to be equally divided between them, the money arising from the sale of his land and other property, and from the debts due to him at the time of his death; and, as they resided in Great Britain, it was his will that his executors make remittances to them in bills of exchange, or in any other mode, as soon as they could." This was adjudged to be a good devise, so that a sale and conveyance by the executors was effectual to the purchaser; and that the land

did not escheat to the commonwealth in consequence of the testators dying without heirs. *Com. v. Selden*, 5 Munf. 160. See also, *Com. v. Martin*, 5 Munf. 117.

Married Woman's Land.—"When the law turns the wife's real estate into money, and her volition has not been put forth to give character to the fund, it will be dealt with as belonging to the husband and wife in the same proportions as the land did before sale," and that, "if the husband had a life estate in the land before sale, he will have a life estate, and no more, in the fund." *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 999. See generally, the titles CURTESY; HUSBAND AND WIFE.

May Create Estoppel.—Where a testator by his will directed that all of his estate should be held by his executors as a trust for the support of his daughter, and gave them power to pay out so much of his money as may be necessary for her support, and provided that the executors should have power to dispose of any of his land, and loan out the money received from such sale on interest, and that if any money was left after the death of his daughter, the residue was to be paid to her children, and the executors with the fund which they acquired from the disposal of certain lands purchased another track of land, which purchase was adopted by the daughter and her children, it was held, that after the death of the mother the children of the daughter of the testator are estopped from treating said property as personalty, and the party holding one-third of said land by virtue of conveyance of one of said children, is entitled to a partition thereof. *Watson v. Conrad*, 38 W. Va. 536, 18 S. E. 744. See generally, the title ESTOPPEL.

E. FAILURE OF GIFT.

Resulting Trust.—In *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, money was bequeathed to be invested in land,

but by reason of a breach of condition precedent the legatee could not take. Held, that the conversion fails and the money goes to the residuary legatee by the theory of resulting trusts.

II. Reconversion.

A. DEFINITION.

By "reconversion" is meant that imaginary process by which a prior constructive conversion is annulled, and the converted property restored in contemplation of equity, to its original state. See *Snell's Prin. Eq.* 160; *Black's Law Dict.*, title Reconversion; *Adams Eq.* (5th Ed.) 137.

B. ELECTION.

1. In General.

As a general rule those persons who have the exclusive beneficial interest in the property constructively converted, may elect to take it in its actual condition, if all interested are sui juris and agree to the arrangement. *Com. v. Martin*, 5 Munf. 122; *Harcum v. Hudnall*, 14 Gratt. 369; *Effinger v. Hall*, 81 Va. 94; *Carr v. Branch*, 85 Va. 604, 8 S. E. 476.

2. Infants.

In *Carr v. Branch*, 85 Va. 604, 8 S. E. 476, the court said: "An infant is incapable of making an election, nor can his guardian or trustee elect for him, though a court of equity may." See also, *Turner v. Street*, 2 Rand. 404; *Com. v. Martin*, 5 Munf. 127.

3. Married Women.

Before the statutory relief from incapacity a married woman could not elect, except upon privy examination. *Pratt v. Taliaferro*, 3 Leigh 419; *Siter v. McClanachan*, 2 Gratt. 280; *Shanks v. Edmondson*, 28 Gratt. 811. But these cases are no longer authority on this subject, in Virginia, under acts, 1899-1900, p. 151, giving to a feme covert the same rights as a feme sole.

4. Complete Conversion.

In *Com. v. Martin*, 5 Munf. 122, it was said: "Where it appears to have been the intention that a sale or pur-

chase, as the case may be, must take place at all events, then a court of equity, whose business it is to aid the intention of the party, will not permit the character thus impressed on the property to be changed by election."

5. Undivided Interest.

Where the proceeds of land to be converted are to be divided among several persons, all interested in the distribution must unite in the election.

Harcum v. Hudnall, 14 Gratt. 369; *Com. v. Martin*, 5 Munf. 117; *Brown v. Miller*, 45 W. Va. 211, 31 S. E. 956.

6. Intention.

In *Harcum v. Hudnall*, 14 Gratt. 369, it was held, that the intention to elect must be clearly and unequivocally manifested, in order to be effective. See also, *Carr v. Branch*, 85 Va. 597, 8 S. E. 476; *Shanks v. Edmondson*, 28 Gratt. 812, and cases cited.

CONVEY—CONVEYANCE.—See the titles DEEDS; VENDOR AND PURCHASER.

To **convey** means to transfer the title of land from one person to another. *Nickell v. Tomlinson*, 27 W. Va. 720.

In *Nickell v. Tomlinson*, 27 W. Va. 720, it is said: "The term **convey** can be properly used, only when the transfer of some 'estate in land' is spoken of."

Land is **conveyed** only when a good title passes. *Fairfax v. Lewis*, 11 Leigh 248.

Convey and Grant.—In *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 41 S. E. 344, it is said: "The word **convey** is now held to be equivalent to the word 'grant,' even at common law. *Chapman v. Charter*, 46 W. Va. 769, 34 S. E. 768." See also, *Uhl v. Ohio River R. Co.*, 51 W. Va. 114, 41 S. E. 344. See generally, the title DEEDS.

Conveyance.—In *Argand Refining Co. v. Quinn*, 39 W. Va. 535, 20 S. E. 579, it is said: "Black, in his Law Dictionary (page 273), defines **conveyance** as 'the transfer of the title of land from one person or class of persons to another.'"

Devise.—The act, Va. Code, ch. 77, § 8, p. 362, does not authorize a devise of land for the use of a religious congregation, but only a **conveyance** by deed. The court said: "There can be no doubt but that the word **conveyance**, in its comprehensive, and perhaps in its technical sense, embraces a devise; and if it had been the only word used by the legislature in the provision in question to express the mode of transfer, it might, reasonably, have been construed in that sense; especially as it is used in that sense in other parts of the Code, as in ch. 116, §§ 1, 11. But we know that in common parlance, the word is often used in a more restricted sense, as contradistinguished from devise; and that it has often been so used in our most important acts of legislation; as for example, in the act concerning **conveyances**, 1 Rev. Va. Code, 1819, ch. 99." *Seaburn v. Seaburn*, 15 Gratt. 423, 427.

CONVICTION.—The governor had constitutional authority to grant reprieves and pardons after **conviction**. It was held, that the governor might pardon a person **convicted** of a felony, by verdict of a jury, before sentence is passed upon him by the court. The court said: "What is the meaning of the word **convicted**, in this connection? Blackstone says: If the jury 'find the prisoner guilty, he is then said to be **convicted** of the crime whereof he stands indicted; which **conviction** may accrue two ways—either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country.' 4 Bl. Com. 362. And again he says: "The plea of *autrefois convict*, or a former **conviction** for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is

a good plea in bar to an indictment.' Id. 336. Jacob says: 'There is great difference between a man **convicted** and attainted, though they are frequently, though inaccurately, confounded together;' and he then proceeds to explain the difference and its consequences. 1 Jacob's Law Dictionary, p. 163, title 'Attainder.' And again he says: '**Convict**, convictus. He that is found guilty of an offense by verdict of a jury.' Crompton saith, that **conviction** is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest; and when a statute excludes from clergy persons found guilty of felony, etc., it extends to those who are **convicted** by confession. Crompt. Just. 9.'" Blair v. Com., 25 Gratt. 853. And see that case for other definitions of **conviction**.

Convicts.

See the titles PRISONS AND PRISONERS; REFORMATORIES; WITNESSES.

Cooling Time.

See the title HOMICIDE.

Co-Ordinate Servant.

See the title FELLOW SERVANTS.

Coparceners.

See the titles EJECTMENT; JOINT TENANTS AND TENANTS IN COMMON; PARTITION; WASTE.

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See the title DOCUMENTARY EVIDENCE. See also, such titles as DEEDS; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; RECORDS; WILLS.

Coram Nobis and Coram Vobis.

See the titles APPEAL AND ERROR, vol. 1, p. 434; JUDGMENTS AND DECREES.

CORAM NON JUDICE.—In *St. Lawrence Co. v. Holt*, 51 W. Va. 363, 41 S. E. 351, it is said: "'Acts done by a court which has no jurisdiction either over the person, the cause, or the process, are said to be **coram non judice**.'" Bouvier's Law Dic. 'Where an action is brought and determined in a court which has no jurisdiction over the matter, it is said to be **coram non judice**.' 7 Am. & Eng. Ency. Law (2d Ed.) 595. That such judgment or decree could not stand for a moment, if attacked in a direct proceeding by motion in proper time in the court below, or by appeal, or writ of error, or bill of review, there is not the slightest doubt, but if it is merely erroneous and not absolutely void, it is binding until reversed, and, if never reversed by a direct proceeding, it is binding forever or until it expires by limitation. It can never be attacked in any

collateral proceeding and all matters settled by it are *res judicata* in every court so long as it remains unreversed." See also, *Neale v. Utz*, 75 Va. 486; *Woodson v. Leyburn*, 83 Va. 843, 3 S. E. 873. And see the titles FORMER ADJUDICATION OR RES ADJUDICATA; JUDGMENTS AND DECREES; JURISDICTION.

CORDIAL.—See *State v. Haymond*, 20 W. Va. 22.

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CORONERS.

I. Incompatible Offices, 508.

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CROSS REFERENCES.

See the titles ELECTIONS; EVIDENCE; HOMICIDE; PUBLIC OFFICERS; SERVICE OF PROCESS; SHERIFFS AND CONSTABLES.

I. Incompatible Offices.

Whether a justice of the peace who accepts the office and commission of coroner thereby forfeits his office of justice has not been determined in Virginia. But even if he does, such acceptance does not vacate such of his subsequent acts as justice as are done before his disqualification is established by some proper judicial proceeding instituted for that purpose. *Maddox v. Ewell*, 2 Va. Cas. 59.

As to the present law, see Va. Code, 1904, § 1020.

II. Powers and Duties of Coroner.

Arrest of Accused.—If the person charged by the coroner's inquest is not in custody, the coroner may issue process for his apprehension in the same manner as a justice. Such a warrant is to be returned to a justice who examines and commits or not as in other cases. *Forde v. Com.*, 16 Gratt. 547.

The coroner does not pass judicially upon the question whether or not the

evidence sufficiently charges the accused with the offense. *Forde v. Com.*, 16 Gratt. 547.

Committing Felons to Jail.—Whether or not a coroner has authority to commit to jail for trial a person charged by the inquest with felony has not been decided in Virginia. *Wormeley v. Com.*, 10 Gratt. 658.

Serving on Examining Court.—A coroner who takes the inquest upon the dead body of a man, whom the prisoner is charged to have murdered, is not thereby legally disqualified from sitting as a member of the examining court. *Forde v. Com.*, 16 Gratt. 547.

Duties of Coroner Are Judicial.—The duties of the coroner are judicial. He conducts inquisition, but the finding of the inquisition is the act of the jury. *Forde v. Com.*, 16 Gratt. 547.

Returning Inquisition.—It is the duty of the coroner to return the inquisition to court. *Forde v. Com.*, 16 Gratt. 547.

Recognizing Witnesses.—It is the duty of the coroner to recognize such witnesses as he thinks proper to appear and testify at court when the ac-

cused is examined. *Forde v. Com.*, 16 Gratt. 547.

Service of Process.—If the process in a case is one which it is unfit for the sheriff to issue because he is interested in the suit, by § 893, Va. Code, 1887, it is the duty of the coroner to execute the same and whenever the office of coroner is vacant or the incumbent under a disability such process is to be served by a constable. If, however, the office of coroner is not vacant and the incumbent under no disability the constable can not serve process directed to the sheriff. Such service is not legal service and the return thereof should be quashed. *Andrews v. Fitzpatrick*, 89 Va. 438, 16 S. E. 278.

Though it is provided by statute that "when for a cause it is unfit for a sheriff to serve a process, such process shall be directed to and served by the coroner," nevertheless, if in an action of debt against four obligors, one of whom is the sheriff, the process goes into the hands of his deputy, who serves it upon him, to which he makes no objection, and allows judgment to go by default, the process is validly served and the judgment is valid. *Turnbull v. Thompson*, 27 Gratt. 306.

Pronouncing Judgment of Outlawry.—It is the duty of the coroner, after the defendant has been exacted the fifth time, to pronounce the judgment of outlawry, and the sheriff in his return ought to state the name of the coroner by whom the outlawry was pronounced. *Com. v. Hale*, 2 Va. Cas. 241; *Com. v. Hagerman*, 2 Va. Cas. 244; *Com. v. Anderson*, 2 Va. Cas. 245.

As to the point that proceedings of outlawry are abolished in Virginia, see Virginia Code, 1904, § 4014.

III. Evidence at Inquest.

Inadmissible at Trial.—The proceedings before a coroner and the verdict of the coroner's jury are generally inadmissible as evidence at the trial of an indictment for murder. So, like-

wise, is the opinion of a witness as to the tendency of the evidence before the coroner. "To admit those proceedings, and a verdict thus arrived at, to be used as evidence upon the trial, to influence, perhaps to control, the verdict of the jury, would, in our judgment, lead to the subversion and final overthrow of the jury system; whilst in nearly every case the rights of either the commonwealth or the accused would be inevitably prejudiced." *Whitehurst v. Com.*, 79 Va. 556. See generally, the title DOCUMENTARY EVIDENCE.

On a trial for murder, the evidence of a witness taken down at the coroner's inquest, but who was not recognized, and who has since removed beyond the jurisdiction of the court, and whose presence can not therefore be obtained at the trial, although efforts were made by the prisoner for that purpose, can not be read. *Crite v. Com.*, 1 Va. Dec. 423. See generally, the title HEARSAY EVIDENCE.

The statements made by one accused of murder while testifying at the coroner's inquest can not be used against him at his trial, but the statements made by him before he is sworn and examined before such inquest are admissible evidence, if otherwise relevant. *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380.

Incriminating Questions.—The fact that a witness has testified before a coroner and stated the facts does not amount to a waiver of his privilege to refuse to answer questions which tend to criminate him, if the statements before the coroner were made by the witness without his being advised of his privilege; and when examined by the court he may refuse to answer the incriminating questions. *Cullen v. Com.*, 24 Gratt. 624.

Impeachment of Witness by Testimony at Inquest.—On a trial for murder, to contradict a witness for the prisoner, it is competent to introduce

in evidence a deposition given by him before the inquest, taken down at the time by the coroner and read to the witness, and signed by him. *Wormeley v. Com.*, 10 Gratt. 658.

Depositions made by witnesses at a

coroner's inquest are admissible to impeach these witnesses when testifying at trial, if upon cross examination they deny that they made certain statements at the inquest. *New York, etc., R. Co. v. Kellam*, 83 Va. 851, 3 S. E. 703.

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I. Scope of Title.

This title includes private corporations generally, their characteristics, creation, organization, powers, duties and liabilities, consolidation, reorganization, dissolution, and the amendment and repeal of their charters. It excludes unincorporated associations; municipal corporations; incorporations for a particular purpose or business, such as railroads, etc., for which see the specific titles; stock and stockholders, with the rights, duties, powers and liabilities of the latter; officers and

agents, their duties, liabilities and responsibilities. It also excludes the taxation of corporations and corporate stocks, as to which see the title TAXATION.

II. Definitions, Distinctions and General Considerations.

A. DEFINITIONS.

A corporation.—A corporation is "a body composed of one or more individuals, and possessed of a franchise, by virtue of which it subsists as a body politic, under a special designa-

tion, and by the policy of the law is vested with the capacity of perpetual succession, and of acting in several particulars however numerous the association, as a single individual." 1 Minor's Inst. (3d Ed.) 529.

"Corporations aggregate are artificial beings created for specific and limited objects, public or private, in order to conduct and continue in succession the interests pertaining to those objects, by the exercise collectively of appropriate, legitimate means, such as natural persons may employ individually." *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 20.

"Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheat. 626, thus describes such artificial person: 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creation of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the objects for which it was created. Among the most important are immortality and, if the expression may be allowed, individuality. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies—the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object like one immortal being.'" *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 332. See *Rece v. Newport News Co.*, 32 W. Va. 164, 9 S. E. 212; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774, 776; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319, 332; *Ro-*

noke Gas Co. v. Roanoke, 88 Va. 810, 824, 14 S. E. 665; *Kelly v. Board of Public Works*, 75 Va. 263, 272; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83.

And in the *Dartmouth College Case*, Judge Story said: "A corporation aggregate is an artificial person, existing in contemplation of law, and endowed with certain powers and franchises, which, although they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real person;" and for this reason such a corporation may contract with them in the same manner as with strangers. *Ruffner v. Welton Coal, etc., Co.*, 36 W. Va. 244, 15 S. E. 48, 53.

Again, a corporation is an inanimate artificial being having no power to act except through living agents. *Frazier v. Va. Military Inst.*, 81 Va. 59; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278. See *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

Corporations are mere artificial persons, which the legislature has the right to call into existence, or not to create at all. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514. See *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 602; *Winchester v. Redmond*, 93 Va. 711, 713, 25 S. E. 1001; *Turpin v. Lockett*, 6 Call 113, 133.

"It has been said that, 'what a corporation really is, presents a question of fact, and not of law, and the solution of the question must be reached through the perceptions, rather than by abstract reasoning. Yet the question has given rise to a vast amount of fruitless metaphysical discussion, both among the civil law and the common-law writers.'" *Wambersie v. Orange Humans Soc.*, 84 Va. 446, 451, 5 S. E. 25.

Constitutional Definition. — Article 12, § 153, Va. Const. (1902), provides that the term "corporation" and "company," as used in this article, "shall

include all trusts, associations and joint stock companies having any power, or privileges not possessed by individuals or unlimited partnerships, and exclude all municipal corporations and public institutions owned or controlled by the state." See West Va. Code, ch. 53, § 1, p. 544.

Franchise to Be a Corporation.—"It is a franchise to be a corporation with power to sue and be sued, and to hold property as a corporate body." *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 787; *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh 42, 75.

As said in *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 546, 40 S. E. 514: "It is manifest that the chief or primary right included in a corporate franchise is the right to be a corporation. This carries many privileges and exemptions. It limits the liability of the individuals composing the corporation in respect to their contracts and acts in the prosecution of the particular enterprise. It enables the collective body, without regard to the number of persons composing it, to act as one man, as well as to limit the personal liability of each individual. It permits a simple and convenient transfer of the interest of each stockholder, and relieves him of many of the great inconveniences of a copartnership relation to his associates. The benefits flowing to the individuals from the privilege thus granted of combining and acting as a corporation in the prosecution of their business are almost innumerable."

Proposed Business and Locality Immaterial.—"The particular business which it is proposed to transact, and the place in which it is proposed to do that business, are matters of inferior consequence and do not enter into the very essence of corporate existence." *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 546, 40 S. E. 514.

Grant of Special Privileges.—A grant

of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from the individual liability. *Floyd v. Loan, etc., Co.*, 49 W. Va. 327, 333, 38 S. E. 653.

Charter Defined.—Article 12, § 153, Va. Const. (1902), provides that "the term 'charter' shall be construed to mean the charter of incorporation by, or under, which any such corporation is formed."

B. CLASSIFICATION AND DISTINCTIONS.

In General.—Corporations may be divided into three classes; purely private corporations, public corporations and quasi public corporations. The last are subject to the same public control by courts or the legislature as quasi public officers. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 340.

For Purposes of License and Taxation.—See the titles LICENSES; TAXATION.

Sections 86 and 87 of ch. 35 of the acts of the legislature of 1901, classifying corporations chartered under the laws of this state, and designating those having their principal places of business or chief works outside of the state as nonresident corporations, and imposing upon them a greater license tax than upon those having their principal places of business and chief works within the state, does not, in so classifying them and discriminating, violate § 1, art. 10, of the constitution of this state, nor clause 1, § 10, art. 1, of the constitution of the United States, nor the fourteenth amendment to the constitution of the United States, and is, therefore, valid and the charge of such greater tax upon such nonresident corporation legal. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514.

Public and Private Corporations Distinguished.—Corporations are generally divided into two classes, based on the character of their business. Corresponding to the private person is the private corporation, created for private purposes or for the pecuniary gain of its members; and of course they do not cease to be private corporations, simply because the legislature supposed, as it always does, that their creation would indirectly promote the public interest. On the other hand public corporations correspond to public officers in the division of natural persons. They are created generally for governmental purposes; or they may be created for business purposes and will still be public corporations, if the whole interest in the corporation belongs to the state. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324. Strictly speaking, they are such only as are founded by the government for public purposes, where the whole interest belongs also to the government. *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 5 S. E. 25.

"Private corporations are associations formed by the voluntary agreement of their members, such as banking, railroad, and manufacturing companies, etc., for the preservation and advancement of private interests. Mr. Minor says (vol. 1, 548), a private corporation is any one not public, and, in order that it may be public, it must not only exist for governmental or for public purposes alone, but the whole property therein (if there be any property) must belong to the government in its political capacity." *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 452, 5 S. E. 25.

"In the case of *Lewis v. Whittle*, 77 Va. 415, 419, this court said: 'Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interest belongs also to the government;' citing the opinion of Justice

Story in the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 669. Saying of the *Richmond Medical College*, then under consideration: 'This medical college is in every sense a public corporation, made so in the manner already stated. The visitors of this college are then holding under an act of the legislature a public office or employment subject to the control and direction of the state, to be appointed and removed by competent public authority.'" *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 453, 5 S. E. 25. See the title **COLLEGES AND UNIVERSITIES**, vol. 2, p. 848.

The real nature of a corporation, in every case, depends upon the charter or articles of association under which it is formed, and must be defined by reference thereto. Whether the association should be termed a public or private, or religious or charitable or civil corporation, is simply a question regarding the meaning of those words. *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 5 S. E. 25.

Prison Association of Virginia.—The prison association of Virginia is not a public corporation. *Trevett v. Prison Ass'n*, 98 Va. 332, 36 S. E. 373.

Quasi Public Corporations.—There is also a third class of corporations corresponding to quasi public officers, called quasi public corporations; viz., owners of ferries, common carriers, innkeepers, etc., who are chartered to conduct a business in which the public has an interest; and hence are subject to the control of the legislature as to their maximum charges, etc. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

Associations and government institutions possessing only a portion of the attributes which distinguish ordinary private or public corporations have sometimes been denominated 'quasi corporations.' Towns and other political divisions, school districts, boards of commissioners, overseers or trustees of the poor, etc., having authority

to act and bring suit as united bodies, without regard to their membership for the time being, are quasi corporations of a public character. *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 451, 5 S. E. 25.

Thus, a corporation which was incorporated to administer a fund dedicated to public uses, is a quasi public corporation, over which the legislature has exclusive control, and the power to repeal its charter. *Wambersie v. Orange Humane Soc.*, 84 Va. 445, 5 S. E. 25.

C. CORPORATION AS ENTITY DISTINCT FROM SHAREHOLDERS.

See the title STOCK AND STOCKHOLDERS. See post, "Effect of Acquisition of Entire Capital Stock," XV, B, 2.

An incorporated company is an entity wholly separate and distinct from the individual stockholders who compose it. *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 399, 25 S. E. 110; *State v. B. & O. R. Co.*, 15 W. Va. 362. See *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 614, 40 S. E. 591.

And a corporation is an artificial person, created by law, with rights and duties altogether separate and distinct from those of individuals, who, from time to time, may compose it. They have a separate existence, separate interests, and separate liabilities, and, so far as the right of an individual member of the company to its earnings is concerned, he is entitled only to his proportionate share of the surplus profits. *Keagy v. Trout*, 85 Va. 390, 398, 7 S. E. 329; *Martin v. South Salem Land Co.*, 94 Va. 28, 49, 26 S. E. 591. See *Barksdale v. Finney*, 14 Gratt. 338.

So that the capital stock, franchises, capital and assets may be taxed, and also the shares of stock in the hands of the individual holders. *Jennings v. Com.*, 98 Va. 80, 34 S. E. 981. See the title TAXATION.

Corporation the Real Person.—It is well settled that from the very nature of a private business corporation, the stockholders are not the private and joint owners of its property, etc.; the corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it. It must purchase, hold, grant, sell and convey the corporate property, do business, sue and be sued, plead and be impleaded for corporate purposes by its corporate name. *Park v. Petroleum Co.*, 25 W. Va. 108; *Barksdale v. Finney*, 14 Gratt. 338. See *Gordon v. Richmond, etc., R. Co.*, 78 Va. 501; *Moore v. Schoppert*, 22 W. Va. 282; *Kyle v. Wagner*, 45 W. Va. 349, 32 S. E. 213.

But the corporation is but the representative of its stockholders, and exists mainly for their benefit. *Martin v. South Salem Land Co.*, 94 Va. 28, 49, 26 S. E. 591; *Moore v. Schoppert*, 22 W. Va. 282, where it is said a technical trust arises in their favor, which will be protected and enforced in equity.

Relation of Corporation to Stockholders Not a Fiduciary One.—An individual stockholder is not, by reason of being a stockholder, a part owner of the property of the corporation, or entitled to act for it as its agent; but he stands as a stranger towards it and may sue it and be sued by it and deal with it at arm's length. *Kanawha Coal Co. v. Ballard, etc., Coal Co.*, 43 W. Va. 721, 29 S. E. 514.

May Contract with Its Members.—An incorporated company is, in a legal point of view, wholly distinct from the persons composing it and may make any contract with one of its members or stockholders that it might make with a stranger. *Biggs v. Elliston Dev. Co.*, 93 Va. 404, 25 S. E. 113. See *Addison v. Lewis*, 75 Va. 701, 720.

May Secure Debt to Shareholder.—A corporation may contract debts to

its individual corporators and is as much bound to pay or secure such debts as debts due to strangers, and the fact that a deed is given to secure such debts does not render it fraudulent unless some fraudulent intent is shown. *Burr v. McDonald*, 3 Gratt. 215; *Hope v. Salt Co.*, 25 W. Va. 789. See post, "To Prefer Creditors and Assign for Their Benefit," XI, G.

Its Property Taxable in Name of Corporation.—Property belonging to a corporation is vested in the shareholders in their corporate capacity and not as individuals, and is consequently taxable in the name of the company. *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319; *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502, 509.

D. CONSTRUCTION OF CORPORATION LAW AS A WHOLE.

"There is confessedly some confusion in our lengthy and elaborate law touching corporations, perhaps necessarily incident to dealing with such a subject, and traceable to amendments from time to time; but it seems to have been the legislative intent to make chapters 53 and 54 apply to all joint stock companies, so far as applicable; and, this being so, they are to be read and harmonized upon the principles of construction applicable to statutes in *pari materia*. They contain elaborate details in a comprehensive system of statute law on one single subject—corporations." *Cross v. West Virginia, etc., R. Co.*, 37 W. Va. 342, 16 S. E. 587, citing *State v. Cain*, 8 W. Va. 733; *Curran v. Owens*, 15 W. Va. 227.

E. STATE REGULATION AND CONTROL.

See the title CONSTITUTIONAL LAW, ante, p. 140.

1. By Legislature or Courts.

See post, "Amendment, Repeal and Extension of Charters," VIII.

a. In General.

The law applicable to artificial persons or corporations, in respect to reg-

ulation of conduct and charges for services, is very similar to the law applicable to natural persons and is obviously based on like grounds. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 332.

And a corporation, except where it is otherwise provided in its charter, expressly or by clear implication, in the use of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as individuals, and is subject to the same control under the police powers of the state or a municipal corporation. *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83; *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 659, 47 S. E. 848.

"It is conceded that a charter granted to a corporation by the state may be, according to its terms, a contract between the state and corporation, the obligation of which can not be impaired by subsequent legislation; but at the same time while this is conceded, it is also certainly true that corporations, like natural persons, are subject to remedial legislation, and amenable to general laws. Private corporations, even without any express reservation of the powers over them by the legislature in their charters, are subject, like individuals, to be restrained, limited and controlled in the exercise of their powers by such laws as the legislature may pass, based upon the principles of safety to the public." *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 95.

Under this police power a city ordinance forbidding a railroad to propel cars through certain crowded streets of a city by steam, was upheld as not impairing the obligation of the contract of incorporation. *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83.

But neither the courts nor the legislature can control the conduct or actions of a private corporation when acting within the scope of the powers

conferred upon it by its charters, any more than they can control the conduct of a private person in his business. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324. To this rule there are some exceptions arising from the character of the business, for which see post, "Quasi Public Corporations," II, E, 1, b.

Thus, where the charter of a water company provides that the water rates shall be uniform throughout the town for the same class of service, but allows a charge of \$9 per hydrant, and also allows a maximum charge of 5 cents per hundred gallons thereby impliedly authorizing a charge by measurement, the plaintiff can not enjoin the water company from charging by measurement as long as the company keeps within its charter and does not discriminate between consumers in the same circumstances. *Exchange, etc., Co. v. Roanoke Gas, etc., Co.*, 90 Va. 83, 17 S. E. 789.

And courts of equity can not substitute their own business discretion and judgment for that of a company on matters intrusted to the company by its charter. Their visitorial powers have no such scope. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

Not by Special Act.—"The general assembly shall not, by special act, regulate the affairs of any corporation, nor, by such act, give it any rights, powers or privileges." Va. Const. (1902), art. 12, § 154.

May Compel Payment of Employees in Lawful Money.—The act of March 7, 1891, prohibiting corporations, etc., from paying their employees in other than lawful money, also the act of March 9, 1891, touching the weighing of coal, are not in violation of the constitution of the United States or of West Virginia. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000. See the title CONSTITUTIONAL LAW, ante, p. 140.

May Take Away Exclusive Privileges.—The right to establish ferries and toll bridges is in the legislature, and that body can at any time, by a repeal of the general law, take away all the exclusive privileges of proprietors theretofore existing; but it has not done so in West Virginia. *Mason v. Bridge Co.*, 17 W. Va. 396.

Prescribing Liabilities for Future Conduct of Business.—The state may prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 132, 17 S. E. 803.

Mandamus to Compel Performance of Corporate Duties.—Mandamus will lie to a corporation to compel it to perform the duties imposed upon it by its charter; viz., issuing a transfer when required to do so by its charter. *Richmond Ry., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775; *Feckheimer v. Nat. Exchange Bank*, 79 Va. 80. See the title MANDAMUS.

Force of Old English Corporation Law.—"Corporation, whether sole or aggregate, ecclesiastical or temporal, being merely creatures of the law, it seems reasonable to presume, that the laws of England, respecting them, which were in force at the time the colony of Virginia was first settled, were brought over hither at the time; and where not altered or repealed by legislative or constitutional acts, remain in force, by virtue of the ordinance of convention, May, 1776, ch. 5 (Ed. 1785 p. 37)." *Turpin v. Lockett*, 6 Call 113, 133.

Subject to Sunday Laws.—See the title CONSTITUTIONAL LAW, ante, p. 140.

b. Quasi Public Corporations.

But a quasi public corporation having accepted a franchise in which the public has an interest, is subject to the control of the legislature as to its

charges, etc., in the exercise of the police power, and a provision in their charter fixing a maximum charge, is not a contract, but amounts to nothing more than a license which may at any time be changed by the sovereign power from the state. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

There is a marked difference between corporations which devote their property to a use, in which the public has a direct interest, and in effect grant to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as they may maintain the use, with power to withdraw the grant by discontinuing the use, and purely private corporations. The former may be called quasi public corporations; and the legislature of the state has over their employment of their property so devoted to a use, in which the public has an interest, a control, which it does not have over the employment of the property of a purely private corporation. The legislature can generally exercise no control, which is forbidden by the charter of a purely private corporation. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324. See the title RAILROADS.

The regulation of public service corporations is legislative in its character and not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the states, are questions; but it must come, when it does come, from some source of legislative power. The legislature may impose a duty and, when imposed, it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage or by contract, or by statute, the courts can not be called on to give it effect. *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 296, 49 S. E. 39.

The principle upon which the state assumes authority to control and reg-

ulate the affairs of railroads and other public service corporations rests largely upon the doctrine of agency. Such corporations are founded by the legislature for public purposes, and are clothed with authority, subject to state regulation and control, to exercise important governmental functions. By their charters they are granted privileges which may not be exercised by private persons, whether individuals or corporations, but always with the reservation, express or implied, that such privileges are subject to reasonable governmental control. This right of control is part of the police power of the state. *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 292, 49 S. E. 39. See *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 43 S. E. 194.

c. Charter as a Contract.

See post, "Amendment, Repeal and Extension of Charters," VIII.

2. By State Corporation Commission.

Origin.—"By § 155 of the constitution, which went into effect July 10, 1902, a permanent commission is created, to be known as the 'State Corporation Commission.'" *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

Object of Creation of Commission.—"The object of creating the state corporation commission was to protect the public rights by regulating public utilities." *Newport News, etc., R. Co. v. Hampton, etc., Electric Co.*, 102 Va. 847, 851, 47 S. E. 839.

"In this commonwealth, the state corporation commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial and executive powers." *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 294, 49 S. E. 39.

Powers.—"The constitution of Virginia, § 156a, art. 12, provides that.

'subject to the provisions of this constitution and to such requirements, rules and regulations as may be prescribed by law, the state corporation commission shall be the department of government, through which shall be issued all charters and amendments or extensions thereof for domestic corporations, and all licenses to do business in this state to foreign corporations; and through which shall be carried out all the provisions of this constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this state.'" *American Surety Co. v. Com.*, 102 Va. 841, 844, 47 S. E. 994; *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

"Subsection 'b' of § 155 of the constitution declares that 'the commission shall have the power, and be charged with the duty, of supervising, regulating, and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall from time to time prescribe and enforce against such companies in the manner hereinafter authorized, such rates, charges, classifications or traffic, and rules and regulations, and shall require them to establish and maintain all such public service facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements the commission may from time to time alter and amend.'" *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 294, 49 S. E. 39.

When Constitutionality of Rule Considered by Court of Appeals.—The rules and regulations established by the state corporation commission for the government of transportation companies and shippers doing business in this state are reasonable, just and valid,

except in so far as they may in their operation directly trench upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected by that instrument; and objection on the latter account may be raised and determined in any case in which that question could be raised and determined if the rules and regulations had been enacted as statutes by the general assembly, except as prohibited by subsection "d" of § 156 of the constitution of this state. Whether said rules and regulations do directly infringe upon the commerce clause of the constitution of the United States, or violate any right of said companies can only be properly determined as the questions arise in concrete cases, and upon the particular facts of each case, and can not be properly decided on this appeal where only abstract questions are raised. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

But the state corporation commission has no authority to make any rule or regulation in conflict with the constitution of the United States, and if any such rule or regulation is made, which, in its application to the facts of a particular case, violates any right of a defendant protected by the constitution of the United States, he may have its validity tested by an appeal to this court, notwithstanding its refusal to pass on the abstract proposition presented on the present appeal. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

Private Track Scales—Public Service Regulation—Fixing Rates.—Placing cars on private track scales, in position to be weighed, by a railroad company engaged in handling cars along its route from the terminus of one railroad to the terminus of another, and to and from the various industries with which it has established switching connections, is cognate to, and so intimately connected with, the public service involved in the carriage and de-

livery of freight by railroad companies to patrons along its route as to constitute a part of such service. The service is a public service within the meaning of the constitution of this state, is subject to the superintending power of the state, and the state corporation commission has the power, under § 155 of the constitution, to compel the performance by railroad companies of such services for customers having switching connections with their roads, and to fix the charges therefor. *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 49 S. E. 39.

The rate of twenty-five cents per car fixed by the state corporation commission upon railroad companies for each car, loaded or empty, placed in position to be weighed on companies' or shippers' individual track scales on sidings leading to industries along the line of such railroads, is a reasonable rate, and is fully sustained by the evidence. *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 49 S. E. 39.

Presumption in Regard Thereto.—"The Virginia Constitution, § 156, subsection 'f,' provides 'that the action of the commission appealed from shall be regarded as prima facie just, reasonable and correct.' *Newport News, etc., R. Co. v. Hampton, etc., Electric Co.*, 102 Va. 847, 47 S. E. 839." *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 297, 49 S. E. 39.

"It has also been held, that the commissioners are presumed to be experts in the matter of rates and charges, and that their findings are entitled to peculiar weight." *Norfolk, etc., R. Co. v. Com.*, 103 Va. 289, 297, 49 S. E. 39.

Jurisdiction as to Railway Crossings.—See the title CROSSINGS.

F. CORPORATE PROPERTY A TRUST FUND.

1. For Creditors.

Where the stock subscribed has all been paid up, neither the individual members, the stockholders, nor their property, are liable to the creditors.

This substitute for and representative of the capital stock constitutes the sole fund to which the creditors may look for the satisfaction of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in law as a trust fund, pledged for the payment of the debts of the corporation. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620. See *Hope v. Salt Co.*, 25 W. Va. 789.

The capital stock of a corporation is a trust fund for the benefit of creditors; for the same reason, the entire assets are also, and the directors are the trustees for the creditors of the corporation. *Lamb v. Laughlin*, 25 W. Va. 300; *Lamb v. Pannell*, 28 W. Va. 663; *Sweeny v. Grape Sugar Co.*, 30 W. Va. 443, 4 S. E. 431; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909; *Newcomb v. Brooks*, 16 W. Va. 63; *Hardy v. Norfolk, etc., Co.*, 80 Va. 404.

Especially the Unpaid Subscriptions.—Corporate property and assets, especially the unpaid subscriptions, constitute a trust fund, specially set apart for the payment of corporate debts, upon the faith of which those debts were contracted, and it will be pursued and subjected to the satisfaction of the corporate liabilities. *Lewis v. Glenn*, 84 Va. 981, 6 S. E. 866. See *Brown v. Bedford City, etc., Co.*, 91 Va. 31, 36, 20 S. E. 968; *Hardy v. Norfolk, etc., Co.*, 80 Va. 404, 416. See the title STOCK AND STOCKHOLDERS.

After Insolvency or Dissolution.—See post, "Assets a Trust Fund," XVII, B, 3; "Assets, after Dissolution, a Trust Fund," XVII, F, 7.

2. For Corporators.

The corporation is a trustee of the corporate property for the benefit of the corporators, who are the stockholders. They receive the profits of it in the form of dividends while the

corporation continues to exist, and when it ends, the surplus which then remains of said property and profits is subject to be divided among them. The corporation alone, while it exists, is in possession of the corporate property. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502, 509.

G. CORPORATION AS PERSON OR CITIZEN.

1. As Person.

Individuals and corporations are both persons, both entities, the one natural, the other legal. *State v. Dry Fork R. Co.*, 50 W. Va. 236, 40 S. E. 447; *Gillett v. American Stove, etc., Co.*, 29 Gratt. 565.

Corporations are in law for civil purposes deemed persons; they have power to plead, be impleaded, grant or receive by their corporate names and to do all other acts within the purview of their corporate power, which natural persons can do. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655; *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977.

Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1.

And as was expressed by Ch. J. Marshall in *Providence Bank v. Billings*, 4 Peters' R. 514: "Any privileges which may exempt a corporation from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 95.

In support of this rule, see *Stribbling v. Bank of the Valley*, 5 Rand. 180; *Baltimore, etc., Co. v. Gallahue*, 12 Gratt. 663; *Bank v. Merchants' Bank*, 1 Rob. 573. In *Miller v. Com.*, 27 Gratt. 110, it was held, that corporations are included under the term "persons" unless they are exempted by its terms, or

by the nature of the subject to which the statute relates (here taxation). See *Crafford v. Supervisors of Warwick Co.*, 87 Va. 116, 12 S. E. 147. In that case, act of March 2 (acts, 1887-88, p. 465), providing that the judge of the county court should, upon the application of persons paying one-third of the taxes on real estate in the county of Warwick, order a poll to be opened to ascertain the sense of the qualified voters as to whether or not the site of the courthouse could be changed, was construed, and it was held, that the word "persons" used in the act, included corporations. *Quesenberry v. Peoples Bld'g, etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73; *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 793; *Lynchburg v. Norfolk, etc., R. Co.*, 80 Va. 237, 247. See Code Va., 1887, § 5, subs. 13; W. Va. Code, ch. 13, § 17, cl. 9.

"In *Stribbling v. Bank of the Valley*, 5 Rand. 180, Judge Cabell said: 'The term person, used in the law, is unquestionably sufficiently comprehensive to embrace corporations; and it must be held to embrace them, unless there is something in the law showing the legislative intention to restrict its application.'" *Crafford v. Supervisors of Warwick Co.*, 87 Va. 110, 115, 12 S. E. 147; *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362.

"In a number of cases this court has, following the rules of construction provided by statute (now chapter 2 of the Virginia Code of 1887, and especially the thirteenth subdivision of § 5 of the chapter), construed the word 'person,' in a statute, to include corporations as well as natural persons, for civil purposes. *Lynchburg v. Norfolk, etc., R. Co.*, 80 Va. 243, 56 Am. Rep. 592, and cases cited." *Sun Life Assurance Co. v. Bailey*, 101 Va. 443, 447, 44 S. E. 692; *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 663.

As to Regulation of Business.— "Neither the courts nor the legislatures can control the conduct or actions

of a private corporation, when acting within the scope of the powers conferred upon it by its charter, any more than they can control the conduct of a private person in his business." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 333. See the title **CONSTITUTIONAL LAW**, ante, p. 140. See ante, "State Regulation and Control," II, E.

Statutory and Constitutional Provisions.—Section 5 of the Code of Virginia (1904) provides, in cl. 13, that "the word 'person' may extend and be applied to bodies politic and corporate as well as individuals."

Again, it is provided in the chapter of the Code of Virginia (1904), constituting the state corporation commission, that "the term 'person' as used in this act shall include individuals, partnerships, and corporations, in the singular as well as in the plural number." See § 1313, cl. (1). See also, Va. Const. (1902), § 153.

And in the negotiable instruments law, § 2841a, cl. 191, Va. Code (1904), it is provided that "persons" includes a body of persons, whether incorporated or not.

It was said in *Lynchburg v. Norfolk, etc., R. Co.*, 80 Va. 237, 247: "And perhaps, under our Code, which provides that 'the word person may extend and be applied to bodies politic and corporate as well as individuals,' the word 'person' must be held to embrace, even in statutes which confer the power of taxation, artificial as well as living beings, unless there be something in the subject matter, object, words or frame of the act, indicating that such was not the purpose of the legislative mind." *Miller v. Com.*, 27 Gratt. 110, citing *Western Union Tel. Co. v. Richmond*, 6 Gratt. 1.

Effect of Rule of Ejusdem Generis.—But, in *Lynchburg v. R. Co.*, 80 Va. 237, it was held that a section of the charter of the city of Lynchburg which granted authority to impose a license tax upon persons engaged in certain

enumerated callings and "upon any other person or employment, which it may deem proper whether such person or employment be herein specially enumerated or not" does not empower the city to impose such a tax upon a railroad corporation, "which is neither a person nor employment in the ordinary acceptance of these words." *Hinton, J.* The decision was based on the rule of ejusdem generis.

Under "Absent Debtor" Law.—A corporation is a "person" so as to come within the purview of the act, 1 Rev. Code, 1819, p. 474, directing the method of proceeding against absent debtors in courts of equity so that a suit may be maintained against a foreign corporation where it has estate within the commonwealth. *Bank of U. S. v. Merchants' Bank*, 1 Rob. 573, *Standard and Brooks, JJ.*, dissenting; *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655.

Subject to the Usury Laws.—Corporations generally are within the usury laws; being included under the designation of "person." The fact that a bank is allowed to take a fraction of a per cent. more than the general law allows does not amount to a general repeal of the usury law as to that bank, but is only a protection against the usury law up to the specified limit. *Stribbling v. Bank*, 5 Rand. 132; *Crabtree v. Old Dommion, etc., Ass'n*, 95 Va. 670, 29 S. E. 741, 4 Va. Law Reg. 12, and note.

Defense of Usury Not Available to Corporation.—The act of March 22, 1873, Code Va. 1887, § 2825, in prohibiting the defense of usury to corporations is not in violation of the federal constitution or that of Virginia and is retroactive in its operation, even though suit has been brought on such a contract before its passage. *Danville v. Pace*, 25 Gratt. 1.

Liable as Garnishee.—A corporation is liable as garnishee under the attachment laws, being included in the word "person" used in the statute. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt.

655. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

Liability to Indictment as "Person."

—See post, "Criminal Liability," XII, B.

2. Dual Incorporation.

See post, "Existence Out of State Granting Charter," II, I.

While a corporation, by the same name, may be chartered by two states, clothed with the same capacities and powers, and intended to accomplish the same objects, and be exercising the same powers and duties in both states, yet it will, in law, be two distinct corporations—one in each state—with only such corporate powers in each state as are conferred by its creation in that state. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212; *Hall v. Bank of Virginia*, 14 W. Va. 584, 623.

In order to make a corporation chartered by another state a corporation of this state, it must be chartered by this state. It will then be a domestic corporation of this state, without reference to its charter in the foreign state, with such powers, duties and franchises only as are conferred by the charter and laws of this state. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212, 214.

No corporation of one state can be made a domestic corporation of another state by simply declaring that it shall be such. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212-215.

But if a foreign corporation be chartered in this state, and accepts its charter by actually doing business here as a corporation, it must, in a suit brought here in our courts, be regarded as a domestic corporation having its residence in this state. *Hall v. Bank of Va.*, 14 W. Va. 584, 627.

Saying: "A legislative authority to a foreign corporation to do business in this state, accepted by actually doing business here, has precisely the same effect as a formal charter. Such corporation in a suit here must be regarded as a domestic corporation having its residence in this state, no matter where

its officers may reside. See *Continental Ins. Co. v. Kasey*, 27 Gratt. 216; *Conn. Ins. Co. v. Duerson*, 28 Gratt. 630, 642, 643." *Hall v. Bank of Va.*, 14 W. Va. 584, 627. See *Goshorn v. Supervisors*, 1 W. Va. 308; *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655.

A railroad extending through two or more states and incorporated by the laws of each is not a joint corporation of the two states but a separate corporation in each state subject only to the laws of each state within the respective jurisdictions, however those laws may conflict as to the operation of the road, and one state can not impose any restrictions or limitations upon the exercise of corporate powers in the other. *Atwood v. Shenandoah, etc., R. Co.*, 85 Va. 966, 9 S. E. 748.

And a railroad company may have an existence for the purpose of suing and being sued by the citizens thereof in more than one state, if chartered or licensed to build its road and do business in more than one. *Baltimore, etc., R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 812; *Goshorn v. Supervisors*, 1 W. Va. 307.

The Baltimore & Ohio Railroad Company, under the charter granted by the legislature of Virginia re-enacting the Maryland charter and conferring the same rights and privileges, is a Virginia corporation and liable to be sued in Virginia. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655.

3. As Citizen.

See the title FOREIGN CORPORATIONS; REMOVAL OF CAUSES.

A corporation is a resident of the state by which it was incorporated, no matter where its stockholders reside. *Hall v. Bank of Va.*, 14 W. Va. 584, 621; *Rece v. Newport News Co.*, 32 W. Va. 164, 9 S. E. 214.

H. CORPORATE DEED AND SEAL.

See post, "Conveyance of Land," XI, B, 9.

1. Necessity for Seal.

Old Rule—New Rule.—In ancient times corporations aggregate could do nothing except by deed under their corporate seal. But this rule can not now be supported as a general proposition. A corporation, like a natural person, can grant or convey land only by deed, but it is now firmly established that a corporation may be bound by promises, express or implied, resulting from the acts of its authorized agents, although such authority be conferred only by virtue of a corporate vote unaccompanied by the corporate seal. *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W. Va. 360.

And this is expressly provided for in § 1, ch. 52, of the Code of West Virginia, and power is further thereby expressly given to a corporation to sue and be sued. These powers a corporation would now undoubtedly have without any such express provision. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

A corporation may make a contract without the use of a seal in all cases where this may be done by an individual. *Grubbs v. Insurance Co.*, 94 Va. 589, 27 S. E. 464; *Kelly v. Board of Public Works*, 75 Va. 263; *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706; *Legrand v. Hampden-Sidney College*, 5 Munf. 324.

Realty Passes Only by Deed.—When the charter of a corporation declares its stock to be personal estate, but that its real estate should only be conveyed as other real estate, such real estate will not pass except by deed duly executed. *Barksdale v. Finney*, 14 Gratt. 338.

Agreement for Sale of Realty—Necessity for Seal.—The seal of a corporation, is not necessary to give validity to an agreement for the sale of real property. *Banks v. Poitiaux*, 3 Rand. 136. See *Legrand v. Hampden-Sidney College*, 5 Munf. 324.

2. Presumption of Due Authority.

If a deed or contract purport to be

sealed with the seal of a corporation, and it is proven to be signed and executed by the proper agents of the corporation, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation until evidence to the contrary has been introduced. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501-507; *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 244, 9 S. E. 180; *Ruffner v. Welton Coal, etc., Co.*, 36 W. Va. 244, 15 S. E. 48; *Young v. Building Ass'n*, 48 W. Va. 512, 38 S. E. 670; *Lamb v. Cecil*, 25 W. Va. 288, 296; *Lamb v. Pannell*, 25 W. Va. 298.

And the presumption of authority to affix the corporate seal to a deed or contract will not be overcome by the mere fact that no vote of the directors authorizing it is shown. *Ruffner v. Welton Coal, etc., Co.*, 36 W. Va. 244, 15 S. E. 48; *Fidelity, etc., Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 244, 9 S. E. 180.

Seal Does Not Prove Itself.—The mere presence of what purports to be the seal of a corporation impressed upon a contract which is valid and binding without the seal, unaccompanied by evidence that the officers of a company intended to, or did, affix it, is not sufficient to change the apparent character of the contract. It must be shown that the seal is the seal of the corporation and was affixed by its authority, and that it was the intention of the parties that it should be a sealed instrument. *Grubbs v. National Life, etc., Co.*, 94 Va. 589, 27 S. E. 464.

"But it is well settled that when a deed is executed under the corporate seal of a corporation, it is presumed that the deed was executed by proper authority from the corporation, and in due course of law appropriate to the matter, until it otherwise appears in allegation and proof." *Fidelity Ins.,*

etc., *Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 244, 9 S. E. 180; *Lamb v. Cecil*, 25 W. Va. 288; *Young v. Building Ass'n*, 48 W. Va. 512, 531, 38 S. E. 670.

3. Authority of President or Agent to Execute Deed.

"A deed of a corporation, executed by the president under the seal of the corporation, is a valid mode of executing it." *Merchants' Bank v. Goddin*, 76 Va. 503, 506; *Burr v. McDonald*, 3 Gratt. 234.

And it is competent for a joint stock company to execute a deed by an agent duly authorized and empowered therefor. *Burr v. McDonald*, 3 Gratt. 215.

"Where the corporation, at a meeting of the stockholders, authorized the officers of the company to execute the deed, under the direction of the executive committee, that was sufficient authority to the president to execute the deed under the direction of said committee, it being an act which in its performance properly belonged to the function of the president, and evidently was all that was contemplated by the resolution of the company." *Merchants' Bank v. Goddin*, 76 Va. 503, 506.

And where the deed of a corporation was signed by the corporation, by its president, with the corporate seal affixed and the certificate of the notary stated that "Thos. L. Rosser, president, whose name is signed to the writing hereto annexed," acknowledged the same before him in his county, this was held a sufficient execution of the deed by the corporation. *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

Private Seal of President Not Sufficient.—To constitute a valid deed of a corporation, the corporate seal must be affixed, the private seal of the president is not sufficient; but such an instrument purporting to be a deed of trust of the corporation, though invalid as the "deed" of the corporation, is valid as a mortgage of the personal property of

the corporation, which it purports to convey. *Rauch v. Oil Co.*, 8 W. Va. 36.

4. Acknowledgments.

See the title **ACKNOWLEDGMENTS**, vol. 1, p. 104.

Seal Must in Any Case Be Acknowledged.—The seal of a corporation, even though an actual seal, must be acknowledged in the body of the instrument. *Bradley Salt Co. v. Norfolk, etc., Co.*, 95 Va. 461, 28 S. E. 567, 3 Va. Law Reg. 722, and note.

Sufficient Acknowledgment of Seal.

—It is a sufficient acknowledgment of a corporate seal in the body of an instrument, if the instrument is there acknowledged to be a bond, inferentially an instrument under seal. *Dinwiddie Co. v. Stuart*, 28 Gratt. 526.

Defective Certificate of Acknowledgment of a Deed.—A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by § 5, ch. 73, W. Va. Code, is fatally defective, and does not entitle such deed to be recorded. *Abney v. Ohio Lumber, etc., Co.*, 45 W. Va. 446, 32 S. E. 256.

Act Validating Deeds of a Corporation Must Not Interfere with Vested Rights.

—The act approved March 1, 1894 (acts, 1893-4, p. 580) validating deeds in favor of a corporation, which were acknowledged before a notary, who was an officer or stockholder of the corporation at the time, is unconstitutional in so far as it impairs the lien of judgments recovered and docketed prior to the approval of such act. *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481.

I. EXISTENCE OUT OF STATE GRANTING CHARTER.

See the title **FOREIGN CORPORATIONS**. See also, ante, "Dual Incorporation," II, G, 2.

A corporation exists only in contemplation of law, and by force of law, and

can have no legal existence beyond the state or sovereignty by which it is created. It must dwell in the place of its creation, and not migrate to another sovereignty. *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. 212; *Hall v. Bank of Va.*, 14 W. Va. 584, 622; *Floyd v. Loan, etc., Co.*, 49 W. Va. 327, 333, 38 S. E. 653; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445. Although a corporation may, by its agents, transact business anywhere, unless prohibited by its charter or local laws, it can have no other residence or citizenship. *Cowardin v. Universal Life Ins., Co.*, 32 Gratt. 445.

Yet, as a lessee of another corporation of this state, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations, and be treated as a Virginia corporation, to a certain extent—so far, at least, as its liability to the citizens of Virginia in operating a railroad within the state is concerned. *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394. See the title RAILROADS.

"A state can not, by chartering a corporation, confer upon it a legal right to act within the jurisdiction of another state; but the legal right to act in a foreign state may always be extended to the corporation by the laws of such foreign state. By the common-law rule, in force throughout the United States, each state extends to all duly incorporated foreign corporations the legal right to carry on business within its jurisdiction. It may, therefore, be said to be a general rule, that a corporation can legally carry on its business in the usual way and by the usual agencies wherever it may find it convenient and profitable to do so." *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 546, 40 S. E. 514.

For it is well settled that a corporation of one state may exercise its faculties in another, under such terms and to such extent as may be permitted

by the latter. *Hall v. Bank of Va.*, 14 W. Va. 584, 621.

In permitting its own corporations to remove out of the state their principal places of business and chief works, it does not intend to bestow any right or privilege in any territory over which another state is sovereign, but it does thereby bestow upon its own corporations a power, a permission, a privilege, which it undoubtedly had the right to withhold. If the time ever come when no state of the union nor any foreign country will permit such corporation to profit by such permission to go beyond the limits of the state of its own creation, the contention that such corporation derives no benefit from such permission and privilege would be perfectly logical and sound. But the state has the right to recognize conditions over which it has no control and permit a corporation of its own creation to take advantage of them and profit by them, and also the right to refuse such permission. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514.

Effect of War on Extraterritorial Powers.—A corporation chartered under the laws of Virginia before the late civil war, and having its office and place of business, its officers and directory in the city of Richmond, if not actually dissolved, at least was dissolved so far as to suspend its power to make assessments on property outside the jurisdiction of the confederate government during the war, as being against the policy of the law. *Mut., etc., Soc. of Va. v. Board*, 4 W. Va. 343. See also, *Hall v. Bank of Va.*, 14 W. Va. 584.

J. TAXATION OF CORPORATIONS AND CORPORATE STOCK.

See the title TAXATION.

III. Promoters and Acts Prior to Incorporation.

A. PROMOTER DEFINED.

"A promoter is a person who brings

about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation itself. Every person, acting by whatever name in the forming and establishing of a company, at any period prior to the company, is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation, and is subject to the disabilities of such." *Bosher v. Richmond, etc., Co.*, 89 Va. 455, 460, 16 S. E. 360.

B. PROMOTERS' PROFITS.

An agent to buy or sell, or to act in any other business, will not be permitted to make profits for himself out of the transaction. All profits or advantages made, or contracted for by him in the business, beyond the ordinary compensation to be paid by his principal, enure to the benefit of his principal. And this rule applies equally to promoters of a corporation who, like agents, occupy a fiduciary relation to the new corporation. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

These principles, forbidding agents to make profits for themselves, are specially applicable to corporations, which can only act by trustees or agents. The great number of corporations, the enormous amount of wealth invested in them, and placed under the control and management of agents and trustees, strongly demand of courts of justice a firm adherence to these principles, and a rigid application of them to every case coming within their operation. *Central Land Co. v. Obenchain*, 92 Va. 130, 143, 22 S. E. 876.

Fiduciary Relation—Assent of Company.—Promoters of a corporation stand in a fiduciary relation to the corporation, and are not allowed to make a profit out of the corporation on the property purchased for it, unless, with

full knowledge of all the facts, it is assented to by the corporation. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

Where the prospectus, under which a corporation was organized, provided for a commission to be paid to certain persons active in getting up the company, upon the cost of property purchased, and at the same time used language meaning that there were to be no promoters' profits, the right of such persons to recover such commission depends upon whether they were promoters of the corporation when they entered into the contract made by them for the purchase of the property. If they were promoters at that time they could not recover, unless with company's assent, after full knowledge, otherwise they could. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

Profits on Sale to Corporation.—Thus, a promoter is guilty of a breach of trust if he sells property to the corporation, purchased after he began promoting, without informing the company that the property belongs to him; or he may commit a breach of trust by accepting a bonus or commission from a person who sells property to the corporation. The law is rigid in its protection of the corporation and stockholders. *Bosher v. Richmond, etc., Co.*, 89 Va. 455, 461, 16 S. E. 360. See *West End, etc., Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182; *Va. Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168.

Actual Cost of Land Means Original Owner's Price.—A clause in a prospectus of a company, stating that "it proposes to take and hold the properties desired, paying therefor actual cost," means that the company was to pay the actual price paid for the land to the owners thereof, excluding therefrom all profits to promoters. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

Promoters Entitled to a Fair and Open Profit.—Where a promoter of a corporation holds an option on land

and in soliciting subscriptions proposes in writing, which is shown to each subscriber, a certain price at which he will sell it to the corporation, and after the corporation was organized, it agreed to purchase on those terms, such promoter is entitled to any profit arising from such sale. *Richardson v. Graham*, 45 W. Va. 134, 30 S. E. 92.

And a corporation being indebted to the promoter of the company for a tract of land, and said promoter being indebted to the company for stock subscribed for by him, the promoter had the right to pay for his stock by giving the company credit to that extent upon the purchase money due him for said land. *Richardson v. Graham*, 45 W. Va. 134, 30 S. E. 92.

C. EFFECT ON SUBSCRIPTION TO STOCK.

See the title STOCK AND STOCK-HOLDERS.

A representation made by a person procuring a subscription to corporate stock in a company to be formed, that the whole proceeds of the capital stock were to be invested in the payment for and improvement of certain real estate, and that nothing was to be paid to promoters or otherwise, makes such subscription voidable at the instance of the subscriber, unless, after full knowledge of the falsity of the representations, he elected to ratify and affirm his subscription. *West End, etc., Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

And when a stockholder has been defrauded by such trustees, and seeks redress against the fraud, it is no answer to say that by proper inquiry he might have learned the truth, or by more vigilance he might have discovered the deception; and, when the representations are by a prospectus, he is not obliged to investigate for himself, and investigate the truth of representations, to protect himself against the charge of negligence. *Bosher v. Richmond, etc., Co.*, 89 Va. 455, 461, 16 S. E. 360. See *Martin v. South Salem Land Co.*, 94 Va. 28, 53, 26 S. E. 591.

D. STATUS BEFORE INCORPORATION—CONVEYANCE TO A FUTURE CORPORATION.

See the title STOCK AND STOCK-HOLDERS.

After the corporators had signed an agreement to become a corporation, but before the charter had been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor, and delivered to a third party, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it to the corporation; and, after the charter had been received, and the corporation organized under it, such third person delivered the deed to, and it was accepted by, the corporation. The said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it. *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243.

Although a deed to a corporation not in existence, or to one incapable by its charter of holding real estate, is void. *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243.

Contracts Made in Behalf of a Future Corporation.—While a corporation can not ratify contracts made in its name or behalf before it has acquired life, it may exercise its power to make contracts when it comes into existence by accepting or adopting such contracts. *Richardson v. Graham*, 45 W. Va. 134, 30 S. E. 92.

IV. Creation and Organization.

A. POWER TO CREATE.

1. In General.

a. New Method as Abrogating Old.

It does not by any means follow, that an existing method of incorporation is designed to be abrogated, merely because another is provided, where the methods are not inconsistent or repugnant. *Davies v. Creighton*,

33 Gratt. 696, 701. See the title **BUILDING AND LOAN ASSOCIATIONS**, vol. 2, p. 646.

b. State's Power to Impose Conditions and Restrictions.

See ante, "State Regulation and Control," II, E.

Corporations being mere artificial persons which the legislature has the right to call into existence or not to create at all, it may impose any restrictions or conditions it pleases upon their creation, or annex any condition subsequent, for the purpose of forfeiting their charters upon their failure to comply with such conditions, and no one can inquire into the reasons which the legislature shall deem sufficient for imposing such conditions and restrictions. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 547, 40 S. E. 514.

The constitution says that the legislature shall provide for the organization of all corporations hereafter to be created, by general laws, uniform as to the class to which they relate (W. Va. Const., art. 11, § 1), from which it is manifest that the constitution recognizes the necessity of corporate organization. But it does not result from this that the legislature shall provide for the organization of any certain class of corporations or of corporations for any particular purpose. That is left wholly within the discretion of the legislature. If the legislature has the power to prevent the corporations created by it from going beyond its limits, it has the power to let them go beyond its limits upon their complying with certain conditions which it annexes. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 548, 40 S. E. 514. See ante, "Existence Out of State Granting Charter," II, I.

c. Grant of a Charter Not Exclusive.

The grant of a charter to one corporation is not held to be exclusive and to prevent the chartering of rival companies, but whenever exclusive rights

are intended express provisions must be introduced. Monopoly is not a matter of inference; it must rest its pretensions upon express grant. It is a restriction upon common right and legislative power, hence can not be implied. *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh 43, 36 Am. Dec. 374; *Roper v. McWhorter*, 77 Va. 214.

Therefore, where the legislature granted a charter to a company to construct a navigable canal along the valley of a stream, and, in consideration of the work, to take the profits, without any provision against the exercise of power to charter other and rival companies, the legislature was nowise restrained from chartering a company to construct a railroad along the same valley, though the railroad shall afford the same public accommodation as the canal, and may in effect impair or annihilate its profits. *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh 42.

d. Incorporation of Church or Church Agency.

See the titles **CHARITIES**, vol. 2, p. 790; **RELIGIOUS SOCIETIES**.

The general assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law. Va. Const. (1902), § 59.

But to incorporate church agencies essential to the accomplishment of church work, is not the same thing as an incorporation of the churches, respectively, in whose interest such corporate agencies have been created and exist. The creation of such a corporation is not an incorporation of a church or religious denomination which is forbidden by § 59 of the constitution of Virginia (1902), but which provides that the legislature may secure the title to church property. *Trustees v. Guthrie*, 86 Va. 125, 128, 10 S. E. 318; *Guthrie v. Guthrie*, 1 Va. Dec. 717; *Protestant Episcopal Soc. v. Churchman*, 80 Va. 718; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

That provision simply forbids the incorporation of any church or religious denomination, but at the same time it authorizes the legislature to secure the title to church property to an extent to be limited by law. The constitutional provision restricting the amount of church property to limits to be prescribed by law, was wisely designed to empower the legislature to guard against the too great accumulation of such property—a precaution equally taken as regards all corporate bodies created by state laws and authorized to acquire and hold certain property for corporate purposes, and having an indefinite existence. *Trustees v. Guthrie*, 86 Va. 125, 139, 10 S. E. 318.

Thus, a residuary bequest to "the trustees of the general assembly of the Presbyterian church in the United States, commonly known as the 'Southern Presbyterian Church,' the same being a body corporate, as I am advised," the beneficiary being a corporation created by the laws of North Carolina for the purpose of carrying on the work of christian education and missions, publishing and diffusing religious literature, and building and supporting Presbyterian churches, is not rendered invalid by Const. Va., art. 5, § 17, which forbids the incorporation of any church, as the beneficiary is not an incorporated church. *Guthrie v. Guthrie*, 1 Va. Dec. 717, following *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318.

West Virginia Doctrine.—See *W. Va. Const.*, art. 6, § 47; *Code*, ch. 57.

The secretary of state will not be compelled by mandamus to issue a charter of incorporation to several persons who agree to become a corporation by the name of the "Baptist Missionary Society of West Virginia," for the purpose of promoting religion by aiding in the support of baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of worship on missionary fields in West Virginia, and by collecting and disbursing funds for these purposes.

Powell v. Dawson, 45 W. Va. 780, 32 S. E. 214. But see *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

Granting a certificate of incorporation upon the presentation of such an agreement would, in effect, be incorporating the church the parties represent, and contrary to the provisions of the constitution and statute. *Powell v. Dawson*, 45 W. Va. 780, 32 S. E. 215.

"In the case of *Gallego v. Attorney General*, 3 Leigh 450, Tucker, P., after reviewing the history of legislation with reference to church property and charitable bequests, on page 477 says: 'No man at all acquainted with the course of legislation in Virginia can doubt for a moment the decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by counsel, that wealth is power. Hence the provision in the bill of rights; hence the solemn protest of the act on the subject of religious freedom; hence the repeal of the act incorporating the Episcopal church, and of that other act which invested the trustees appointed by religious societies with power to manage their property; hence, too, in part, the law for the sale of glebe lands; hence, the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for churches and graveyards) have been refused. The legislature seems to have been fearful that the grant of any privilege, however trivial, might serve but as an entering wedge to greater demands.' The law under which this controversy arises descended to us from the state of Virginia. In the constitution of that state (Const. 1851, art. 4, § 32) it was provided that 'the general assembly should

not grant a charter of incorporation to any church or religious denomination, but might secure the title to church property to an extent to be limited by law; and the same, in substance, is found in the constitution of this state (art. 6, § 47)." *Powell v. Dawson*, 45 W. Va. 780, 32 S. E. 216.

e. For Illegal Purpose.

The circuit court of the city of Richmond had no power to grant a charter to a corporation authorizing it to obstruct a public highway, and the charter granted to the Richmond Carnival Association did not purport to confer such power. *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345.

f. Legislative Action Necessary.

A corporation can not be created by mere acquiescence. This can be done only by positive act of legislation, or by some power authorized by some legislative act. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592, 622.

2. By Special Act.

The constitutions of both Virginia and West Virginia now forbid the creation of private corporations by special act. See post, "Under General Laws," IV, A, 3.

Pipe Line Company Might Formerly Be Created by Special Act in West Virginia.—A pipe line company, whose object is the transportation of petroleum and other oils, is an internal improvement company and might have been created by a special act of the legislature under art. 11, § 5, constitution of West Virginia, and the power of eminent domain might have been conferred upon it. *W. Va. Transportation Co. v. Volcanic O. & C. Co.*, 5 W. Va. 382.

Now no corporation can be created by special act in West Virginia, but only by general law. Art. 11, § 1, Const., 1872.

3. Under General Laws.

a. Constitutional and Statutory Provisions.

In Virginia.—Article 12, § 154, Va.

Const. (1902), declares that "The creation of corporations, and the extension and amendment of charters (whether heretofore or hereafter granted), shall be provided for by general laws, and no charter shall be granted, amended or extended by special act, nor shall authority in such matters be conferred upon any tribunal or officer, except to ascertain whether the applicants have, by complying with the requirements of the law, entitled themselves to the charter, amendment, or extension applied for, and to issue, or refuse, the same accordingly," etc.

"Subject to the provisions of this constitution and to such requirements, rules and regulations as may be prescribed by law, the state corporation commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this state to foreign corporations; and through which shall be carried out all the provisions of this constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this state. Va. Const. (1902), § 156 (a). See ch. 46 A, for statute carrying out this provision.

Former Virginia Statutes Relating to Court Charters.—For the provisions of former statute for obtaining a charter by a corporation, see Code Va. (1887), § 1145.

"On the 3d day of March, 1854 (acts 1853-4, ch. 46), an act was passed empowering the circuit and county courts, in their discretion, to grant charters for mining and manufacturing purposes. This was the first of a series of acts, extending down to the present time, investing the courts with jurisdiction to grant charters of incorporation." *Davies v. Creighton*, 33 Gratt. 696, 699.

These several acts, commencing with the act of March 3, 1854, were embod-

ied by the compiler in the Virginia Code of 1860, ch. 65, § 4, et seq., and on the 29th of January, 1867, §§ 4, 5, 7, ch. 65 (Va. Code, 1860), were amended, and the provisions of § 4 extended so as to authorize the circuit courts to grant charters of incorporation "for the conduct of any enterprise or business which may be lawfully conducted by private individuals," etc. Acts, 1866-7, ch. 129. *Davies v. Creighton*, 33 Gratt. 696, 700.

"The acts of March 3, 1854, and March 11, 1856, were amended March 15, 1858, so as to forbid county courts to grant corporate powers, thus leaving the jurisdiction for that purpose exclusively in the circuit courts. Acts, 1857-8, ch. 70." *Davies v. Creighton*, 33 Gratt. 700.

By an act approved March 30, 1871 (acts, 1870-71, ch. 277), §§ 4, 5, 6, 7, 8, 9, 10, ch. 65, of the Virginia Code of 1860, and all acts and parts of acts amendatory thereof, were repealed, and other provisions substituted; but the main features of the former acts were preserved. The circuit courts were empowered, in their discretion, on proper certificates, to grant charters to "joint stock companies for the conduct of any enterprise or business which may be lawfully conducted by an individual or by a body politic or corporate, except to a railroad, or turnpike, or canal, beyond the limits of the county wherein the principal office of said company is to be located, or to establish a bank of circulation." *Davies v. Creighton*, 33 Gratt. 696, 700.

In West Virginia.—"No corporation shall hereafter be created by special charter, and no act shall be passed granting special privileges to any joint stock company heretofore or hereafter incorporated under the provisions of chapter fifty-four of this Code, or any other general law of this state," etc. W. Va. Code (1899), ch. 53, § 3, p. 544.

The constitution says that the legislature shall provide for the organization of all corporations hereafter to be

created, by general laws, uniform as to the class to which they relate, (W. Va. Const., art. 11, § 1) from which it is manifest that the constitution recognizes the necessity of corporate organization. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 548, 40 S. E. 514.

See W. Va. Code (1891), ch. 54, for provisions relative to obtaining a corporate charter.

b. Same Effect as When Conferred by the Legislature.

Franchises and corporate rights granted indirectly by the state through instrumentalities provided by general laws for such purposes, are the same in effect, as if the power conferring such franchises and rights had been exercised directly by the state itself. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

B. PROCEDURE.

1. In West Virginia.

See W. Va. Code, chs. 53, 54.

a. No Particular Form of Words Necessary.

No particular form of words is necessary to the creation of a corporation, but it may result from implication and intendment. It is the grant of certain powers and privileges and the imposition of the necessary restrictions, which constitute the main elements of a corporation and as it is always a question of intention, the formal words, "erect, establish, incorporate," etc., are not deemed essential; so an act of assembly authorizing a foreign corporation to extend their road into West Virginia makes such foreign corporation a West Virginia corporation. *Goshorn v. Board*, 1 W. Va. 307; *Hall v. Bank of Va.*, 14 W. Va. 584, 628.

b. Agreement or Proposal for Incorporation.

Acknowledgment.—When the statute says that the agreement shall be acknowledged "by the several corporators" it means each one. *Greenbrier*,

etc., *Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 303, 306.

"The acknowledgment is the evidence that the incorporator recognizes his signature to the act, and desires it carried into execution by filing the agreement with the secretary of state, in order that a certificate of incorporation may be issued upon it. Without such acknowledgment, such certificate could not issue. It is the delivery by each corporator of the agreement to the secretary of state to obtain such certificate." *Greenbrier, etc., Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 303, 305.

c. Certificate of Incorporation.

Variance from Agreement or Proposal.—It would seem that a departure in the certificate of incorporation from the proposal of the corporators would be more material, stronger to relieve the corporator, than an alteration in the charter after its issue. *Greenbrier, etc., Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 303, 307.

A fundamental variance in the certificate of incorporation from such preliminary agreement will relieve one who by it subscribed stock, from payment thereof. *Greenbrier, etc., Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 303, 305.

And where the agreement signed provided that the corporation should expire December 1, 1910, while the certificate of incorporation makes it expire December 1, 1919, this seems to be a material variance. *Greenbrier, etc., Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 303, 307.

Necessity for Filing Certificate of Incorporation.—Where the statute law of a state requires the filing of the original certificate of incorporation, such filing is a condition precedent to the creation of the corporation and until this has been done, it has no existence, and that fact may be taken advantage of collaterally whenever the fact of incorporation is called in question. *Child v. Hurd*, 32 W. Va. 66, 9 S. E. 362.

2. In Virginia.

See, for procedure for obtaining a corporate charter, ch. 46 A of the Code of Virginia (1904). Note that the certificate of incorporation there mentioned seems to correspond with the agreement or proposal for incorporation under the West Virginia practice, and the certificate of incorporation in West Virginia seems to correspond with the charter under the Virginia law.

3. Opening Books of Subscription under Legislative Charter.

"In a legislative charter, unless there is some provision in the charter to the contrary, the general law directs that commissioners named in the act to receive subscriptions shall give thirty days' notice of the times and places for opening the books of subscription, and shall keep them open for ten days, and longer if need be. When it appears to the commissioners at the place first named in the act that so much of the capital stock has been subscribed as is sufficient to incorporate the subscribers, they are required to give notice by publication, and call a meeting of the subscribers." *Martin v. South Salem Land Co.*, 94 Va. 28, 41, 26 S. E. 591; Va. Code, 1887, §§ 1106-1111, now repealed.

4. Charter Fees.

"Provision shall be made by general laws for the payment of a fee to the commonwealth by every domestic corporation, upon the granting, amendment or extension of its charter." Va. Const. (1902), art. 12, § 157.

Under the present constitution of Virginia, and the laws made in pursuance thereof, all corporations, without exception, are placed upon terms of equality, and are required to pay a charter fee (as distinguished from an annual license fee), as a condition precedent to doing business in this state, with a proviso that this charter fee shall not be exacted of those corporations by which this fee has been at any time paid. The fact that no charter

fee has been heretofore required of surety companies, or that they have paid an annual license fee, does not exempt them from the payment of the charter fee required by §§ 37-40, inclusive, of acts 1902-'3-'4, pp. 178-180 (Va. Code, 1904, p. 2214); and there is nothing in the way of a contract with, or an estoppel upon the state, to interfere with its unquestioned power to impose the tax. *American Surety Co. v. Com.*, 102 Va. 841, 47 S. E. 994.

By § 1104, as found in the acts of 1902-'3-'4, at page 360, every incorporated company doing business in this state is required to pay a charter fee. The amount of that charter fee is fixed by §§ 37-40, already referred to, and the penalty for doing business without complying with the law is imposed by § 1105. *American Surety Co. v. Com.*, 102 Va. 841, 845, 47 S. E. 994.

The fee required by § 1104 is what is known as a charter fee and not an annual license tax. *American Surety Co. v. Com.*, 102 Va. 841, 843, 47 S. E. 994.

Omission to Require Payment of Fees on Court Charters in Virginia.—The act of February 10, 1890, ch. 54, § 1, provided for the payment of a certain fee on every charter thereafter granted under § 1145 of the Virginia Code of 1887, before it should become operative. The act of February 28, 1890, ch. 124, § 1, amending the former act, by omitting the words "granted under Code, § 1145," obviated the necessity of the payment of the fee in question, and testimony of the draftsman of such act, to the effect that the words were inadvertently omitted, was not admissible. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029, 14 S. E. 976. This omission was subsequently supplied by amendment. See acts 1891-2, p. 393, and acts 1895-6, p. 718.

5. First Meeting—Presumption That Incorporation Was Regular.

Where the law requires that notice shall be given of a meeting to organize a corporation, if it appears by the

books of the corporation that such a meeting was held with the requisite number of stockholders present, it will be presumed that the proper notice was given. *Grays v. Turnpike Co.*, 4 Rand. 578.

Where the law requires the presence at the first meeting of a corporation, of "the number of persons entitled to a majority of all the votes which could be given on all the shares" and the books showed merely the presence "of a majority of shareholders" it will be presumed that the meaning was the same. *Grays v. Turnpike Co.*, 4 Rand. 578.

C. BEGINNING OF CORPORATE EXISTENCE.

1. When Legal Existence of Corporation Chartered by the Court Begins.

When a charter has been granted by a circuit court, pursuant to § 1145 of the Code, and lodged with the secretary of the commonwealth for recordation (the tax thereon having been paid when a tax is required), the corporation so chartered has a legal existence, and may sue and be sued as a corporation. *Coalter v. Bargamin*, 99 Va. 65, 68, 37 S. E. 779.

"The statute (§ 1146, Va. Code, 1887) does not say or imply, as is argued, that when the charter is lodged in the office of the secretary of the commonwealth, the incorporators named in the charter may do what is necessary to perfect the organization of the company, and that when these things are done, it shall have a legal existence, but it declares that as soon as the charter has been lodged in the office of the secretary of the commonwealth, the incorporators, their successors and associates, shall be a body politic and corporate, by the name set forth in the certificate, with all the general powers, and subject to all the general restrictions, provided by law previously or subsequently passed." *Coalter v. Bargamin*, 99 Va. 65, 68, 37 S. E. 779. See

now Va. Code (1904), § 1105a (3), which is very similar, § 1105a (4); W. Va. Code (1899) ch. 54, § 10, p. 558.

Necessity for Subscription of Minimum Capital.—"The time when persons who obtained a charter from a court became a body politic and corporate was somewhat considered in the case of *Martin v. South Salem Land Co.*, 94 Va. 28, (26 S. E. 591). The question in controversy in that case was between the creditors and the stockholders of the company as such, and it appeared that the minimum capital stock had been subscribed, so that the question here involved did not arise in that case, and what was said may not have been necessary to its decision; still we see no reason to change the opinion there expressed. In that case it was said, among other things, that when a company is chartered by the legislature 'the subscription of the minimum amount of stock required and a meeting of the stockholders, are made conditions precedent to its corporate existence.' * * * But 'when a charter has been granted by a circuit court, pursuant to § 1145 of the Code, and lodged with the secretary of the commonwealth for recordation (the tax thereon having been paid where a tax is imposed) the corporation so chartered has a legal existence so far, at least, that neither it nor its stockholders will be permitted to question it in a controversy with its creditors. To hold otherwise would be to disregard the plain language of § 1146 of the Code.'" *Coalter v. Bargamin*, 99 Va. 65, 68, 37 S. E. 779.

In the absence of any provision in the order granting the charter requiring the minimum capital to be subscribed, the stockholders are not liable as partners, although the minimum capital has not been subscribed. The subscription of the minimum capital is not a condition precedent to the existence of the corporation. *Coalter v. Bargamin*, 99 Va. 65, 37 S. E. 779.

Coalter v. Bargamin, 99 Va. 65, 68,

37 S. E. 779, distinguishes *West End, etc., Co. v. Claiborne*, 97 Va. 734, 749, 34 S. E. 900, on the facts and issues involved, saying: "The question there was between the company and a subscriber to its stock. One of his defenses was that he had subscribed to the stock of the company upon condition that there should be bona fide subscriptions to the amount of minimum capital fixed by its charter, and that this condition had not been complied with."

The court said further: "We fully agree with the learned counsel of the plaintiff that no body of persons should have a corporate existence until the minimum amount of the company's capital has been subscribed, but that is a question of policy which the legislature, not the courts, must determine. We can only administer the law as it is written." *Coalter v. Bargamin*, 99 Va. 65, 71, 37 S. E. 779. See Va. Code (1904), § 1105a (4).

2. Corporation Chartered by Legislature.

But in a charter granted by the legislature, unless otherwise provided in the charter, it is necessary that the minimum capital shall be subscribed as provided by law, and that there shall be a meeting of the stockholders before there is any corporate existence. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591, quoted in *Coalter v. Bargamin*, 99 Va. 65, 68, 37 S. E. 779.

D. CHARTER AS NOTICE.

1. To Stockholders.

A stockholder is bound at his peril to take notice, not only of the charter of the company of which he is a member but of its by-laws also. *West End, etc., Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *National Mut. Bld'g, etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Nickles v. People's Bld'g, etc., Ass'n*, 93 Va. 380, 25 S. E. 8; *West End, etc., Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182; *Bockover v. Life Ass'n*, 77 Va. 85.

Acquiescence in Change of Charter.—And if a stockholder pays any installment on his stock or participates in a stockholders' meeting, he is estopped to deny knowledge of the terms and provisions of the charter, however much it may vary from his contract of subscription. *West End, etc., Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

2. To Persons Dealing with Corporation.

All Persons Dealing with Corporation, Bound with Notice.—Persons dealing with a corporation are bound with notice of whatever is contained in the law of its organization and they must be presumed to be informed as to the restrictions or conditions annexed to the grant of power, by the law under which the corporation is authorized to act. *Silliman v. Fredericksburg, etc.*, 27 Gratt. 119, 130; *Bocock v. Alleghany, etc., Co.*, 82 Va. 913, 1 S. E. 325; *Iladen v. Farmers', etc., Fire Ass'n*, 86 Va. 683; *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599; *Bockover v. Life Ass'n*, 77 Va. 85; *Whitehurst v. Whitehurst*, 83 Va. 155, 1 S. E. 801; *Eastern Bld'g, etc., Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298; *Campbell v. Eastern Bld'g, etc., Ass'n*, 98 Va. 729, 37 S. E. 350, 6 Va. Law Reg. 632; *Bohmer v. Bank*, 77 Va. 445.

Thus, persons contracting with a supposed agent of a corporation for the sale of land to it are affected with notice of the corporation's mode, under its by-laws, of authorizing agents to bind it by purchases of land, and dealt with such agent at their peril. *Bocock v. Alleghany, etc., Co.*, 82 Va. 913, 1 S. E. 325; *Silliman v. Fredericksburg, etc., R. Co.*, 27 Gratt. 119.

And this is true whether such dealings are within the state of its incorporation or in a foreign state in which it is legally doing business. *Bockover v. Life Ass'n*, 77 Va. 85.

3. Scope of Principle.

The General Law Forms Part of the Charter.—A general law does not need

to be copied into the charter, but forms an essential part of it and all parties are bound by its terms whether copied into the charter or found only in the statute book. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891; *Bockover v. Life Ass'n*, 77 Va. 85.

Also Provisions Made in Pursuance of Authority of the Legislature.

Where the act of incorporation is a bare grant of existence to the corporation, to be effectuated by the provisions imposed on it by the governing bodies of the cities and counties named therein respectively, such provisions will constitute an organic part of the charter of such corporation. *Richmond, etc., R. Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

In Case of Court Charters, from the Time of Filing.—After the charter of a corporation has been lodged for record in the office of the secretary of the commonwealth, anyone dealing with such corporation is bound with notice of its provisions. *West End, etc., Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

E. EXPIRATION OF CHARTER AND ITS EFFECT.

See post, "Tort Committed after Expiration of Charter," XII, A, 4, c; "Effects of Dissolution and Ouster," XVII, F.

The extinction of a corporation by efflux of time can not be distinguished, as regards disability, from that of an individual by death. *May v. State Bank*, 2 Rob. 56, 74; *Rider v. Nelson, etc., Union Factory*, 7 Leigh 154; *Bank v. Patton*, 1 Rob. 499.

The statute keeping corporations, whose charters have expired, in existence for the purpose of settling their business by suit or otherwise, passed since the decisions in *Rider v. Nelson, etc., Union Factory*, 7 Leigh 154; *Bank v. Patton*, 1 Rob. 499, would of course now prevent the abatement of appeals in such cases for such reason. *Bradley v. Ewart*, 18 W. Va. 598, 605.

Effect on Property Rights.—See post, "After Dissolution," XI, B, 6.

Whether the property of an expired corporation reverts to the donors, or to the stockholders, or to the commonwealth as derelict, there seems to be no doubt that it no longer remains in the corporation as such. *Rider v. Nelson, etc., Union Factory*, 7 Leigh 154. See post, "Corporate Powers," XI.

It seems the better opinion that the corporate property, if not previously conveyed to some other, would revert, upon the dissolution of the corporation, to the grantor, and not to the commonwealth. *Bank v. Poitiaux*, 3 Rand. 136, 142. See *Mercer Academy v. Rusk*, 8 W. Va. 373.

Liability after Charter Expired.—See post, "Expiration of Charter Period of Existence," XVII, E, 1, c.

The principle to be deduced from our statute and the authorities, is, that a private business corporation, acting, and carrying on its corporate business in its corporate name, after its legal existence has ended by the expiration of its charter, must be held to be a corporation de facto; and that as such, so long as it in fact so carries on its business, and contracts or incurs liabilities with, or to third persons dealing with it as a de facto corporation, it may sue and be sued at law, either in actions ex contractu or ex delicto, and it can not defeat such action by alleging that its charter had expired before the cause of action arose. Its directors and stockholders by failing to wind up its business when the charter expires, as it is their duty to do under our statute, can not relieve the corporation from liability for acts done in its name, and during its actual existence as a de facto corporation. In order to relieve it from liability the corporation must have ceased to exist both in law and in fact. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

It was the duty of the directors, under the provisions of this statute, to wind up its business when its charter

expired; but the facts show that they did not do so. On the contrary, the corporation continued to prosecute its business in its corporate name just as it had done before its charter expired. It continued to exist, as a matter of fact, after its franchise or legal right to exist had expired. It thus became a corporation de facto, but not de jure." *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 602. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 55.

And consequently, when it is sued as a corporation, a plea averring simply that it has ceased to exist in law, or as a legal corporation, will be insufficient, but it must aver also that it had ceased to exist in fact at the time the alleged cause of action arose. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

And the individual members of such association can not be made liable, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, or whether the dealing with the association in its corporate capacity was authorized by the legislature, or prohibited by law, and illegal. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

Effect on Rights of Action.—See post, "Power to Sue and Be Sued," XIV, A.

And suits may be brought or defended and all other lawful acts done, in the corporate name after the expiration of the charter, in like manner as before the dissolution. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227; *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646; *Hall v. Bank of Va.*, 14 W. Va. 584.

Expiration of Corporate Existence as Ground of Abatement.—See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 54, et seq.; APPEAL AND ERROR, vol. 1, pp. 531, 532.

V. Defective and Irregular Incorporation.

A. DE FACTO CORPORATIONS.

Where the defendant is sued by its corporate name and issues its policies signed by the president and treasurer, that fact alone will justify the inference that defendant is a de facto corporation. *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771. See the title DE FACTO CORPORATIONS.

B. CORPORATIONS BY ESTOPPEL.

"This court has held in the case of *Manufacturing Co. v. Bennett*, 28 W. Va. 16, that 'a party who has contracted with a corporation, as such, can not afterwards raise the objection that at the time he entered into such contract the corporation was not legally incorporated, if such corporation could constitutionally exist.'" *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299, 303; *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771.

And it is a general rule that a party who has contracted with an association assuming to be a corporation, and acting in a corporate capacity, can not, after having received the benefit of the contract, set up as a defense to an action brought upon it by the corporation that the latter was not a legal corporation, or had no authority to make the contract in a corporate capacity. This rule does not rest, upon the doctrine of estoppel, as has sometimes been said, but is founded upon the policy of the common-law prohibition against unauthorized corporate action. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 603.

The same rule is applicable in a suit brought against a corporation upon a contract which has been performed by the other party. A company which has entered into a contract in a corporate capacity can not, after the contract has been performed by the other

party, set up, as a defense to an action for damages, that it was not a de jure corporation. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 603.

Where one party has admitted the due incorporation of the other in the facts agreed in the case, he will not be allowed in that case to question the existence of such fact. *National Bld'g, etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521.

As to estoppel of members and stockholders, see the titles ESTOPPEL; STOCK AND STOCKHOLDERS.

Estoppel of Corporation.—And a corporation may be estopped to deny its corporate existence by the execution of a deed in its corporate name, reciting that the grantor was a corporation. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526, 538. See post, "Evidence of Incorporation," XIV, D, 2.

VI. Stock and Stockholders.

See the title STOCK AND STOCKHOLDERS.

VII. Officers and Agents.

See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

VIII. Amendment, Repeal and Extension of Charters.

A. CORPORATION TAKE CHARTER SUBJECT TO GENERAL LAW.

Corporations, chartered by the state, take their charters subject to the general law of the state, and subject to such changes as may be thereafter made. *Va. Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

And it is competent for the state to pass laws giving parties who furnish materials and supplies to certain corporations prior liens and the charter rights of such corporation are not impaired thereby. *Va. Development*

Co. v. Crozer Iron Co., 90 Va. 126, 17 S. E. 806.

General laws affecting corporations form as essential parts of the charters of said corporations as though copied into them. The act of congress of 1884, which struck out from the general law the twenty-year limitation previously imposed on all charters, was entirely prospective, and applied only to corporations thereafter chartered. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891.

And a legislative act affecting the corporation, having been accepted by the stockholders, becomes incorporated into the charter, and is henceforth a part and parcel of it. *Gordon v. Richmond, etc., R. Co.*, 78 Va. 501, 513.

Thus, the act of 1847 having been accepted by the company, together with the act of 1837, establishing general regulations for the incorporation of railroad companies, so far as properly applicable, became parts of the charter of the Baltimore, etc., R. Co. (granted by act of 1872), along with the act of 1827, the act of 1827 giving way to both or either of the acts of 1847 or 1837 whenever inconsistent with them or either of them. *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319, 325.

Private Acts of Incorporation Passed between March 15, 1887, and May 1, 1888.—Section 4203, excluding from the operation of the Code any act passed by the legislature between March 15, 1887, and May 1, 1888, applies only to the acts of a general nature and not to acts of incorporation, which are private acts. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

An act of the legislature chartering a rolling mill is a private act, hence the provision of § 4203 of the Code, excluding from the operation of the Code any act passed between the 15th of March, 1887, and the 1st of May, 1888, does not apply, this provision referring merely to public acts. *Va. De-*

velopment Co. v. Crozer Iron Co., 90 Va. 126, 17 S. E. 806.

So that no amendment of the charter was necessary to bring the company within the operation of that law, nor does § 2485 of the Code (giving a lien for supplies furnished to manufacturing companies), operate, nor was it designed to operate, as an amendment of the charter. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 132, 17 S. E. 806, citing *Anderson v. Com.*, 18 Gratt. 295.

B. CHARTER AS A CONTRACT.

See the titles CONSTITUTIONAL LAW, ante, p. 140; CONTRACTS, ante, p. 307.

1. General Rule.

Private and Public Corporations Compared.—The charter of a private corporation is almost universally admitted to be a contract; and the legislature can not, without the consent of such private corporation, alter its charter in a material respect, for such act would impair the obligations of such charter, which is a contract, and would therefore be unconstitutional and void. This was decided in *Dartmouth College v. Woodward*, 4 Wheat 518; and it has been ever since admitted to be law by nearly all courts. *Va. Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806. But it is just as universally admitted, that the charter of a public corporation is not a contract and may therefore, without the consent of the corporation be changed by acts of the legislature in any manner the legislature may please. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 351; *Yeaton v. Bank*, 21 Gratt. 593; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 95; *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 659, 47 S. E. 848.

Public Corporation—Charitable Trusts.—Where a fund has been dedicated for a public use, and a society chartered by the legislature to admin-

ister the trust, the society is a quasi public corporation over which the legislature has exclusive control, and it may repeal its charter at will. *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 5 S. E. 25.

And the charter of a quasi public corporation is not a contract. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

2. Can Not Affect Inalienable Rights.

"It would seem to be the prevailing opinion, and one based upon sound reason, that the state could not barter away, or in any manner abridge or weaken, any of the essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well being of organized society; and that any contracts to that end being without authority, can not be enforced under the provisions of the national constitution forbidding the states to pass laws impairing the obligation of contracts." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 364.

Saying: "The supreme court of the United States has since then, in 1879, upon this express ground held, that by an amendment of the constitution of a state a charter strictly private in its character may be entirely modified and destroyed, though the company, when it obtained its charter granting it the right to carry on its business for twenty years, paid to the state a money consideration for this privilege. The case to which I refer is *Stone v. Mississippi*, 101 U. S. 814." *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 364.

Thus, where a certain tax is imposed on a corporation by its charter, the legislature does not thereby disable itself from imposing upon it a different or more onerous tax in the future. *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 550, 40 S. E. 514. See the title TAXATION.

Again, acts of incorporation, ought never to be passed, but in consideration of services to be rendered to the public. This is the principle on which such charters are granted even in England (1 Bl. Com. 467), and it holds a fortiori in this country, as our bill of rights interdicts all "exclusive and separate emoluments or privileges from the community, but in consideration of public services." (Section 4, art. 1, Va. Const. 1902.) It may be often convenient for a set of associated individuals to have the privileges of a corporation bestowed upon them, but if their object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege. But the hands of a succeeding legislature are not tied up from revoking the privilege. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 347, approved in *Mut. Assurance Soc. v. Stone*, 3 Leigh 218, 232.

It is the character of a legislative act to be repealable by a succeeding legislature; nor can a preceding legislature limit the power of its successor, on the mere ground of violation only. That effect can only arise from a state of things involving public utility, which includes the observance of justice and good faith towards all men. - *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 348.

The power of a succeeding legislature is bounded only by the principles and provisions of the constitution and bill of rights, and by those great rights and principles, for the preservation of which all just governments are founded. It is neither to be limited by a state of things, which leaves no beneficial result whatsoever to the community, nor by those petty inequalities and injuries, which arise to some individuals or classes of men, under every general regulation whatsoever. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 348.

Construction against Grant. — The grant of privileges to a corporation is

to be construed strictly against the corporation and in favor of the public. *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319, 320; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. 604, 615.

"And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken." Chief Justice Taney in *Ohio Life Ins. Co. v. Debolt*, 16 Howard, 416, cited with approval in *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319.

"Public grants are to be construed strictly, and any ambiguity in the terms of the grant must operate against the corporation and in favor of the public; and the corporation can claim nothing but what is clearly given by the act." *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 96.

3. Subject to Police Power.

See the title CONSTITUTIONAL LAW, ante, p. 140.

Regulation of Manner of Exercising Corporate Franchises.—Perhaps the most striking illustration of the exercise of the police power will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of state regulation, and that the charter implies an undertaking, on the part of the state, that in the same way in which their exercise is permissible at first, and under the regulations

then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection and enjoyment. *Va. Development Co. v. Crozer Co.*, 90 Va. 126, 17 S. E. 806; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83. See post, "Alteration or Repeal of Corporate Charters," VIII, C.

Bearing in mind the distinction between public and private corporations in the matter of public control—that the former are regarded as instrumentalities of the state and liable to visitation and regulation, while the charters of the latter are contracts within the meaning of the contract clauses of the state and federal constitutions, the obligation of which, in the sense of these clauses, can not be impaired, nevertheless, the police power of a state is a governmental function, the exercise of which neither the legislature nor any subordinate agency thereof, upon which part of its authority may have been conferred, can alienate or surrender by grant, contract or other delegation. *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 659, 47 S. E. 848.

Thus, a general power contained in a charter authorizing an aqueduct company to open ground in the streets of a city or town for the purpose of laying and repairing its water pipes, does not place the company, with respect to the manner of exercising those rights, beyond legislative control. *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 659, 47 S. E. 848.

"The case of *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672, is relied on as controlling authority for the contention of appellee, but the facts of the two cases are essentially different. In

the former case the court was dealing with the reasonableness of, and right to enforce, a penal ordinance of the city of Alexandria, while this case involves the police power of the state." *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 660, 47 S. E. 848.

4. Who May Set Up Breach.

A charter of incorporation is not a contract between the corporate body on the one hand and individuals whose rights and interests may be affected by the exercise of its powers on the other; but it is a compact between the corporation and the government from which they derive their powers. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

Individuals, therefore, can not take it upon themselves, in the assertion of private rights, to insist on breaches of the contract by the corporation as a ground for resisting or denying the exercise of a corporate power. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

The act of March 1st, 1867, entitled "An act to authorize the James River & Kanawha Company to borrow money;" though when accepted by the company it would create a contract between the company and the state, did not create a contract between the company and the holders of the \$180,000 of state bonds, therein mentioned; and a holder of one of these bonds could not maintain an action thereon against the company. *Stuart v. James River, etc., Co.*, 24 Gratt. 294.

C. ALTERATION OR REPEAL OF CORPORATE CHARTERS.

1. Where Power Is Reserved to Alter or Amend.

Where the legislature reserves the power to alter or amend corporate charters, an alteration made by them does not impair the obligation of the contract within the meaning of the constitution, or interfere with vested rights. *Robinson v. Gardiner*, 18 Gratt. 509; *Yeaton v. Bank*, 21 Gratt. 593.

For where a charter is, by its terms,

made subject to modification or repeal at the pleasure of the legislature, the stockholders, by accepting the same, assent to this reservation as a constituent part of their contract. *Anderson v. Com.*, 18 Gratt. 295, 299.

Can Not Disturb Existing Contracts.

—Under the reserved right "to repeal, alter or modify" the legislature may alter the charters of banks or take them away altogether, but it can not disturb contracts lawfully made under such charters, or disturb rights already legally vested under the old charters. *Anderson, J.*, dissenting. *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457.

May Be Exercised Either by General or Special Law.

—Under a power of modification of repeal reserved in the charter, the charter may be modified by a general law as well as by special act, so as to make shareholders personally liable, and those who become, or continue shareholders, must be understood as consenting to it. *Anderson v. Com.*, 18 Gratt. 295; *Robinson v. Gardiner*, 18 Gratt. 509; *Va. Development Co. v. Crozer Co.*, 90 Va. 126, 17 S. E. 806.

If, in a special act of the legislature of this state chartering a company and conferring on it specified privileges exceeding those granted to other like corporations by the general law of the state, there be reserved a right to amend this act by a future legislature, and the legislature subsequently passes a general act applicable to all corporations of this character, whereby the specified privileges, while not withdrawn, are so modified as to render them far less valuable to the corporation, which had been chartered by this special act, this can not be regarded as an exercise by the legislature of the reserved right to amend such act; as it can not properly be called an amendment of this special act, for by our constitution, art. 6, § 30, it is provided, that "no law shall be amended by reference to its title only; but the section amended shall be inserted at large in the new act." *Laurel*

Fork, etc., *R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

But such general act is not necessarily inoperative on such corporation, as it may or may not be subjected to such law; this depending upon whether the legislature has the constitutional power so to control the corporation in this respect. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324.

2. Under Constitutional Provision.

"All charters and amendments of charters, now existing and revocable, or hereafter granted or extended, may be repealed at any time by special act." Va. Const. (1902), art. 12, § 154. See W. Va. Code, ch. 53, § 8, p. 545.

3. Right of Corporation to Refuse to Accept Amendment.

Under the power reserved in the charter of a private corporation, to repeal, alter, or modify the charter, the legislature may repeal the charter, but can not modify it without the consent of the corporation. But if the corporation refuses to consent to the modification it must discontinue its business as a corporate body. *Yeaton v. Bank*, 21 Gratt. 593.

"The power of the legislature to 'repeal, alter or modify the charter of any bank at its pleasure,' must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it can not compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporations, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be accepted. It is clear that the government can not enforce the acceptance of a charter upon a pri-

vate corporation without its consent." *Yeaton v. Bank*, 21 Gratt. 593.

"These well-settled principles are everywhere recognized as applicable to the original charters of incorporation; and upon principle and authority they apply with equal force to any amendment or modification of the charter as well as to the original charter. Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification, than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the legislature on the one hand, and the corporation on the other, the former expressing its intention, by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance." *Christian, J.*, in *Yeaton v. Bank*, 21 Gratt. 593.

"The reservation of the right to alter, amend or repeal the act by which the corporation is created, may be prudent and salutary; but it seems to be a necessary implication, that if the legislature should undertake to make what in their opinion is a legitimate alteration

or amendment, the corporation has the power to reject or accept it, whatever may be the consequences. One consequence undoubtedly is, that the corporation can not conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification can not be forced upon the corporation without its consent." Christian, J., in *Yeaton v. Bank*, 21 Gratt. 593.

Thus, the act of March 1st, 1867, entitled "An act to authorize the James River & Kanawha Company to borrow money;" though, when accepted by the company, it created a contract between the company and the state, did not create a contract between the company and the holders of the state bonds therein mentioned; and though the company executed a mortgage on its property to secure the money authorized to be borrowed by said act, yet, if the company has not borrowed the money or made use of the bonds intended to be secured by the mortgage, it can not be held to have accepted the terms of the act or become liable under its proviso. *Stuart v. James River, etc., Co.*, 24 Gratt. 294.

Every Amendment a New Contract.—Every amendment or modification of a charter of incorporation is nothing more than a new contract, which is not binding upon the corporate body until accepted by them. *Yeaton v. Bank*, 21 Gratt. 593, 600. See *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319.

"Even after a corporation has been organized under its charter, its charter can not be materially amended, to bind a stockholder, without his consent." *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557, 563, 16 S. E. 877.

Acceptance Not Presumed from Partial Compliance.—Where a corporation has executed a mortgage on its property to secure money authorized to be borrowed by an act of the legislature,

passed upon its application for an extension of its franchise, and attaching certain conditions thereto, yet, if the corporation has not borrowed the money, or made use of the bonds intended to be secured by the mortgage, it can not be held to have accepted the terms of the act or become liable under its proviso. *Stuart v. James River, etc., Co.*, 24 Gratt. 294.

A Branch Bank Can Not Accept Modification for Mother Bank.—A branch bank, having no separate charter, has no power to accept a modification of the charter of the mother bank. *Yeaton v. Bank*, 21 Gratt. 593.

Not Necessary to an Immaterial Change.—A limited power to borrow money conferred on a building association by a new charter, is not such a radical departure from the original design and business of the company as would necessitate the assent of each member of the company in order that he may be bound by it. *Bosang v. Building, etc., Ass'n*, 96 Va. 119, 30 S. E. 440.

Effect of Acceptance of New Charter on Old.—When a new charter is granted to and accepted by a corporation, the former charter is not thereby wholly superseded, but only in those respects in which it is inconsistent with the new charter. *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319.

But where a corporation, on consolidation with another corporation, accepts the provisions of the act consolidating them, it operates as a repeal of any provisions of the former charters of the two corporations which are inconsistent with such act of consolidation. *Petersburg v. Petersburg, etc., Co.*, 29 Gratt. 773.

Majority Rules.—A member of the mutual assurance society against fire is bound by an act of assembly varying the terms of the original act of incorporation; such act being passed at the instance of a legally constituted meeting of the said society, although that individual member was not present at

the meeting. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315.

IX. By-Laws and Regulations.

A. GENERAL POWER TO MAKE BY-LAWS.

The power to make reasonable by-laws, consistent with its charter, inheres in every corporation. One who becomes a member, subjects himself not only to regulations then existing, but to those afterwards enacted within the scope of such power. The corporation can not by a subsequent by-law destroy the contract of membership or change the essential character of an antecedent agreement between a member and the corporation; but a by-law more or less affecting the remedy of shareholders may be passed and existing members will be bound by it, so far, at least, as they consented to the exercise of such a power when they became members. *Eastern Bld'g, etc., Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298.

It is a fundamental principle of corporations, that the majority may establish rules and regulations for the corporation (which are considered as a sort of municipal law for the body corporate), subject only to a superior and fundamental law which may have been prescribed by the founder thereof, or by the legislature which grants the privileges. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 351.

Perhaps, also, these petty legislatures ought further to be limited by all those considerations (including the due observance of justice), which ought to bound the proceedings of all legislatures whatsoever. If, however, there be no such paramount law, or overruling principle, the mere will of the majority is competent to any regulation. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 351.

Limitations.—A corporation has not the power, by laws of its own enactment, to disturb or divest rights which

it has created, or to impair the obligation of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void. *Savage v. People's Building, etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991.

Thus, a provision in a condition indorsed on a stock certificate, that any action against the corporation by the shareholders shall be brought in a certain county of another state, is void, as taking away jurisdiction by consent. *Savage v. Peoples' Building, etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991.

Must Not Be Contrary to Existing Laws.—A by-law in contravention of the laws of Congress is void. *Feckheimer v. Bank*, 79 Va. 80.

Must Be Prospective in Operation.—By-laws and regulations of corporations merely govern future action. Ex post facto laws are no more lawful for corporations than for states. *Savage v. People's Building, etc., Ass'n*, 45 W. Va. 275, 31 S. E. 991, 993.

After Expiration of Charter.—A corporation whose charter has expired by limitation, can not set up by-laws made by it as a de facto corporation, to avoid its contracts. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891.

B. ALTERATION OF BY-LAWS BY DIRECTORS.

Though a by-law of a company authorizes the directors to alter or amend the by-laws, the directors have no authority under said by-law or otherwise to disregard or alter another by-law, which was intended to impose a limitation on their powers. *Stevens v. Davison*, 18 Gratt. 819.

C. STOCKHOLDERS AFFECTED WITH NOTICE.

See ante, "Charter as Notice," IV, D. A stockholder is bound, at his peril, to take notice of the by-laws of the corporation, of which he is a member. *West End, etc., Co. v. Claiborne*, 97 Va. 739, 34 S. E. 900; *Campbell v.*

Eastern Bld'g, etc., Ass'n, 98 Va. 729, 37 S. E. 350, 6 Va. Law Reg. 632; Nickels v. Association, 93 Va. 380, 25 S. E. 8.

Persons dealing with a corporation are affected with notice of the provisions of its charter, constitution and by-laws. Haden v. Farmers', etc., Fire Ass'n, 80 Va. 683.

Absence When They Were Adopted Immaterial.—Where the charter of a corporation allows a majority to alter and amend the rules and regulations as they may judge necessary, all members of the corporation will be bound by such subsequent change, confirmed by act of assembly, though not present at the meeting adopting it. Currie v. Mutual Assurance Soc., 4 Hen. & M. 315.

X. Corporate Name.

See post, "Actions by and against Corporations," XIV; "Succession of Corporations," XV, B.

Validity of Contract under Assumed Name.—A contract entered into by a corporation under an assumed name may be enforced by either of the parties, and the identity of the company may be established by the ordinary methods of proof. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299, 303.

Thus, where an action of unlawful detainer is brought by a mining company, in its proper corporate name, against one of its tenants, who has leased one of its tenement houses, and has been engaged in mining coal for it, although the lease was in writing, and executed by said corporation under a name different from its true corporate name, assumed for its own convenience, the tenant accepting said lease, and occupying said premises, and paying rent thereunder, is estopped from denying the power of said corporation to contract in its assumed name. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299, 303.

"We find the law stated thus in

Morawitz on Corporation (2d Ed., 354): 'The identity of a corporation is no more affected by a change of name than the identity of an individual. The agents of a corporation have no implied authority to use any name except that indicated by the company's charter, in contracting on the company's behalf; but the use of a wrong name is ordinarily not material, if the corporation is really intended by the parties. * * * A contract entered into by a corporation under an assumed name may be enforced by either of the parties. If the contract is expressed in writing, and the identity of the corporation can be ascertained from the instrument itself, the misnomer is wholly unimportant; but, if necessary, other evidence may be introduced in order to establish what company was intended.' Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299, 302.

Virginia Military Institute.—Where the Virginia Code of 1873 provided for a board of visitors for the institution, and declared them to be a corporation, but, in another section, gives "The Virginia Military Institute" as the specific name of the corporation, and vests in the corporation known by that name the title to all its property, it was held that the corporate name of the institute was "The Virginia Military Institute." Frazier v. Va. Military Inst., 81 Va. 59. See now ch. 69, Va. Code, 1904.

Misnomer of Corporation in Contracts.—"But contracts may be made by or with them, by a mistaken name, if the mistake be only in syllabis et verbis and not in sensu et re ipsa." So a bond executed to the "President and Managers of the Culpeper Agricultural and Manufacturing Society" may be sued on by the Culpeper Agricultural and Manufacturing Society," that being the legal style of the corporation. Culpeper Agricultural, etc., Society v. Digges, 6 Rand. 165.

Misnomer as Affecting Validity of Bequest.—See the title WILLS.

Where the name or description is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not defeat the bequest; and the same rule applies as well to corporations as to individuals. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *Roy v. Rowzie*, 25 Gratt. 599.

XI. Corporate Powers.

A. IN GENERAL.

1. Such as Charter and Laws Confer.

a. In General.

Corporations, whether private or public, are artificial persons, possessing those rights and properties only, which their charter confers on them either expressly or as necessarily incidental to their existence and to the carrying out of the purposes for which they are created. *Laurel Fork, etc., R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324, 333; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319, 332; *Wroten v. Armat*, 31 Gratt. 228; *Roper v. McWhorter*, 77 Va. 214.

"A corporation is an artificial being, created by the state, for the attainment of certain defined purposes, and therefore vested with certain specific powers, and others fairly and reasonably to be inferred or implied from the express powers and the object of the creation. Acts falling without that boundary are unwarranted, *ultra vires*. If the act sought to be done is foreign to the nature and design of the corporation, it is *ultra vires*; and, though the act be calculated to attain the purpose, yet it may be *ultra vires* because of the undue means of accomplishing it." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 602.

Change of Circumstances as Affecting Charter Rights.—A company chartered over three-quarters of a century ago for the purposes of supplying water to a sparsely settled town of a few thousand inhabitants, with the privilege of opening streets and highways, and which has only exercised its privilege to a very limited degree—furnishing

drinking water to only a small part of the town—can not (after the town has grown to be a city, and expended a large sum of money in furnishing the entire city with a complete water system for all purposes) under its general grant of power, dig up or obstruct the streets of the city, against its will, for the purpose of enlarging or extending its system. In the case in judgment, the further fact that the company is practically insolvent and without means, either as regards capital or water supply, or properly enlarging its system, justifies the conclusion that its undertaking is an abuse rather than a legitimate exercise of charter rights. *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 47 S. E. 848.

Majority Rules.—See ante, "Right of Corporation to Refuse to Accept Amendment," VIII, C, 3; "General Power to Make By-Laws," IX, A.

The rule of decision by a majority of a corporation is a fundamental law in this country and in England, thereby differing from the civil law, which requires the concurrence of two-thirds of all the members. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 350.

b. Implied Powers.

Whilst no powers will be implied except those only which are incident to the very existence of the corporation, or so necessary to the enjoyment of some special grant that without the implied power such right would fail, yet it is an established principle that corporations may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

The difference between the powers of corporations and individuals is to be found mainly in the limited objects of the former, and the necessity of their acting in a concrete character. It is essential to corporations, as well as individuals, that they should have the

capacity to sue and be sued, to make contracts, to acquire and alienate property. Without these powers the purposes of their institution could not be accomplished. But they have not, like individuals, an unlimited discretion in the application of these powers. They may not exercise them for purposes foreign to their creation. A bank of discount and deposit can not engage in manufacturing or agricultural pursuits; and insurance or mining companies can not discount bills or notes, or circulate their paper as money; a road or navigation company can not speculate in lands or stocks. But all such corporations have the right to secure and collect debts due to them, and consequently to obtain deeds of trust or mortgages therefor upon property real or personal, or to commute them by taking in payment assignments of choses in action, or conveyances of lands or goods. The authority to use such means is to be determined by the lawfulness of the end which they are employed to accomplish. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 20.

"There can be no question but that a corporation is the creature of its charter, from which it derives not only all its powers, but its very existence. It certainly has no power which its charter denies to it. But in the absence of such denial it has certain implied powers which are as complete as if they were expressly given or affirmed in the charter. One of these powers is the power to acquire estate, real or personal. Another is the power to acquire a credit by bond, bill of exchange or other chose in action, and to obtain security for the payment of such credit by mortgage, deed of trust, or other security." *Wroten v. Armat*, 31 Gratt. 228, 247.

Powers of Corporations Depend upon the True Construction of Their Charters.—Whatever the implied powers of corporations aggregate may be at common law and the modes by which those powers are to be carried into

operation, corporations, either private or public, created by statute, must depend, both for their powers and the mode of exercising them, upon the true construction of the statute creating them; they are precisely what the statute has made them, they derive all their powers from the statute, and are capable of exercising their powers only in the manner prescribed or authorized by it. *Penn. Lightning Rod Co. v. Board of Education*, 20 W. Va. 360; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319; *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599; *Winchester v. Redmond*, 93 Va. 711, 714, 25 S. E. 1001.

Contracts Fairly within the Objects of Incorporation Not "Ultra Vires."—

A contract by a railway company to deliver a certain number of bales of cotton in a certain place at a specified time is not ultra vires a railroad corporation, being incident to and for the benefit of their business as common carriers, and not forbidden by their charter. The court, citing *1 Wood Ry. Law*, pp. 179, 480, said: "There is no question but that, under the head of its implied powers, a corporation, especially a railroad corporation, may, in order to increase its business, enter into many contracts and undertakings which are not strictly within its express powers, if they are not expressly prohibited and are essential to promote the business of the corporation, or add materially to the convenience of its prosecution." *Norfolk, etc., R. Co. v. Shippers' Compress Co.*, 83 Va. 272, 280, 2 S. E. 139.

Where the charter of a corporation authorizes a bond issue, an application of the proceeds to pay off the floating debts of the corporation is not ultra vires. *Addison v. Lewis*, 75 Va. 701.

Implied Powers May Be Curtailed by the Provisions of the Charter or General Law.—It is, moreover, unquestionable that the general incident power of a corporation, whether derived from the common or the statute law, may be

curtailed by the provisions of its legislative charter, either expressly or by necessary implication. Thus the charter may in terms prohibit the corporation from purchasing lands or goods for any purpose whatever, or for any but a particular specified purpose; or the prohibition may be implied from an insertion, by way of enactment, of the general incidental power to purchase, with a proviso limiting it to a given purpose. But a general prohibition would not be inferred from a mere partial enactment of the incidental common-law power; as, for example, from a clause authorizing a bank, insurance or manufacturing company to purchase land for the erection of its necessary buildings. Such a clause, whether with or without limitation as to quantity or value, would not exclude the incidental power to take mortgages or other securities on real or personal estate, for debts due the corporation, or assignments or conveyances of chattels or lands in commutation therefor. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 20.

And it can not be doubted that the powers incident to corporations at common law may be restrained and limited by legislative enactments of a general character. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 20.

c. Presumption in Favor of Right to Exercise.

Every presumption is in favor of the right of a corporation to exercise the powers distinctly granted in its charter, and that right will not be abridged unless the legislature has clearly transcended its constitutional authority. *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 43 S. E. 194.

d. Corporation Must Exercise Its Powers Collectively, Not Individually.

Where authority is conferred on a corporation aggregate by statute to make contracts, neither a majority of the members, nor all of them acting separately, have the power to bind the corporation; one of the principal ob-

jects being the concurrent counsel and deliberation of the members acting together; and of course, if they can not make a binding contract acting separately, they can not, individually, ratify what has been done, so as to bind the corporation. A corporation can only act as a body or by its authorized agents. *Penn. Lightning Rod Co. v. Board of Education*, 20 W. Va. 360.

Thus, the members of a corporation aggregate can not separately and individually give their consent, or enter into contract in such manner as to obligate themselves as a collective body or board. *Penn. Lightning Rod Co. v. Board of Education*, 20 W. Va. 360; *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452, 453.

e. Joint Contract for Lawful End Valid.

A joint contract in behalf of two or more separate and distinct corporations, to obtain an object which, severally, they might attain in virtue of their charters, can not be considered an infraction of them, because not expressly provided for therein. The same ends are to be obtained as by several contracts and there is nothing in a joint contract that is either forbidden by the charters, or against their policy. *Banks v. Poitiaux*, 3 Rand. 136, 146.

f. Notice of Restrictions on Powers.

See ante, "Charter as Notice," IV, D.

2. Construction.

Construed Strictly against the Corporation.—It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them, as are clearly comprehended within the words of the act or derived therefrom by necessary implications, regard being had to the objects of the grant; any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. *Roper v. McWhorter*, 77 Va. 214; *Somerville v. Wimbish*, 7 Gratt. 229.

Grants of corporate powers being in derogation of common right, are to be strictly construed. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 788; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. 604, 615; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 96.

"Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the act creating them." "The statute, quoad the corporation, is an enabling act, not only in regard to the powers conferred, but also as to the mode prescribed for exercising those powers; and, unless the mode so prescribed is observed by the corporate body, its act will not bind the corporation." *Penn. Lightning Rod Co. v. Board of Education*, 20 W. Va. 360." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599, 602.

Construction to Accord with Objects of Creation.—It was held in *Immigration Soc. v. Com.*, 103 Va. 46, 48 S. E. 509, that the words used in a section of an act authorizing the incorporation of a certain description of corporations, which prescribed powers to be exercised by such corporations, are sometimes to be restrained and narrowed so as to conform to the terms used in another section of the same act declaring the objects for which such corporations are authorized to be formed, although otherwise their meaning might be broader.

3. Can Only Act by Agent and Officers.

See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Corporations can act only by officers and agents. *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. 218, 232; *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *Petersburg v. Applegarth*, 28 Gratt. 321, 345; *Crall v. Com.*, 103 Va. 855, 859, 49 S. E. 638; *Hulings v. Hulings Lumber Co.*, 38 W. Va. 357,

18 S. E. 620; *Colman v. W. Va. Oil, etc., Co.*, 25 W. Va. 148, 174; *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548, 554; *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 372; *Muhleman v. National Ins. Co.*, 6 W. Va. 508. See *Penn. Lightning Rod Co. v. Board of Education*, 20 W. Va. 360.

And a corporation can only act through living agents. *Frazier v. Va. Military Inst.*, 81 Va. 59.

But a corporation may now bind itself in any way that a natural person may bind himself. *Kelly v. Board of Public Works*, 75 Va. 263, 271, citing *Stuart v. Valley R. Co.*, 32 Gratt. 146.

Ratification of Acts Done in Its Behalf.—"It is a principle of law universally acquiesced in and constantly applied, that a corporation (and within qualified limits a municipal corporation), like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance; that such ratification may take place by conduct in pais, and that no formal vote or resolution of the board of directors or the body of the shareholders is necessary to that end; that such conduct may consist either in affirmative action, or in a failure to act; that is, in passive acquiescence; that it may be the conduct either of a managing agent or of the board of directors, or of the body of shareholders; in short, the conduct of the agent or agency which might have authorized the act in the first instance, or of the general constitutional body; and that when a ratification has thus taken place it is equivalent to an antecedent authority, and estops the corporation from subsequently disavowing the act so ratified. In this manner not only unauthorized acts of agents, but also the acts of de facto officers, and even those of officious intermeddlers may become the acts of the corporation by adoption." *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452, 454. See *Newport News Co. v.*

Newport News St. R. Co., 97 Va. 19, 32 S. E. 789; West Salem Land Co. v. Land Co., 89 Va. 192, 15 S. E. 524; Crump v. U. S. Mining Co., 7 Gratt. 352.

4. Effect of Dissolution.

See post, "After Dissolution," XI, B, 6; "On Powers," XVII, F, 6.

B. TO ACQUIRE, HOLD AND DISPOSE OF PROPERTY.

1. In General.

See post, "Of Literary Fund Corporation," XII, A, 2.

"The creation of a corporation gives to it, amongst other powers, as incident to its existence and without any express grant of such powers, that of buying and selling." Banks v. Poitiaux, 3 Rand. 136, 141. See Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19.

"A corporation may be seized of real property as well as be possessed of personal property; but, as has been said by Lord Abinger, 'the interest of each individual shareholder is a share of the net produce of both when brought into one fund.'" Barksdale v. Finney, 14 Gratt. 338, 357.

And under § 1068 of the Virginia Code, every corporation, when not otherwise provided, has the right "to purchase, hold, and grant estate, real and personal." Davis v. Lee Camp, 1 Va. Dec. 782.

Limitation Thereon.—"This power may be limited, restrained or prohibited, either by the charter creating the corporation, or by a general law, as in England, by the statutes of mortmain." Banks v. Poitiaux, 3 Rand. 136, 141.

But the incidental capacity of a corporate body to acquire property for its chartered objects, is for the most part salutary, and the entire prohibition of it would often be productive of great inconvenience. Nothing is easier, whenever sound policy may require the denial of this otherwise inherent power, than a plain manifestation of such legislative intent in the charter of incorporation; and it ought not to be lightly

inferred, but made manifest by express terms or necessary implication. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19; Wroten v. Armat, 31 Gratt. 228.

2. Power of Corporations to Acquire Land.

Charter Limitations Merely Directory.—The charters of banks limiting the amount of land that the corporation may acquire are merely directory. They impose no penalty in terms. They do not declare the purchase by or conveyance to the banks to be void, nor vest the title in the commonwealth or any other than the banks in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. Banks v. Poitiaux, 3 Rand. 136.

"If, in making the purchase of the land in question, the banks violated their charters, the corporation might, for that cause, be dissolved by a proceeding at the suit of the commonwealth; and even in that case, it seems to be the better opinion, that the property, if not previously conveyed to some other, would revert, upon the dissolution of the corporation, to the grantor, and not to the commonwealth." Banks v. Poitiaux, 3 Rand. 136, 142.

"But any conveyance made by the corporation, before its dissolution, would be effectual to pass its title. The banks therefore have a title which they can convey to the appellee and which would, in his hands, be indefeasible. It would seem extremely inconvenient if a contractor with one of these banks could, for the purpose of avoiding his contract, institute the injury whether the bank had violated its charter." Green, J., in The Banks v. Poitiaux, 3 Rand. 136; Fayette Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016; Litchfield v. Preston, 98 Va. 530, 37 S. E. 6, 6 Va. Law Reg. 397, and note; Wroten v. Armat, 31 Gratt. 228.

"It is true that the capacity of corporations at common law to purchase and hold lands and chattels is laid down broadly in the books, though I am not aware of any case in which the question was made whether this power was unlimited. However this may be, I think it clear that our statutory corporations can not take and hold real estate for purposes wholly foreign to their creation." *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 20. See also, *The Banks v. Poitiaux*, 3 Rand. 136; *Wroten v. Armat*, 31 Gratt. 228.

Proof that a corporation has an estate in fee in land—whether, upon the dissolution of the corporation, the estate would revert to the grantor or not—is sufficient to support a finding by the jury, that the plaintiff has an estate in fee. *Mercer Academy v. Rusk*, 8 W. Va. 373.

Such Charters Construed Liberally.—Under an act of assembly, authorizing a bank to hold as much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more, the bank may purchase more ground than is necessary for the erection of a banking house, build fire-proof houses on the vacant land, for the greater security of the banking house, and sell them to third persons. *Banks v. Poitiaux*, 3 Rand. 136. See also, *Davis v. Lee Camp*, 1 Va. Dec. 782.

3. Statute of Mortmain Not in Force in Virginia.

The statute of mortmain has never been adopted in this state, and there is no proceeding authorized by the common law of this state, or any statute thereof, under which lands acquired by a corporation in violation of its charter can be forfeited to the state. While a limit is fixed upon the quantity of land which a corporation may take and hold, the statute imposes no penalty for its violation, and is only directory. The only penalty incurred is that which

waits upon every violation by a corporation of its chartered rights and privileges. No one can question the right of a corporation to take and hold real estate except the state by which it was created, or that within whose limits it does business, and even these must do so by a direct proceeding for that purpose. A conveyance of real estate to a corporation in excess of the amount allowed by law, conveys the title of such real estate to the corporation, and a conveyance from it is effectual to pass its title thereto to the grantee. *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 274, 24 S. E. 1016, citing *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19; *Marshall v. Conrad*, 5 Call 364.

But see *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243, where it is said: "A deed to a corporation, incapable by its charter of holding real estate, is void."

4. Prohibition to Take Land as Security Does Not Avoid the Security.

A prohibition on a bank to take a deed of trust or mortgage to secure loans will not render the security void, for such a provision is made for the benefit of the government and not of the borrower and the government alone can take advantage of it or not at its pleasure. *Wroten v. Armat*, 31 Gratt. 228.

5. Incapacity to Take Not Inferred from Inhibition to Hold.

An incapacity to take will not be inferred from an inhibition to hold, though the policy of the latter be to prevent the accumulation by the corporation of a specified description of property, if the purpose of the conveyance be a sale of the property by the corporation, and the application of the proceeds to the objects contemplated by the charter. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19.

"This proposition, reasonable in itself, may be fairly deduced from the case of the *Banks v. Poitiaux*, 3 Rand.

136." *Wroten v. Armat*, 31 Gratt. 228, 251.

"To avoid altogether the contract of a corporation made in reference to the objects of its institution is a measure of extreme rigor, and may be productive of great injustice to the corporation on the one hand, or to the other contracting party on the other." *Wroten v. Armat*, 31 Gratt. 228.

6. After Dissolution.

See ante, "Expiration of Charter and Its Effect," IV, E; post, "On Powers," XVII, F, 6.

In *Barksdale v. Finney*, 14 Gratt. 358, the case of *Rider v. Nelson*, etc., *Union Factory*, 7 Leigh 154, is cited as holding, that as a corporation, without express provision of law, could never hold property, and can only hold it for so long a time as the charter permits, after the expiration of its charter it can hold no property; and therefore a judgment against it would be fruitless. *May v. State Bank*, 2 Rob. 56, 101.

"Its power to hold property in the character of a corporation, is gone at the instant of the termination of its existence. Whether its property reverts to the donors, or to the stockholders, or to the commonwealth as derelict, there seems to be no doubt, that it no longer remains in the corporation as such. Without express legislative enactment, this imaginary creature of the law never could have held property at all. It can, therefore, only hold it so far as it is given, and for so long a time as it is permitted by the charter which gave it existence." *Rider v. Nelson*, etc., *Union Factory*, 7 Leigh 154, 155.

7. Purchase of Real Estate by Mining Corporation.

Under § 24, ch. 53, W. Va. Code, a mining corporation, after it is fully organized, may purchase real and personal estate for the use of such corporation and for its other corporate purposes and business, at such price, upon such terms and conditions, as may be agreed upon by the owners and di-

rectors or stockholders of such corporation, and may pay for such property by issuing so many shares of its capital stock to the vendor as are equal in amount at par value to the price agreed upon for such property, but not to exceed its authorized capital. Merchants', etc., *Bank v. Belington Coal*, etc., Co., 51 W. Va. 60, 41 S. E. 390.

8. Immigration Societies Dealing in Lands.

Immigration societies, organized under the act of March 5, 1894 (acts, 1893-'4 p. 723), are not authorized to sell lands of others than the members of the society without paying the license tax required by the act of March 16, 1903 (acts, 1902-'3-'4, pp. 155, 188). The object of such societies, as declared by § 1 of the act first above mentioned, is "to advertise for sale and to sell or lease the lands of the members of said society," and more general language used in other sections of the act will be so construed as to carry out the declared object and intention of the legislature in enacting the statute, and thus reconcile all of the provisions of the act, and render it harmonious throughout. *Immigration Soc. v. Com.*, 103 Va. 46, 48 S. E. 509.

9. Conveyance of Land.

A certain corporation, a camp of confederate veterans, by special act, had power to hold land to provide a home for invalid confederate veterans, provided that it should not hold, at any one time, more than 500 acres. The government was vested in a board of visitors, who purchased land. At a regular meeting of the camp, the board of visitors was authorized to sell a portion of the tract purchased, if advisable. Subsequently the board of visitors sold the tract in question, which sale was ratified by both the board and the camp. Held, that the board of visitors had full power to make the sale, and the purchaser obtained a good title. *Davis v. Lee Camp*, 1 Va. Dec. 782.

"Nor does the necessarily limited

duration of time in which the object and purposes of the corporation can operate in any wise affect the title in a grantee of the corporation. There is such a thing as a fee simple for alienation and a determinable fee for enjoyment. The limited life of a corporation, whether by express provision in its charter, or by its repeal or forfeiture, does not affect the estate and title of a grantee." *Davis v. Lee Camp*, 1 Va. Dec. 782, 784.

Sale of Land, Bought Contrary to Charter, Enforced.—It seems that where the corporation is trying to enforce a sale by it of lands already acquired contrary to its charter, specific performance will be enforced, but not where the corporation is trying to enforce a sale to itself in violation of its charter. *Banks v. Poitiaux*, 3 Rand. 136, and dictum in *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 274, 24 S. E. 1016.

Necessity for Deed.—See ante, "Corporate Deed and Seal," II, H.

Where the charter of a corporation made its stock personal estate, but provided that its real estate should only be conveyed as other real estate, the legal title could only pass by deed from such corporation. *Barksdale v. Finney*, 14 Gratt. 338.

10. Capacity to Take by Will.

See the titles RELIGIOUS SOCIETIES; WILLS.

Power to Accept Bequests.—Corporations have the legal capacity to take charitable bequests, when, and to the extent, authorized by their charters. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Roy v. Rowzie*, 25 Gratt. 599.

"A bequest to a corporation, as a mere trustee for indefinite purposes, not embraced in the purview of the acts aforesaid (validating certain indefinite charities), would be void for uncertainty, because there must in general be certainty as to the cestui que

trust, and as to the objects of the trust in every case of trust, in order to make it valid. Certainty only as to the trustee is not sufficient. But a bequest to a corporation, for the general purpose of its incorporation, is not indefinite nor uncertain in any respects." *Roy v. Rowzie*, 25 Gratt. 599, 611.

Parol Evidence Admissible to Show Identity of Corporation.—See *Roy v. Rowzie*, 25 Gratt. 599; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302.

11. Acquirement of Land by Accretion.
See the title ACCRETION, vol. 1, p. 103.

12. Corporations as Beneficiaries of Charities.

See the title CHARITIES, vol. 2, p. 794, et seq. .

13. Who May Raise Question.

See post, "Effect of Ultra Vires Acts," XIII.

C. TO ALIENATE ITS FRANCHISE, OR PROPERTY NECESSARY THERETO.

1. Private Corporations.

A private corporation, unless authorized by charter to do so, can not lease or dispose of its franchise, or its property needful in the performance of its obligations to the state, without legislative consent. Dictum in *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599. See *Roper v. McWhorter*, 77 Va. 214.

Such authority is now given by statute in Virginia, in case of a foreclosure and sale under a deed of trust or mortgage, or under a decree of court, of all the works and property of an internal improvement company. Va. Code, 1887, §§ 1233-4, 1236; acts, 1891-2, p. 623; 1 Va. Law Reg. 546.

2. Public Corporations.

A public corporation, vested with powers by the state to be exercised for the public, can not transfer to another the exercise of such powers, and make a lease of its property, necessary to enable it to execute its functions, without legislative consent. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

3. Quasi Public Corporations.

In *Roper v. McWhorter*, 77 Va. 214, a ferry was held to be a quasi public franchise, in the proper exercise of which the public was interested, hence it could not be transferred without express legislative authority.

4. Effect on Liabilities.

Can Not Thus Exempt Itself from Liability.—A railroad corporation can not, without distinct legislative authority, by lease or any other contract, turn over to another company its road and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road. *Ricketts v. Chesapeake*, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901; *Fisher v. W. Va.*, etc., R. Co., 39 W. Va. 366, 19 S. E. 578; *Naglee v. Alexandria*, etc., R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308. See post, "Liabilities," XII.

Lease or Mortgage Works No Exemption.—A corporation can not exempt itself from liability by leasing its property and the use of its franchises to another, without the authority of the legislature. *Ricketts v. Chesapeake*, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901.

Nor does a voluntary conveyance by deed of trust of its property and franchises, without the authority of the legislature, work such an exemption. *Naglee v. Alexandria*, etc., R. Co., 83 Va. 707, 3 S. E. 369.

5. Dedication to Public Use.

A corporation may dedicate some of its land to public use for a highway, if it do not materially interfere with the accomplishment of the purpose of its incorporation. *Hast v. Piedmont*, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

D. TO ACQUIRE CORPORATE STOCK.

1. In Itself.

May Accept Devise or Bequest of Its Own Stock.—A corporation has the power to accept a devise or bequest of its own stock, whether such is declared

by its charter to be realty or personalty. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19.

2. In Another Corporation.

May Be Authorized by Law.—A law authorizing a bank to subscribe to the stock of a joint stock company is valid. *Goddin v. Crump*, 8 Leigh 120.

E. TO ACT AS TRUSTEE.

The old rule that a corporation could not be a trustee has been long rejected and now the well-established doctrine is that corporations of every description may take and hold estates as trustees for purposes not foreign to the objects of their creation and existence, and they may be compelled by the courts to carry the trusts into execution. *Protellant*, etc., *Soc. v. Churchman*, 80 Va. 718. See the title TRUSTS AND TRUSTEES.

F. TO RAISE MONEY BY LOAN, MORTGAGE, OR OTHERWISE.

1. Power to Borrow Money.

A private manufacturing company may borrow money to carry on its operations. *Burr v. McDonald*, 3 Gratt. 215; *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. 909; *Wroten v. Armat*, 31 Gratt. 248, 297.

Section 49, ch. 53, W. Va. Code, among other things, provides: "For every corporation subject to this chapter there shall be a board of directors, who shall have power to do, or cause to be done, all things that are proper to be done by the corporation." Such a corporation has the power to borrow money as incident to its power to purchase stock and other material. *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. 909-915.

From Its Stockholders.—A corporation may contract debts with its individual corporators, and it is as much its duty to pay or secure such debts as debts due to strangers. *Hope v. Valley City Salt Co.*, 25 W. Va. 789. And a deed of trust given on the corporate property to secure such debts,

is not fraudulent *per se*. *Hope v. Valley City Salt Co.*, 25 W. Va. 789.

2. Power to Mortgage.

See the title MORTGAGES.

A quasi public corporation has the power to mortgage its property for the furtherance of the objects of its creation, when authorized by the legislature. *Enders v. Board of Public Works*, 1 Gratt. 364.

And no objection can be raised to the validity of a mortgage, by other creditors, on the ground that it was not expressly assented to by its stockholders, they not objecting. *Enders v. Board of Public Works*, 1 Gratt. 364.

Certificate of Mortgage Bonds by Trustee.—Where certain first mortgage bonds have been deposited as security for general mortgage bonds, it is not necessary for them to be certified by the trustee, and if it were, it is such a power coupled with a trust that a court of equity will compel its execution. *Atwood v. Shenandoah Val. R. Co.*, 85 Va. 966, 9 S. E. 748.

Unissued Mortgage Bonds of No Value.—Bonds of a manufacturing company, called treasury bonds, secured by mortgage on its real and personal property, are of no value before issue, and represent nothing. *Millheiser Mfg. Co. v. Callego Mills Co.*, 101 Va. 579, 44 S. E. 760.

And they were in no sense personal property of the corporation, subject to the lien of supply creditors, and after issue and negotiation, the holders became mortgagees, and as such are expressly protected by the terms of § 2485, Va. Code, 1904, as amended, where no claim for supplies had been asserted under the statute until issue and transfer. *Millheiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 584, 44 S. E. 760.

G. TO PREFER CREDITORS AND ASSIGN FOR THEIR BENEFIT.

1. Power to Create Preferences.

See the title ASSIGNMENTS FOR

THE BENEFIT OF CREDITORS, vol. 1, p. 814, et seq.

a. In Virginia.

A deed by a private manufacturing corporation incorporated in 1833, in trust to pay its debts, which gives preferences in favor of some of its stockholders who had been sureties for the corporation, was valid, the act of February 13, 1837, Sess. Acts, ch. 84, § 17, prohibiting such preferences by mining and manufacturing corporations not applying. *Burr v. McDonald*, 3 Gratt. 215.

Prior to the act of 1837 there was no law prohibiting preferences by any insolvent private corporation. *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909. See also, *Planters' Bank v. Whittle*, 78 Va. 737. For present statute, see Va. Code, 1904, § 1149.

"In *Bank v. Whittle*, 78 Va. 737, it was held, that the directors of an insolvent bank might make preferences among its creditors, and even in its own favor; that the act of February 13, 1837, did not apply to any corporation, except corporations for mining and manufacturing purposes, and with this exception, in Virginia, the law for many years has been that any corporation might prefer its creditors. The act denying the right to mining and manufacturing companies to prefer a creditor was retained in our Code until 1863, when it was omitted. It was not only omitted from chapter 83 of the acts of 1863, which re-enacts the law governing corporations, but § 18 of said chapter, by implication, repeals § 34 of ch. 57 of the Code of 1860, the conclusion of said § 18 reading as follows: 'And, generally, it may do for the purposes for which it is incorporated, and in the transaction of its proper business, but subject to the restrictions and regulations herein contained, whatever would be lawful for a natural person to do;' and there being 'no question that a natural person, although insolvent, might prefer his creditors, it follows

that a corporation, under this section, could do the same." *Ruffner v. Welton Coal, etc., Co.*, 36 W. Va. 244, 15 S. E. 48, 52.

It was provided by § 1149 of the Code of Virginia, 1887, that any lien or incumbrance on the works or property of an incorporated company, for the purpose of giving preference to a creditor or creditors, except to secure a debt contracted or money borrowed at the time of the creation of the lien or incumbrance, should inure to the benefit, rateably, of all existing creditors of the company. This was held in *Bank v. Whittle*, 78 Va. 737, to apply only to companies organized under court charters, but this section was repealed by acts of 1904, p. 370.

b. In West Virginia.

The law in West Virginia was the same as in Virginia until 1863, when the provisions of the act of 1837 were omitted from a general re-enactment of the law governing corporations, so that trust deeds preferring creditors executed in 1882, 1883 and 1884 were valid, since there was nothing, at that time, in the policy of the West Virginia statute, against such preferences. *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909; *Hope v. Salt Co.*, 25 W. Va. 789; *Ruffner v. Welton, etc., Co.*, 36 W. Va. 244, 15 S. E. 48. But in *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 621, the court said that the policy of the West Virginia statutes was changed adversely to such preferences by ch. 74, § 2, W. Va. Code.

Saying: "At the time this deed was made (1890), there was nothing in the policy of our statutes which forbade an insolvent corporation to prefer creditors, but the statute on the subject is now changed." See latter clause of § 2, ch. 74, W. Va. Code, 1891 (acts 1891, ch. 123). *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620.

"It was held, that an insolvent cor-

poration, having ceased to do business, has the same power as an insolvent individual to prefer a creditor in a general assignment of all its property for the payment of its debts. *Burr v. McDonald*, 3 Gratt. 215; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909." *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620-631.

"Allen, J., in delivering the opinion of the court, said: 'The court is further of the opinion that there is no repugnancy in the terms of the deed, and nothing illegal in the preferences thereby given, if in other respects the deed be free from objection, as the act of February 13, 1837 (Sess. Acts, ch. 84, § 17, p. 79), prohibiting such preferences, does not apply to this corporation.' *Burr v. McDonald*, 3 Gratt. 236." *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909-19.

"The great weight of authorities, and all the reasons and logic, would compel us to hold that under no circumstances, unless expressly authorized by statute or its charter, could an insolvent corporation, having ceased to exercise its franchises, make an assignment preferring creditors. If this court was free to do so, answering the first three queries propounded in *Lamb v. Laughlin*, 25 W. Va. 300, we would hold that all the assets of an insolvent corporation not using its franchises constitute a trust fund for the benefit of its creditors; that the directors of such insolvent corporation are quasi trustees for its creditors; and that such directors can not make an assignment preferring any creditors. We have not decided the question, either in (*Lamb v. Laughlin*), 25 W. Va. 300, or in *Lamb v. Pannell*, 28 W. Va. 666." *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909, 917.

Preference of Directors.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

"The giving of a mortgage by a solvent corporation, to secure payment to

a director, is viewed with suspicion, but it is legal when perfectly free from actual fraud. But, where the corporation is insolvent, an entirely different question arises. * * * The weight of authority clearly and wisely holds that an insolvent corporation can not pay a debt to a director in preference to debts due others, either by turning out property to him, or by giving him a mortgage on corporate assets." *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 629, citing *Hope v. Salt Co.*, 25 W. Va. 789, and quoting from *Wait on Insolvent Corporations*, § 162. See post, "Assets a Trust Fund." XVII, B, 3.

See query whether the board of directors of an insolvent corporation can prefer creditors, and themselves among the number. *Lamb v. Laughlin*, 25 W. Va. 300.

c. Enured Rateably to the Benefit of All Existing Creditors.

A deed of trust executed by a corporation, if not executed to secure a debt contracted, or money borrowed at the time of the creation of the lien, will enure rateably to all the creditors existing at the time of the creation of the lien. Va. Code, 1873, ch. 57, § 63; Va. Code, 1887, § 1149 (now repealed, acts, 1904, p. 370); *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878; *Haskin Wood, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 439, 26 S. E. 878, 3 Va. Law. Reg. 108, and note; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404.

Such deed is not avoided by the statute, but is enforced for the common benefit of all existing creditors, and a creditor under a contract made with the company before the creation of the lien, under which he was demanding payment, and on which he afterwards obtained a judgment for unliquidated damages for a breach of such contract, is an existing creditor within the meaning of the statute. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404, 421.

Thus, a deed of trust executed to secure a note given two months before for money borrowed at that time, comes plainly within the terms of the statute, and enures to the benefit of all the creditors existing at its date. *Haskin Wood, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 439, 445, 26 S. E. 878.

d. Confession of Judgment as Voluntary Preference.

A confession of judgment, by a corporation chartered by a court, for an antecedent debt, is such an illegal voluntary preference as comes within the purview of § 1149, Va. Code, 1887 (now repealed, acts, 1904, p. 370), hence will enure rateably to the benefit of all creditors whose debts existed at the time. *Riley, J.*, saying, obiter, that such a corporation might suffer a judgment, where it had no defense. *Tate v. Commercial Bld'g Ass'n*, 97 Va. 74, 33 S. E. 382.

e. Creation of a Lien Distinguished from Payment of Indebtedness.

An assignment of bonds of a corporation at their face value in discharge of the company's indebtedness, and not as security for the indebtedness of the company, is not the creation of a lien so as to come within the language of the statute providing that "Any lien or incumbrance created by any company on its works or property, for the purpose of giving a preference to one or more creditors of the company over any other creditor or creditors, except to secure a debt contracted or money borrowed at the time of the creation of the lien or incumbrance, shall enure rateably to the benefit of all the creditors of the company." Va. Code, 1873, ch. 57, § 63; Va. Code, 1887, § 1149; *Planters' Bank v. Whittle*, 78 Va. 737; *Merchants' Bank v. Goddin*, 76 Va. 503.

And a lien created by a trust deed, to secure contemporaneous loans, gives no preference within the meaning of repealed § 1149, Va. Code (1887). *Cawardin v. Universal, etc., Co.*, 32 Gratt.

445; *Pope v. Valley City Salt Co.*, 25 W. Va. 789.

f. Priority of Lien to Those Furnishing Supplies, etc.

Sections 2485, 2486, providing that employees and persons furnishing supplies to railroads, mining and manufacturing companies shall have liens superior to mortgages, deeds of trust, etc., executed since March 21, 1877, is not in conflict with the fourteenth amendment to the United States Constitution, as being special and class legislation, and pig iron furnished to a rolling mill is included among such "supplies." The supply liens are given precedence over all mortgages, etc., executed since March 21, 1887, not merely over those executed between that date and May 1, 1888. *Va. Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

2. Power to Make an Assignment for the Benefit of Creditors.

See the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, p. 802, et seq.

A corporation has the power to make a deed of assignment to trustees for the benefit of creditors generally. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866; *Planters' Bank v. Whittle*, 78 Va. 737; *Burr v. McDonald*, 3 Gratt. 215; *Lamb v. Cecil*, 25 W. Va. 288; *Farmers' Bank v. Willis*, 7 W. Va. 31.

"After a corporation has become insolvent, being unable to proceed with its business, the only proper thing to be done is to dispose of its property to those entitled to receive it; and the best and fairest way to do this is to assign its property to a trustee for the benefit of its creditors." *Lamb v. Cecil*, 25 W. Va. 288, 296; *Lamb v. Pannell*, 25 W. Va. 298.

Manner of Making Assignment.—A corporation may execute a deed of assignment by any agent duly authorized and a deed prepared according to the directions of the corporation and approved by the company in general

meeting is valid. *Burr v. McDonald*, 3 Gratt. 215.

And where the common seal of the corporation is attached, and the signature of the proper officer is proved, the presumption is that it was authorized, and the seal is prima facie evidence of due authority to affix it. *Lamb v. Cecil*, 25 W. Va. 288. See ante, "Presumption of Due Authority," II, H, 2.

Construction—Law of Domicile Governs.—A deed of assignment to trustees for the benefit of creditors, of all the property of a corporation, is to be construed by the law of the domicile of the corporation. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

Passes Unpaid Subscriptions.—A deed of assignment to trustees for the benefit of creditors, of all the property of a corporation, passes all unpaid subscriptions to the trustee, with the right to collect the same, when a call has been duly made, by suit in his own name, as well under the statute, Va. Code, 1873, ch. 141, § 17, as in the exercise of the original powers of a court of equity. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866. See the title **STOCK AND STOCKHOLDERS**.

Effect on Right to Sue.—Whatever claims a corporation could collect by suit or action before assignment, may be so collected afterwards by the trustee in the deed of assignment. *Lamb v. Cecil*, 25 W. Va. 288. See the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, p. 799.

Effect of Sale under Deed of Trust.—In Washington, etc., *R. Co. v. Alexandria*, etc., R. Co., 19 Gratt. 624, *Dorman, J.*, was of opinion that ch. 61, §§ 28, 29, Va. Code, 1860, providing that a sale under a deed of trust or mortgage of a corporation's property, passed subsequently-acquired property as well, that the corporation was ipso facto dissolved and the purchaser became a corporation, did not apply to the sale by a trustee of a mere equity,

conveying no legal title. See Va. Code, 1887, §§ 1233, 1234, 1236; acts, 1891-2, p. 623.

Office Copy as Evidence.—Where a deed of assignment is made for the benefit of creditors by a corporation, a copy of said deed from the records of deeds of the county may be exhibited with the bill by the trustee with the same effect, as if he had filed the original. *Lamb v. Cecil*, 25 W. Va. 288; *Lamb v. Pannell*, 25 W. Va. 298.

H. TO FORM PARTNERSHIP.

See the title PARTNERSHIP.

Power to Form a Partnership with a Natural Person.—The authorities are conflicting as to whether a corporation can form a partnership with an individual; but it is believed that the weight of authority is against such power. A dictum in *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

But where a corporation and an individual have assumed to enter into a partnership, and jointly transacted business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name, irrespective of their partnership rights and duties as between themselves, or the power of such corporation to execute the powers incident to a partnership. *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

"The law will not allow the defendant, by special plea, to avoid its liability by averring that one of the parties with whom it contracted was a corporation, and incapable of forming a partnership." *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

I. TO MAKE AN AFFIDAVIT.

In a suit against a corporation, a replication to a plea of the statute of limitations by the corporation, to the effect that the plaintiff could not truly make the affidavit or "test oath" prescribed by § 27, ch. 106, W. Va. Code, 1888, is bad, since a plaintiff is excused from making such an affidavit in a suit

against a corporation, the corporation on its part being unable to make an affidavit. *Stuart v. Greenbrier Co.*, 16 W. Va. 95. The same is true where a corporation is plaintiff. *Bank v. Handley*, 14 W. Va. 823. See the title AFFIDAVITS, vol. 1, p. 230.

Affidavit to Plea.—See the title VERIFICATION.

Where a pleading of a corporation is to be sworn to, it must be by the president or some officer conversant with the facts. It can not be made by the attorney at law of the corporation, unless he has personal knowledge of the facts. *Quesenberry v. People's Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73.

The affidavit to the facts stated in a plea to the jurisdiction should be positive, and not as the plaintiff believes. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

Test Oaths.—The test oath laws have no application where the plaintiff or defendant is a corporation. *Stuart v. Greenbrier Co.*, 16 W. Va. 95; *Bank v. Handley*, 14 W. Va. 823.

J. TO CONTRACT.

It is essential to corporations, as well as individuals, that they have the capacity to make contracts. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 20.

One of the objects of creating a corporation by law is, to enable it to make contracts, and these contracts may be made with its stockholders as well as with others. *Addison v. Lewis*, 75 Va. 701, 720; *Biggs v. Elliston Dev. Co.*, 93 Va. 404, 25 S. E. 113.

And a corporation may make all contracts necessary for the carrying on business for which it was created. *Duningtons v. Northwestern Turnpike Road*, 6 Gratt. 160.

K. TO EXERCISE RIGHT OF EMINENT DOMAIN.

See the title EMINENT DOMAIN.

L. TO DEAL WITH OFFICERS AND AGENTS.

See the title OFFICERS AND

AGENTS OF PRIVATE CORPORATIONS.

M. TO SUE AND BE SUED.

See post, "Power to Sue and Be Sued," XIV, A.

XII. Liabilities.

A. CIVIL LIABILITY.

1. In General.

"It has been held in many cases, that where the law imposes an obligation on a corporation which it refuses or fails to discharge, it may be held liable civilly at the suit of a party who sustains damages in consequence of its refusal." *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163, 174.

A corporation may now bind itself in any way that a person may do so. *Kelly v. Board of Public Works*, 75 Va. 263, 271, citing *Steuart v. Valley R. Co.*, 32 Gratt. 146.

A corporation, like a individual, is liable for any damage arising from the neglect of a duty resting upon it in regard to the care and maintenance of a wharf at which vessels lie, paying wharfage therefor. *Petersburg v. Applegarth*, 28 Gratt. 321, 339.

In Trespass or Trover.—A corporation, as such, may sue or be sued in trespass or trover. If a corporation obtain property which does not belong to it, its duty is to restore it, or if used, to render an equivalent to the owner. *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163, 174.

On Implied Assumpsit.—"It is a just and reasonable presumption (nothing to the contrary appearing) that he who has received the services or property of another impliedly undertakes to make compensation therefor; that the doctrine applies generally to corporations as well as to natural persons; and therefore an action of assumpsit will lie against a corporation upon an implied obligation that the corporation, having obtained and used the property, is bound in conscience to pay the party, on a quantum valebant, what the property was reasonably worth. Having re-

ceived the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract." *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452, 454.

When Not Liable for Nonfeasance.

—A corporation chartered for the improvement of a river and authorized to charge tolls thereon, if it has not charged tolls, is not liable for damages resulting from failure to improve the river. *James River, etc., Co. v. Early*, 13 Gratt. 541.

2. Of Literary Fund Corporation.

The incorporation of the public officers having the direction and management of the literary fund, was for the purpose of administering the same according to the several laws and its charter, and such corporation is responsible for the administration of that fund only, or such other funds as by law it may be authorized to take. Here a bequest to executors for the benefit of the literary fund was held valid, provided a legislative act could be obtained within a reasonable time, or the lives or life of the executors, authorizing such corporation to take charge of such bequest. *Literary Fund v. Dawson*, 10 Leigh 147.

3. Of a Quasi Public Corporation.

A corporation is liable to be sued in assumpsit under the authority of its charter, for work done and materials furnished, even though the governor and other officers are members, as mere trustees for the state, having no personal interest in it, and the object of the corporation is to effect a public improvement at the public expense. The court distinguished this case from that of *Sayre v. Turnpike Co.*, 10 Leigh 454, holding that case only authority for the proposition that a quasi public corporation like the above is not liable for a remote and consequential injury. *Dunnington v. President, etc., Turnpike Road*, 6 Gratt.

160, 171. See the titles HOSPITALS AND ASYLUMS; TORTS; TURNPIKES AND TOLLROADS.

4. For Torts.

a. In General.

Corporations can be held liable for torts. They can be held liable for damages for torts done in pursuance of conspiracy and combination between them and other corporations or persons, just like natural persons. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591.

Saying: "An action may be maintained against its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, for libel." *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 614, 40 S. E. 591.

"The case of *State v. Baltimore*, etc., R. Co., 15 W. Va. 362, strongly asserts this liability. So, *Smith v. Norfolk*, etc., R. Co. (this term); *Gillingham v. Company*, 35 W. Va. 588; *Gregory v. Railroad Co.*, 37 W. Va. 306. 'Upon like grounds, an action may be maintained against a corporation to recover damages caused by a conspiracy to which the corporation was a party.'" *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 615, 40 S. E. 591.

"It is a mere legal entity, impersonal, and in itself is incapable of so doing; but it is moved by human beings, is operated by human agents, and is thus an active person, not only for damages done in the breach of contracts, but for torts doing others harm. It will not avail, either, to say that it has no power within the scope of its authority to do wrong, and can do only the lawful things contemplated by the state in the bestowal of its charter, and that therefore, so far as its agents make it do wrong, its acts are outside the field of its legal power, ultra vires and void,

not binding the corporation, and thus that no tort binds it. Such was the old common-law rule, but it is completely overruled." *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 614, 40 S. E. 591.

For Lawful Act Carefully Done.—"Point 2 of the syllabus in *Taylor v. Baltimore*, etc., R. Co., 33 W. Va. 39, 10 S. E. 29, is as follows: 'When a person or corporation is vested with authority by the legislature to do an act, it will be protected from all responsibility and liable to no suit at law or in equity, provided what it is authorized to do is done carefully and skillfully, though without such authority it would have been a nuisance, but, if done carelessly and unskillfully, and damages result from such carelessness and want of skill, it will be responsible.'" *Watson v. Fairmont*, etc., R. Co., 49 W. Va. 528, 541, 39 S. E. 193.

b. For Combination or Conspiracy.

It is very clear that a corporation can be guilty of a combination or conspiracy with other corporations or persons, aimed at and accomplishing the injury of other corporations or persons. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 614, 40 S. E. 591.

c. Tort Committed after Expiration of Charter.

See ante, "Expiration of Charter and Its Effect," IV, E.

A private business corporation, duly chartered and organized under the laws of this state, which failed to wind up its business when the time fixed by its charter for its duration expired, but continued thereafter in its charter name to carry on its corporate business, may be sued in a court of law in its corporate name for a tort committed by it after its charter had expired. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

In such case a plea that the charter of the corporation had expired, and that

it had ceased to exist in law at the time the alleged cause of action arose, will be held bad, because it does not also aver that the corporation had wound up its business, and ceased to exist in fact as well as in law. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

d. Public Corporations.

See the titles HOSPITALS AND ASYLUMS; TORTS.

e. Of Prison Association.

The prison association of Virginia is not a public corporation, and, though of a benevolent character, it is responsible for its torts. *Trevett v. Prison Ass'n*, 98 Va. 332, 36 S. E. 373; *Maia v. Directors Eastern State Hospital*, 97 Va. 507, 34 S. E. 617.

5. For Acts of Officers and Agents.

See the titles MASTER AND SERVANT; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

a. In General.

It is well settled that the law of agency applies to officers and agents of a corporation. Corporations, like natural persons, are bound by the acts and contracts of their agents done and made within the scope of their authority. *Bocock v. Alleghany Coal, etc., Co.*, 82 Va. 913, 1 S. E. 325; *Silliman v. Fredericksburg, etc., R. Co.*, 27 Gratt. 119; *Petersburg v. Applegarth*, 28 Gratt. 321, 345; *Crump v. Mining Co.*, 7 Gratt. 352; *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033.

It is now firmly established, both in England and America, that a corporation may be bound by promises, express or implied, resulting from the acts of its authorized agents, although such authority be conferred only by virtue of a corporate vote unaccompanied with the corporate seal. *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W. Va. 365, citing *Banks v. Poitiaux*, 3 Rand. 136, 137.

But the person dealing with the agent must inquire into his authority, and the corporation is bound only when its

agents keep within the limits of their authority. *Silliman v. Fredericksburg, etc., R. Co.*, 27 Gratt. 119.

See, however, *De Voss v. Richmond*, 18 Gratt. 338, a case of a municipal corporation, but where the liability was assimilated to that of a private corporation, where the corporation was held liable to a purchaser of a corporate bond for the failure of the officers of the corporation to observe certain directions of the corporation as to the manner of issue, the purchaser having no notice of such directions.

Purchase of Property Sold by Its Officer in Violation of Trust—Liability of Corporation.—The president and acting manager of a private corporation is trustee in a deed of marriage settlement, and as trustee he sells the trust property, in violation of his duty as trustee, and purchases a part of it for the corporation. The corporation is a participator in the violation of the trust, and liable therefor. *Barksdale v. Finney*, 14 Gratt. 338.

The cestui que trust having sued the trustee for an account of the trust subject and made the corporation a party; and having taken a decree against the trustee for the amount of the purchase money for which the trust property sold, which proves unavailing, may then pursue the property in the hands of the corporation, if it is still in the possession of the corporation, or have a decree against it for the price at which it was purchased. *Barksdale v. Finney*, 14 Gratt. 338.

Subsequent Ratification.—Whether the officer of a corporation was authorized or not, in his capacity as officer and agent, to make a certain purchase, where the purchase was duly accepted and ratified by the corporation, and the benefits thereof received, the corporation becomes bound, and can not afterwards disaffirm the transaction, because of the falling market, upon the neglect by the company to perform some act which could be performed by them, as

where the minutes of the company showing these facts were not signed. *West Salem Land Co. v. Montgomery Land Co.*, 89 Va. 192, 15 S. E. 524.

b. Acts, Declarations, Admissions, etc., as Evidence against Corporation.

See the titles DECLARATIONS AND ADMISSIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

A corporation must of necessity carry on its business through the medium of officers and agents, and where the duty of negotiating and conducting a particular transaction devolves upon its agent, it follows that quoad that business, his acts and declarations, within the scope of his employment and in the performance of his duties, are admissible in evidence against the principal. *Blair v. Security Bank*, 103 Va. 762, 767, 50 S. E. 262; *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033.

A corporation can only speak through its officers and agents, and their declarations, admissions and representations made in the course of their employment, and relating to the immediate transactions in which they are engaged, are always competent against the corporation. *White Hall Co. v. Hall*, 102 Va. 284, 46 S. E. 290.

But the power of the directors to bind the company by their representations and admissions exists only while they are acting within the scope of their authority and in due course of business. *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Muhleman v. National Ins. Co.*, 6 W. Va. 508; *Silliman v. Fredericksburg, etc., R. Co.*, 27 Gratt. 119; *Bocock v. Alleghany Coal, etc., Co.*, 82 Va. 913, 1 S. E. 325.

"The acts and statements of an agent, acting, in making a contract, within the scope of his authority, bind the principal as to all the elements of the contract, though particular statements were unauthorized. *Crump v. U. S. Mining Co.*, 7 Gratt. 352. False and fraudulent statements of an agent, in the course

of business within the scope of his authority, bind the principal." *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033, 1034.

Admissions of a Manager of a Corporation.—The admission of the manager of a telephone company, made while in the performance of his duties, that a wire which caused a personal injury was the wire of his company, is admissible in evidence against the company in an action brought against it to recover damages for the injury. *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148.

As to Partnership.—The false statement of an agent of a corporation appointed to buy timber for it, in making the contract, that the company is a partnership, does not bind its members or the corporation to liability as partners. *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033.

c. Notice to Corporation.

The general rule is that knowledge acquired by agents of a corporation, when acting within the scope of their agency, becomes notice to and knowledge of the corporation for judicial purposes. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 835, 47 S. E. 830.

And where the evidence shows that the agent of a corporation, whose duty it was to load certain tank cars with naphtha for delivery to purchasers, knew, or had opportunity of knowing, the condition under which the cars were unloaded by the purchaser, his knowledge might be treated as notice to the corporation as acquired while performing duties for it within the scope of his agency. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 835, 47 S. E. 830.

Dealings between Two Companies Having a Common Director.—A corporation is not affected by the knowledge of an agent, when the agent himself contracts with it, or otherwise deals with it in a transaction in which his interest and the interests of the company are opposed, for in such a trans-

action he could not represent the company. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Where two companies, having the same person as director, enter into dealings with each other, the knowledge of the common director can not be imputed to either company in a transaction in which he did not represent it. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

d. Torts of Agents.

See the titles AGENCY, vol. 1, p. 240; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

It was at first doubted whether a corporation was in any case liable in a civil suit for the torts of its agents, especially whether an action of trespass would lie against a corporation. But modern authorities all agree, that corporations are liable for torts committed by their agents in the discharge of the business of their employment and within the proper range of such employment and that too whether the tort be one, the responsibility for which is to be enforced by an action on the case or by trespass. *State v. Baltimore, etc.*, R. Co., 15 W. Va. 362; *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Baylor v. Baltimore, etc., R. Co.*, 9 W. Va. 270.

A corporation is liable for the tortious acts of its servants while engaged in the business of their principal, to the same extent that individuals are liable under like circumstances. *W. Va. Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591.

"A corporation really exists and acts only by its agents, and must be held responsible in a civil suit for the acts of the agent done in the discharge of the business of their employment, whether done negligently or on purpose. The true view probably in such case is, that the acts of the agent of a corporation should be regarded as the acts of the agent of a private person when done in the presence of his em-

ployer." *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 372.

Even When Torts Are Willful and Malicious.—Although there has long been doubt on the question, and there is still conflict, the better opinions now is that a corporation is liable, not only for the unintentional torts of its agents when done within the scope of their employment, but also for their willful or malicious torts under the same circumstances. *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362.

"Doubts have been entertained about the proper form of action, against a corporation in case of a willful tort by its agent; but it seems that the weight of reason is in favor of holding the company responsible in a civil suit, where the tort, though willful, has been committed by its agent in the discharge of the business of the corporation without any other proof of the assent of the corporation." *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 373. See *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033, where it is said the corporation is liable for torts committed in the course of its business, though unauthorized or forbidden.

In *Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 492, 14 S. E. 234, the court quotes from *Ang. & Ames Corp.*, § 388, as follows: "A corporation is liable for an injury done by one of its servants in the same manner and to the same extent only as a natural individual would be under like circumstances. * * * A distinction exists as to the liability of a corporation for the willful tort of its servant towards one to whom the corporation owes no duty except such as each citizen owes to every other, and that towards one who has entered into some peculiar contract with the corporation by which this duty is increased."

Liability of Corporation for Libel by Agent.—A corporation is responsible for the publication of a libel, or of insulting words under the statute, by its

agent acting within the scope of his employment, and in the course of the business of the corporation. *Sun Life Insurance Co. v. Bailey*, 101 Va. 443, 44 S. E. 692. See *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358, where the question was raised but not passed upon. See the title **LIBEL AND SLANDER**.

"The modern authorities hold corporations responsible for the acts of their agents, though willfully or maliciously done. Thus a corporation may be responsible for a libel published by its authorized agents." *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 373.

Liability for Punitive Damages.—In West Virginia, a corporation is not liable to punitive damages even for the wanton and malicious acts of its agents, in the absence of evidence tending to show that his conduct was either authorized or approved by the corporation or that the agent was incompetent or of known bad character. *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901. See also, dictum in *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809. This question has never arisen directly in Virginia, but in *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, the corporation was held liable for punitive damages, but on the ground that the corporation subsequently ratified the act of its agent.

But where the unlawful act of the agent is not willful or malicious but the result of a mistake, punitive damages can not be exacted from the corporation. *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809.

c. Negligence of Officer Imputed to Corporation.

See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

The negligence of an officer of a corporation in allowing a judgment to

be rendered against the corporation as garnishee, when the debt had been previously assigned to another party and notice thereof had been given to another officer, will preclude the corporation from relief in equity against the judgment. *Richmond Enquirer v. Robinson*, 24 Gratt. 548.

6. Effect of Alienation of Franchise or Property.

See ante, "To Alienate Its Franchises or Property Necessary Thereto," XI, C.

7. Effect of Consolidation.

See post, "Consolidation," XV, A.

8. Liability of Property to Condemnation.

See the title **EMINENT DOMAIN**.

9. Injunction against Trespass by Corporation.

See the title **INJUNCTIONS**.

10. How Question Raised as to Liability.

If the cause of action stated in the declaration is one for which the corporation is not liable, a demurrer is the proper and usual way to raise the question. *Duncan v. Lynchburg*, 2 Va. Dec. 706, citing principal case; *Noble v. Richmond*, 31 Gratt. 271; *Orme v. Richmond*, 79 Va. 86; *Powell v. Wytheville*, 95 Va. 73, 27 S. E. 805; *Maia v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617.

B. CRIMINAL LIABILITY.

1. Liability to Indictment.

See the title **INDICTMENTS, INFORMATION AND PRESENTMENTS**.

It may be now regarded as settled, not only that a corporation may be sued in tort, but that it may be indicated for a failure to perform certain public duties which the law or its charter imposed upon it. *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 374.

But a distinction was formerly taken between acts of nonfeasance, as a failure to perform certain public duties, and acts of misfeasance by the agents

of a corporation. In the one case they have been admitted to be liable to indictment; but in the other they have been held by some courts not to be so liable. Thus in the case of *Com. v. President, etc., Turnpike Co.*, 2 Va. Cas. 362, decided in 1823, it was held, that a corporation was not indictable for a nuisance for obstructing a highway by digging it up and placing therein large quantities of stone and dirt. The general court, in so holding, expressed no opinion; but it was probably so held, because the act for which they were indicted was an act of misfeasance by the agents of the corporation for which the court was of opinion that their agents alone could be indicted. *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 374.

The court in *Com. v. President, etc., Turnpike Co.*, 2 Va. Cas. 361, held, that there was a specific remedy provided for the offense by way of penalty, not on the corporate body, but against the individual employed to keep the road in repair, and that such specific remedy must be followed; and in another case by the same style, between the same parties (2 Va. Cas. 363), it was held, that such a corporation could not be impleaded by its artificial name for the criminal offense stated in the information. See Va. Code (1904), § 4015.

In What Cases Indictable.—The liability of corporations to indictment for misfeasance done by them by their servants and agents in certain classes of cases, is established. The real difficulty is in defining the cases in which corporations are liable to indictment for misfeasance. *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 379.

In certain cases a corporation may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591.

"There are statutes which, from their very nature, exclude corporations

from the meaning of the word 'person.' Such, for instance, are all statutes declaring a person committing certain acts guilty of a felony, or other criminal offense, and affixing certain punishment for the offense. In such cases, and others that might be named, corporations, from the very nature of the act itself, are not included in the word 'person,' for very obvious reasons." *Miller v. Com.*, 27 Gratt. 110.

For civil purposes, corporations are in law deemed persons. The only doubt has been whether that word would be so construed as to embrace them within the purview of penal statutes, and in the case of *U. S. v. Amedy*, 11 Wheat. 393, the court decided that under the act of congress making it felony to destroy a vessel with the intent to prejudice any person or persons that had underwritten such vessel, corporations were comprehended. *Allen, J.*, in *U. S. Bank v. Merchants' Bank*, 1 Rob. 573. But see *Miller v. Com.*, 27 Gratt. 110.

Stribbling v. Valley Bank, 5 Rand. 132, goes on to say: "The only doubt has been whether the word (person) would embrace (corporations) within penal statutes, etc." *Crafford v. Supervisors*, 87 Va. 110, 116, 12 S. E. 147.

See, for instance in which corporation was indicted for criminal offense like a natural person, *Immigration Soc. v. Com.*, 103 Va. 46, 48 S. E. 509.

Where Evil Intention Constitutes an Element of the Offence.—"In view of the fact that since these decisions have been rendered, the courts have shown a tendency to extend the liability of corporations in civil actions for the misfeasance of their agents, and as it seems now well settled that they may be held liable in suits for libel, and perhaps malicious prosecution, and for assaults and batteries committed by their agents in the performance of their duties, and in view of the further fact that they may in such suits, it is said, be subjected to exemplary or

punitive damages, I hesitate to accede to the statement that they can not be held liable to an indictment for any offenses which derive their criminality from evil intention. The very basis of an action of libel, or for a malicious prosecution, is the evil intent, the malice of the party against whom such a suit is brought; and I can not now well see how it is possible to hold that a corporation may be sued for a libel, and punitive damages recovered, and at the same time hold that such corporation could not be indicted for such libel. The suits of libel and malicious prosecution are in their nature very like to criminal proceedings; and if they lie against a corporation, it would seem to follow, that there are cases for which indictments may lie against a corporation where the evil intention constitutes an element in the offense. And if a corporation is, as has been said, liable civilly for an assault and battery committed through its servants, it is perhaps going too far to say that a corporation can in no case be liable criminally for any offenses against the person under any circumstances." Green, P., in *State v. Baltimore*, etc., R. Co., 15 W. Va. 362.

May Be Indicted for a Nuisance.—If a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways upon the express condition that it shall restore such highways to their former state, or to such state, as not unnecessarily to have impaired their usefulness, takes possession of a part of a public highway and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under § 45, ch. 43, of the West Virginia Code, notwithstanding it has such authority from the county court. *State v. Monongahela R. Co.*, 37 W. Va. 108, 16 S. E. 519.

May Be Indicted for "Sabbath Breaking."—A corporation may be in-

dicted for "Sabbath Breaking" under West Virginia Code, ch. 149, §§ 16, 17; *State v. Baltimore*, etc., R. Co., 15 W. Va. 362.

Liable for Contempt.—A corporation is liable to a fine for a contempt, by motion. *Baltimore*, etc., R. Co. *v.* *Wheeling*, 13 Gratt. 40.

Liability for Peddling without License.—See the title HAWKERS AND PEDDLERS.

2. Allegation and Proof of Incorporation.

An indictment is not bad for omitting to aver that the defendant is a corporation. It is very well settled in the Virginias, and generally elsewhere, that in civil cases it is not necessary to aver in a declaration that a party is a corporation, or to show how it became such by pleading its charter. *Reese v. Conococheague Bank*, 5 Rand. 326; *Douglass v. Kanawha*, etc., R. Co., 44 W. Va. 267, 28 S. E. 705. And there seems to be no reason for drawing any distinction, in this matter, between civil and criminal proceedings. *State v. Dry Fork R. Co.*, 50 W. Va. 236, 40 S. E. 447.

Individuals and corporations are both persons, both entities, the one natural, the other legal. But authorities say that it is not necessary in an indictment to say that the defendant is a corporation. If, however, it were necessary to aver it in the indictment, the name, "The Dry Fork Railroad Company" would import a corporation, and be a sufficient averment that it is such. *State v. Dry Fork R. Co.*, 50 W. Va. 236, 40 S. E. 447; *Gillett v. American Stove*, etc., Co., 29 Gratt. 565.

Same Rule as in Civil Proceedings against Corporations.—In criminal prosecutions against corporations, the fact of the incorporation of defendant does not have to be proven unless such fact is put in issue as provided in § 41, ch. 125, W. Va. Code, 1890, p. 145. *State v. Thacker Coal*, etc., Co.,

49 W. Va. 140, 38 S. E. 539. See also, *Lithgow v. Com.*, 2 Va. Cas. 297.

"Section 41, ch. 125, W. Va. Code, provides that 'Where plaintiffs or defendants sue or are sued as partners and their names are set forth in the declaration or bill, or where a plaintiff or defendant sues or is sued as a corporation, it shall not be necessary to prove the fact of such partnership, or the existence of such corporation, unless the pleading which puts the matter in issue be verified, or there be an affidavit filed therewith, denying such partnership or the existence of such corporation.' The provision applying to corporations was enacted in 1882. This matter was not put in issue by plea denying the corporate character of defendant. Prior to the act of 1882, it was necessary to prove the existence of the corporation where it sued or was sued as such. The act applies in criminal prosecutions as well as civil cases." *State v. Thacker Coal, etc., Co.*, 49 W. Va. 140, 145, 38 S. E. 539. See Va. Code (1904), § 3280.

Where Name Imports Incorporation.

—In indictments, where the thing stolen is alleged to be the property of a corporate body by name, it is not necessary to aver the political existence of the corporation. Its existence is matter of evidence, and, after verdict, it is inferred from its corporate name. *Lithgow v. Com.*, 2 Va. Cas. 297.

3. Proof Necessary in Indictment.

"While in a civil suit for a tort, even when done willfully, perhaps no other proof may be necessary in any case than that the act was done by its agents, yet to hold such proof sufficient to sustain an indictment against a corporation for the misfeasance of its agents in every case, would be to disregard the maxim, that the accused is always presumed to be innocent; and clear proof of guilt on the part of the accused must be produced, before a conviction can properly be had. The

act of misfeasance may, in a particular case, be of such a character, that though done by an authorized agent within the scope of his general employment and for the benefit of the corporation, yet it may give rise to but a suspicion that it has been directed or approved by the corporation. And if the act be of such character, independent proof must in such case be produced of the approval of the corporation, before it can be found guilty in a criminal proceeding. In such case it would clearly not be necessary to prove that the corporation by a distinct act, such as a vote of its directors, either directed the act to be done or subsequently approved of its being done. For if this was required, it would amount to an absolute exemption of a corporation from all liability criminally for the wrongs of its agents; for criminal acts are never so formally directed or approved. Still, in such a case, the approval of the corporation must be satisfactorily proven, but such approval may be shown satisfactorily otherwise than by proving such direct act of approval. The criminal act being in such a case done by an authorized agent acting within the scope of his authority, the mere doing of the act, even though done willfully, sufficiently shows, we incline to think, the assent and approval of the corporation, to make them liable in a civil suit; and it gives rise to a suspicion in a criminal proceeding against the corporation, which if corroborated by evidence that similar acts have been done by the agents of the corporation repeatedly, would be sufficient proof of their approval to justify a conviction. It is but a reasonable inference that acts which are habitually done by the authorized agents of a corporation are done with their approval; and this is indeed almost the only manner in which the approval by the corporation of the acts of its agents can ever be proven. The tacit appropriation by a corporation of the benefits of the

acts of its agents, repeatedly occurring, is full and satisfactory proof of the assent of the corporation to the doing of such acts." *Green, P., in State v. Baltimore, etc., R. Co., 15 W. Va. 362.*

XIII. Effect of Ultra Vires Acts.

A. WHO MAY CONTEST ULTRA VIRES ACTS.

1. In General.

The corporation can contest an ultra vires act of its directory; also, the attorney general may restrain a corporate excess which tends to the public injury. *Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 599.*

This was a public corporation vested with state property for public use and the court said: "It appears that the corporation can contest an ultra vires act of its directory. But, though a private citizen may not do so, it is abundantly settled that where there is a corporate excess of power, which tends to the public injury or defeats public policy, it may be restrained in equity at the suit of the attorney general." *Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 599, 601.*

Ultra Vires Lease by Public Corporation.—But where a public corporation vested with state property for public use makes a lease of it which is ultra vires, a private person can not sustain a suit to contest it; this can be done only by the state or the corporation. *Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 599.*

But the president and directors, as such, have no authority to sue in behalf of the corporation. *Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 599.*

Excess of Charter Powers—Question for State.—The right of a corporation to acquire or hold real estate can not be questioned save by the state. *Chesapeake, etc., R. Co. v. Walker, 100 Va. 69, 40 S. E. 633; Fayette Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016; Banks v. Poitiaux, 3 Rand. 136.*

A conveyance of real estate to a corporation, in excess of the amount allowed by law, conveys the title to the corporation, and no one can question the right of the corporation to take and hold the same except the state by which it was created, or that within whose limits it does business, by direct proceeding for that purpose. *Fayette Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.*

The doctrine that the state alone can interfere seems to rest upon the principal suggested in the *Banks v. Poitiaux, 3 Rand. 136*, that it would be extremely inconvenient if every contractor with corporations might, for the purpose of avoiding their contracts, be permitted to institute inquiry as to violations of the charter. It is a question which concerns public interests, and the state alone is competent to protect and defend them. *Fayette Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 289, 24 S. E. 1016; Wroten v. Armat, 31 Gratt. 251.*

2. When Corporation May Set Up Defense of "Ultra Vires."

When want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who can not be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of authority depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed. *Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 505.*

Where there is nothing on the face of the paper indicating that a corporation has exceeded its corporate powers in the execution of a mortgage, it will not be allowed to plead "ultra vires" in a suit to enforce it. The stockholders only can object, not the corporation itself. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501.

It is said in *De Voss v. Richmond*, 18 Gratt. 338, 362, that it is at least doubtful, upon the authorities, whether a corporation can, in any case, allege against a third person, who has contracted with it, that its contract was void because ultra vires, where the other party had no knowledge of the facts which made it so.

Failure to Comply with Statute for Stockholders' Protection Unavailable by Corporation.—Where a bill is filed by a party representing himself to be a mortgagee of real estate, for the purpose of enforcing a mortgage which purports to have been regularly signed, sealed, and acknowledged by the president and treasurer of a corporation chartered under the laws of the state of New York, which real estate is situated in this state, objection to the validity of said mortgage for noncompliance with a statute enacted for the stockholders' benefit, requiring their previous consent, can not be made by the company on the ground that it was ultra vires, but must be made by a stockholder or stockholders of said company. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501.

3. When Nonstockholder.

If it be true that a corporation is exceeding its corporate powers, that fact is not alone sufficient ground for equitable interference at the suit of a person who is not a member of the company. *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 540, 39 S. E. 193.

And other creditors of a corporation can not object to a mortgage executed by the corporation, without the

express consent of the stockholders, as being invalid, where the stockholders had never dissented, and in their answer to the bill of foreclosure made no objection. *Enders v. Board of Public Works*, 1 Gratt. 364.

4. Rights of a Minority of Shareholders.

In order to give standing in a court of equity to a small minority of shareholders, contesting, as ultra vires, an act of the directors, it must appear that they have exhausted all the means within their reach to obtain redress of their grievance within the corporation itself and that they were stockholders at the time of the transaction complained of, or that the shares have devolved on them since, by operation of law. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501. See the title STOCK AND STOCKHOLDERS.

5. Estoppel of Stockholders.

See the titles ESTOPPEL; STOCK AND STOCKHOLDERS.

Where the stockholders of a corporation had notice of an agreement entered into by the corporation, and acquiesced in the same for several years, although they aver a want of knowledge that the agreement had not been properly executed and honestly carried into effect until the filing of a bill to avoid same, they had notice of its existence and the means of determining its validity, and are estopped to question or deny the authority to execute it. *Fidelity, etc., Co. v. Shenandoah R. Co.*, 32 W. Va. 244, 9 S. E. 180; *Trader v. Jarvis*, 23 W. Va. 108.

Equity will not allow a stockholder, with notice of a contract which he complains of as ultra vires, or with means of becoming acquainted therewith, to wait an unreasonable length of time, with view to ascertaining whether the contract would result profitably, and then repudiate it if it has resulted in loss. *Boyce v. Mon-*

tauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501.

B. JURISDICTION OF EQUITY TO ANNUL SUCH CONTRACTS.

Equity has jurisdiction to declare null and void an order of the board of directors of a corporation that is ultra vires and obstructs its rights to property, though that order be void. *Ravenswood, etc., R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285.

C. CORPORATION A NECESSARY PARTY.

In a suit to annul an act of a corporation as ultra vires, the corporation is a necessary party. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

D. INDIVIDUAL LIABILITY.

Where a bill expresses a desire that, if the corporation is not bound by the purchase alleged, then, in that event, the court shall hold the individual corporators liable, and the decree is against both corporation and individual corporators, it was held error, because the decree must be on the case made by the pleadings, although the evidence may show a right to a further decree. *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. 641, 13 S. E. 100; *Mundy v. Vawter*, 3 Gratt. 518.

No individual liability can attach to incorporators as sureties on a contract which does not bind the corporation. *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. 641, 13 S. E. 100.

XIV. Actions by and against Corporations.

A. POWER TO SUE AND BE SUED.

See post, "On Right to Sue and Be Sued in General," XVII, F, 1. See ante, "Dual Incorporation," II, G, 2; "Expiration of Charter and Its Effect," IV, E; "Liabilities," XII.

Every corporation is a personality in

law, with power to sue and be sued, to plead and be impleaded, and is thereby entitled to and amenable to all legal defenses which pertain to private persons (*Baltimore, etc., R. Co. v. Galahue*, 12 Gratt. 655). And this is true though the state be an incorporator thereof, and the corporation be for the purpose of discharging a public duty, as for instance the care of the insane. *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977. See the title HOSPITALS AND ASYLUMS.

It is essential to corporations, as well as individuals, that they should have the capacity to sue and be sued. *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19; *Kelly v. Board of Public Works*, 75 Va. 263, 272.

By the terms of most, if not all, acts of incorporation, whether for public or private purposes, it is provided that they may sue and be sued. *Maia v. Eastern Hospital*, 97 Va. 507, 512, 34 S. E. 617.

And power is expressly given by statute, both to sue and be sued. See Va. Code (1904), § 1105e, (2), (b); W. Va. Code, ch. 52, § 1. But these powers a corporation would now undoubtedly have without any such express provision. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

On Contract for Benefit of Another.

—A corporation can not sue to recover money paid by others upon a contract, the consideration whereof has wholly failed, where it appears that at the time of the contract the corporation was not in existence, the money was not paid by or for it, or for any of its liabilities, and the contract was not made for its benefit, but wholly for the benefit of the parties to the contract, and there has been no subsequent assignment to it, or acceptance by it, of the benefit of the contract. *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897.

Domestic Laws and Remedies Apply. — "Dwelling in the place of its

creation, all contracts made with the corporation must, by legal intendment, be made subject to the laws of its creation, and all persons contracting with it must be presumed to contract with reference to the remedies provided them by the state creating the corporation, and if these remedies are not as convenient and efficient as they might possibly have been made, they can have no rightful claim by law or comity to supplement such inefficient remedies by invoking the aid of the courts of a foreign state. They have contracted with reference to the advantages afforded them by the laws of the state under which the corporation was created, and no injustice is done them when they are obliged to be content with the remedies which the laws of the same state afford for the protection of their property and the enforcement of the rights thereby granted to them." *Nimick v. Iron Works*, 25 W. Va. 184, 203.

B. SUITS BROUGHT AND DEFENDED IN CORPORATE NAME.

See the title COLLEGES AND UNIVERSITIES, vol. 2, p. 848. See ante, "Corporate Name," X.

A corporation must sue and be sued in its corporate name. *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409; *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792; *Culpeper Agricultural, etc., Soc. v. Digges*, 6 Rand. 164; *Porter v. Nekervis*, 4 Rand. 359; *Stewart v. Thornton*, 75 Va. 215; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336; *Hechmer v. Gilligan*, 28 W. Va. 752; *Mason v. Farmers' Bank*, 12 Leigh 84; *Legrand v. Hampden-Sidney College*, 5 Munf. 324. And the same rule prevails in courts of equity. *Stewart v. Thornton*, 75 Va. 215.

A corporation must defend a suit brought against it in its corporate name, and a purchaser of stock will not be permitted to do so, unless the

corporation has refused to defend. If, in such case, the officers or agents of the corporation refuse to defend the suit, the court may allow such defense in equity to be made by the stockholders. *Park v. Petroleum Co.*, 25 W. Va. 108. See also, *Park v. New York, etc., R. Co.*, 26 W. Va. 486; *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599; *Kanawha Coal Co. v. Ballard, etc., Co.*, 43 W. Va. 721, 29 S. E. 514. See also, the title STOCK AND STOCKHOLDERS.

And a corporation which has succeeded a partnership becomes the owner of debts due to it, and may sue for the same in the corporate name in a court of equity. *Griffin v. Macaulay*, 7 Gratt. 476, 583.

It is said to be "a rule as old perhaps as the earliest laws forming or authorizing the formation of corporations, that a corporation must sue and be sued by its corporate name." Like a natural person, "it is recognized in law only by its name, and in its corporate capacity, rights and liabilities, it is as distinct from the persons composing it as an incorporated city is from an inhabitant of the city." *Stewart v. Thornton*, 75 Va. 215, 217. See also, *Porter v. Nekervis*, 4 Rand. 359; *Bank of Virginia v. Craig*, 6 Leigh 399; *Thompkins v. Branch Bank*, 11 Leigh 372; *Mason v. Farmers' Bank*, 12 Leigh 84. In the last two cases it was held, that a statute authorizing a suit against branch banks on causes of action against the mother bank, did not authorize such suit to be brought in the name of the branch bank, but it should be against the mother bank by its corporate name. See the title BANKS AND BANKING, vol. 2, p. 259.

And trustees of a corporation, to whom all the property and assets thereof had been transferred, can institute suit in the name of the corporation upon a note belonging to such corporation. *Crews v. Farmers' Bank*, 31 Gratt. 348.

"When the rights and interest of a corporation are involved, they can be asserted and enforced by the corporation only—in its corporate capacity and in its corporate name—unless the act of incorporation or some statute otherwise provides." *Stewart v. Thornton*, 75 Va. 215, 217.

"The case of *Stewart v. Thornton*, 75 Va. 215, is very apposite, holding that, as a county school board is a corporation, suit to recover a fund belonging to it must be brought in the corporate name, and that a suit by persons styling themselves 'directors of the county school board' could not be maintained." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599, 601.

Representation by Officers.—"Where a corporation is sued, the president and directors are brought before the court to represent it, for as it is a body only in contemplation of law, there is no other way in which it can be sued." *Rider v. Nelson, etc., Union Factory*, 7 Leigh 154, 155.

Stockholders as Necessary Parties.—Stockholders of a corporation are not necessarily parties to a suit to subject the corporate property to a vendor's lien. *Shickel v. Berryville Land, etc., Co.*, 99 Va. 88, 37 S. E. 813. See the titles PARTIES; STOCK AND STOCKHOLDERS. See also, post, "When Former Corporation Not a Necessary Party," XV, B, 3.

C. MISNOMER OF CORPORATION.

Though misnomer of a corporation is only matter of abatement, where it is plaintiff, yet where it is defendant, it is matter in bar. *Bank of Va. v. Craig*, 6 Leigh 399.

And a bill filed against "the president and directors of the bank of Virginia," not against "the president, directors and company of the bank of Virginia," the proper corporate name, and an injunction indorsed by the clerk on a subpoena to restrain the president and directors of the bank, served on

the president, did not make the bank a party to the bill in its corporate capacity, nor was it binding upon, or even notice to, the bank, of the equity asserted in the bill. *Bank of Va. v. Craig*, 6 Leigh 399, cited in *Osborn v. Glasscock*, 39 W. Va. 760, 20 S. E. 706, as holding that the effect of the rule of *lis pendens* is to subject the pendente lite purchaser of the subject of the suit to a decree only in that suit, not in another.

But where suit is brought against a branch bank instead of the mother bank, which, alone, is incorporated, this is not a mere misnomer, which must be pleaded in abatement; but is a bar to any recovery and though a verdict be founded upon the general issue pleaded, the error is not cured by the statute of jeofails. *Mason v. Farmers' Bank*, 12 Leigh 84.

As Ground of Abatement.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 6.

Identification of Corporation Sufficient.—The name of a corporation is not the only means of identity. If some words be added, omitted, or changed in the spelling, in the true name of the corporation, this is not a fatal variance, if there be enough to distinguish it from other corporations, and to show that the corporation suing or being sued was the one intended. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792; *Culpeper, etc., Soc. v. Digges*, 6 Rand. 165.

It is enough if it be *idem re et sensu*. It need not be *idem syllabis sue verbis*. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 534, 23 S. E. 794; *Culpeper, etc., Soc. v. Digges*, 6 Rand. 165.

Leave to Amend Will Be Given.—A corporation may be known by several names as well as a natural person and a recovery may be had against it in its true name provided its identity be averred in pleading and apparent in

proof. Where there is a variance as to the name, opportunity to amend will be allowed so as to put in issue the identity of the two corporations. *Langhorne v. Richmond City R. Co.*, 91 Va. 364, 22 S. E. 357.

Abbreviated Name Used in Charter—No Objection Can Be Made in the Appellate Court for the First Time.

Where a corporation is formally called in the charter, the "President, Directors & Co. of the Farmers' Bank of Va.," but elsewhere in the charter and generally, merely the "Farmers' Bank of Va.," and it is sued in the latter name and no objection is made in the lower court, it can not be successfully objected to in the court of appeals. *Farmers' Bank v. Willis*, 7 W. Va. 31.

D. AVERMENT AND PROOF OF INCORPORATION.

1. Old Rule and New Compared.

No Averment of Incorporation Necessary, Proof of it at the Trial.—A corporation need not set forth in its declaration how they are a corporation, but must prove it at the trial; and this rule applies to motions as well as to suits by a corporation. *Grays v. Turnpike Co.*, 4 Rand. 578; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Rees v. Conococheague Bank*, 5 Rand. 326; *Taylor v. Bank*, 5 Leigh 471; *Jackson v. Bank*, 9 Leigh 240; *Quarrier v. Insurance Co.*, 10 W. Va. 507; *Lithgow v. Com.*, 2 Va. Cas. 297. And the same rule holds where a corporation is sued, nor do the provisions of §§ 1, 18, ch. 61, W. Va. Code, 1860, "that an action for excessive charges can not be maintained against anyone but an incorporated railroad company," affect the case. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

A statement of the fact of the incorporation, and the continuance of the charter, is sufficient. *Taylor v. Bank*, 5 Leigh 471.

Nor is it necessary to aver that it is authorized by law to sue or be sued

in its corporate name; but these questions may be put in issue by the defendant, or raised upon the trial of the general issue. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336, 338. *Rees v. Conococheague Bank*, 5 Rand. 326; *Central Land Co. v. Calhoun*, 16 W. Va. 361.

Not Even Necessary to Aver or Prove It at the Trial unless Denied under Oath.—In a suit against a corporation it is not necessary to aver in the declaration, that it is a corporation, nor is it necessary to prove at the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying the fact. The court will take notice of the fact ex officio. Va. Code, 1887, § 3280; *Baltimore, etc., R. Co. v. Sherman*, 30 Gratt. 602; *Gillett v. American Stove, etc., Co.*, 29 Gratt. 565; *Douglass v. K. & M. R. Co.*, 44 W. Va. 267, 28 S. E. 705; *Lively v. Southern Bld'g, etc., Ass'n*, 46 W. Va. 180, 33 S. E. 93; *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 46 S. E. 366. And the plea of "nul tiel corporation" unaccompanied by an affidavit denying the corporate existence of the plaintiff, does not put the plaintiff to the proof of its corporate existence. *Crews v. Farmers' Bank*, 31 Gratt. 348.

Under the plea of nonassumpsit, the plaintiff, being a corporation, would, at common law, have to prove that it was a corporation. See *Rees v. Conococheague Bank*, 5 Rand. 326; *Taylor v. Bank*, 5 Leigh 471; *Jackson v. Bank*, 9 Leigh 240; *Gillett v. American Stove, etc., Co.*, 29 Gratt. 565; *Grays v. Turnpike Co.*, 4 Rand. 578; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526. But this has been changed by statute law in this state. See ch. 71 of the acts of 1882, p. 153, amending ch. 125, W. Va. Code, § 41 (Warth's Amended Code, ch. 125, § 41, p. 705). And a corporation suing in this state need not prove its existence, unless this be denied by a special

plea, verified in a certain way. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227, 230.

At common law, if a motion be made by a corporation, and the defendant pleads the general issue, or defends the case without filing any plea, the plaintiff can not recover without proving its existence as a corporation. But if the defendant puts in a special plea, such as conditions performed, which impliedly admits the existence of the corporation, and it is tried on an issue made on such a plea, it is not necessary for the plaintiff to prove its existence as a corporation to entitle it to recover. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

Name Importing Incorporation.—The use of the word company, in a name, argues a corporation, and setting it forth impliedly amounts to an allegation that the defendants are a corporate body. *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 152, 46 S. E. 366; *State v. Dry Fork R. Co.*, 50 W. Va. 235, 40 S. E. 447. See *Lithgow v. Com.*, 2 Va. Cas. 297.

And in *Gillett v. American Stove, etc., Co.*, 29 Gratt. 565, it was held, that it sufficiently appeared that the plaintiff sued as a corporation, where the writ and declaration were in the corporate name, and that the description amounted to an allegation that the plaintiff was a corporate body, no affidavit being filed with the plea of nonassumpsit, denying the incorporation, and no proof was held necessary.

In *State v. Thacker Coal, etc., Co.*, 49 W. Va. 140, 145, 38 S. E. 539, it is said, quoting from a Georgia case: "When the name of a party to an action is such as to import that it is a corporation, and the cause proceeds to judgment without any allegation as to its incorporation, the judgment is not void. Whether in such case the name imports a corporation, should, as a general rule, be left to judicial knowledge."

Affidavit Must Deny Corporate Existence at Time of Contract Sued on.—

The affidavit denying the fact of incorporation, which is necessary to put such fact in issue, Va. Code, 1887, § 3280, must deny the corporate existence at the time of the contract sued on; it is not sufficient merely to deny it at the time of the institution of the suit. *Richmond, etc., R. Co. v. New York, etc., R. Co.*, 95 Va. 386, 28 S. E. 573.

Never Necessary under a Plea of Conditions Performed.—But while under a special plea that the plaintiff was not a corporation or under the general issue, as non est factum, not guilty, and nonassumpsit, it was necessary to prove plaintiff's existence as a corporation, under a plea of conditions performed, it never was necessary, since by such a plea, the defendant admits the obligee of the bond had an existence as a corporation. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

Plea to Merits or Demurrer Admits Capacity.—"Where there is a plea of general issue, or other plea to the merits, it admits the capacity of the plaintiff to sue. So it is where a corporation sues. Our statute was only necessary to require an oath to a plea denying incorporation." *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033. And so does demurrer admit the fact of incorporation, as alleged in the declaration. *Culpeper, etc., Soc. v. Digges*, 6 Rand. 165, 18 Am. Dec. 708.

In Criminal Proceedings.—See ante, "Criminal Liability," XII, B.

2. Evidence of Incorporation.

Books of Corporation the Best Evidence.—The books of a corporation are the best evidence of due incorporation, and ought to be admitted, and all fair presumptions will be made in favor of the regularity of incorporation. *Grays v. Turnpike Co.*, 4 Rand. 578.

The corporate existence of a corporation may be shown by the introduction of its charter, and of the

minute book of the corporation showing organization under the charter. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Grays v. Turnpike Co.*, 4 Rand. 578.

Certified Copy of Certificate of Incorporation.—A certified copy of the certificate of incorporation, duly authenticated, is sufficient evidence of the fact of incorporation. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

Records and Parol Evidence.—The organization of a corporation may be proved by its records and parol proof, without the production of its list of subscribers. *Crump v. U. S. Mining Co.*, 7 Gratt. 352.

Deed under Seal as Evidence of Incorporation.—A deed of the corporation, signed with its name by the secretary and under the seal of the corporation, duly acknowledged and admitted to record and reciting that "it is a corporation framed under the laws of the state of New York" is prima facie evidence of incorporation. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

Insurance Policies in Corporate Name.—Where an insurance company had caused the policy sued upon to be issued in its corporate name, signed and attested by its officers as such, it may be inferred that it professed to act as a corporation, and further proof of incorporation is unnecessary to establish it prima facie. *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771.

Ex Parte Affidavit Not Sufficient.—Where the only proof of incorporation is the ex parte affidavit of a witness, which is excepted to by opposing counsel, such proof is insufficient and the bill should be dismissed. *Bowyer v. Giles, etc., Turnpike Co.*, 9 Gratt. 109.

Not Inferred from Merely Doing Business as a Corporation.—The fact of incorporation can not be inferred from the mere doing business as if in-

corporated. *Jackson v. Bank of Marietta*, 9 Leigh 240.

Estoppel to Deny Incorporation.—See ante, "Defective and Irregular Incorporation," V.

3. When Court Will Notice Incorporation Judicially.

When Charter a Public Act.—Where the charter of a corporation is a public act, e. g., the charter of a bank, it is not necessary for the corporation in bringing an action to prove its incorporation. *Northwestern Bank v. Machir*, 18 W. Va. 271; *Hays v. Northwestern Bank*, 9 Gratt. 127; *Stribbling v. Bank*, 5 Rand. 132.

The acts of the legislature conferring corporate powers on the Baltimore, etc., R. Co. are public acts and will be noticed by the court ex officio. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336; *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362.

Extension of Such Charters.—And the court will take judicial cognizance, not only of the original charter of a bank, but likewise of acceptance by the bank of an extension of its charter. *Farmers' Bank v. Willis*, 7 W. Va. 31.

Charters of Private Corporations Created under General Law and Printed with Public Acts.—Though the court expressly declined to decide the question, as not necessary to the decision in that case, *Bon Aqua Imp. Co. v. Insurance Co.*, 34 W. Va. 764, 12 S. E. 771, they plainly indicated that, if the case arose, they would hold that the courts would take judicial notice of private corporations created under general law, whose certificates were printed with the public acts of the legislature, in accordance with § 19, ch. 54, W. Va. Code, 1891.

E. ANSWER, PLEAS AND DISCOVERY.

Answer of Corporation Must Be under Common Seal—Effect.—A corporation can not be sworn and therefore must put in its answer under its common seal only. If the plaintiff wishes

to have a sworn answer, he must make some of the officers or members of the corporation parties. The answer of a corporation not being verified by affidavit, is no evidence for the defendant, though responsive to the bill; but it puts the allegation to which it responds in issue and imposes on the plaintiff the burden of proving it. This is its effect on a motion to dissolve an injunction, as well as on the hearing of the cause. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. 40; *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655; *Teter v. W. Va., etc., R. Co.*, 35 W. Va. 433, 14 S. E. 146; *Roanoke St. R. Co. v. Hicks*, 96 Va. 516, 32 S. E. 295; *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514; *Quesenberry v. People's Bld'g, etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73. See the title **ANSWERS**, vol. 1, p. 397.

And a bill against a corporation defendant, not requiring a sworn answer the answer should be signed by the president and the seal of the company affixed. *McKell v. Collins Colliery Co.*, 46 W. Va. 625, 33 S. E. 765.

Pleas to the Jurisdiction.—A corporation can not, in pleas to the jurisdiction, appear either in person or by attorney, but must appear by its president. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

Form of Plea.—A plea to the jurisdiction by a corporation should conclude "whether the court can or will take further cognizance of the action aforesaid," not "that the plaintiff's aforesaid action may abate and be dismissed." *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

Further, the necessary facts should be alleged to have existed when the action was brought, not merely when the plea was filed. The language of the plea in these respects should have been "That the cause of action, if any such cause there was, did not, nor did any part thereof, arise in said county of Kanawha, and the principal office of the said corporation was not, and the

president, who is its chief officer, did not reside in that county at the time said action was brought, but its office and his residence were at the time and ever since have been, and now are in the county of Ohio, and in the last-named county, there arose the cause of action and every part thereof, if any such cause there was." *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Guarantee Co. v. National Bank*, 95 Va. 480, 28 S. E. 909. See the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 1.

Certainty Required.—The averments in a plea to the jurisdiction, as in all other pleas, of all the material facts, should be direct and positive, and not by way of recital. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

Such a plea must be certain to every intent, and all the old strictness of the common law, both as to the form and substance, is still required, and a failure of such a plea in any of the particulars above indicated would be fatal, and such defective plea should, on motion of the plaintiff, be stricken from the record. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

Affidavits to Pleas.—See ante, "To Make an Affidavit," XI, I. See the title **PLEADING**.

Discovery.—See the title **DISCOVERY**.

When discovery from a corporation is asked it is indispensable to make some proper officer of it a defendant, as a corporation can not answer under oath, and therefore the practice is to make such officer a party, or shareholders cognizant of the desired facts. *Teter v. W. Va., etc., R. Co.*, 35 W. Va. 433, 14 S. E. 146; *Roanoke St. R. Co. v. Hicks*, 96 Va. 516, 32 S. E. 295. In the latter case the Virginia court said: "A bill can not be maintained against a corporation alone, as one for discovery, it being unable to answer under oath." *Munson v. German Ins. Co.*, 55 W. Va. 423, 426, 47 S. E. 160.

F. EVIDENCE.

See the titles EVIDENCE; WITNESSES.

One Party to a Contract Not Disqualified to Testify because Other Party Is a Corporation.—A corporation must of necessity contract through its agents, and is incapable of testifying except through the mouth of its agents. Its incapacity to testify does not, however, operate to exclude the testimony of a party with whom it has made a contract or had a transaction, which is the subject of a suit between them, because it is not incapacitated to testify by reason of death, insanity, infamy, or other legal cause, the causes specified by the statute, whose existence shall disqualify the other party as a witness in his own favor, unless he be first called to testify in favor of the party who is incapable of testifying by reason of some one of the causes so specified. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *Kelly v. Board of Public Works*, 75 Va. 263.

Death of Other Party Does Not Disqualify Agent of the Corporation.—The agent of a corporation is not disqualified to testify by the death of the other party to a transaction, the original parties to which were the corporation and the said party. Unless the agent is one of the "original parties" to the contract, he is not incompetent, the test of competency being not the fact to which such party is called to testify, but the contract or other transaction, which is the subject of the investigation. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *First Nat. Bank v. Terry*, 99 Va. 194, 37 S. E. 843.

Corporate Records.—In unlawful detainer by a corporation against its ex-treasurer for possession of house and lot allowed him as residence whilst in office as part of emoluments, the records of the corporation are admissible as evidence to show the arrangements made between the parties. *Frazier v. Va. Military Inst.*, 81 Va. 59.

G. VERIFICATION OF PLEADINGS.

See the title PLEADING.

H. REQUIREMENT OF "TEST OATH."

See ante, "To Make an Affidavit," XI, I.

I. VENUE OF ACTION.

See the title VENUE.

J. SERVICE OF PROCESS ON CORPORATION.

See the title SERVICE OF PROCESS.

K. REMOVAL OF CAUSES BY CORPORATION OR STOCKHOLDERS.

See the title REMOVAL OF CAUSES.

L. LIMITATION OF ACTIONS.

See the title LIMITATION OF ACTIONS.

XV. Consolidation and Succession.**A. CONSOLIDATION.****1. Effect on Property and Liabilities.**

A consolidation not only renders the property and works of the old company, which pass to the company with which it is consolidated, subject to the liabilities of the old company, but also makes the new, or surviving company responsible for them. *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. 159, reversing, on rehearing, on another point 1 Va. Dec. 787.

The corporation which is created by the consolidation of other corporations, or the surviving corporation where another or others are merged into it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporations, and may be sued under its new name, or under the name of the surviving company, for their debts, as if no change had been made in the name, or in the organization of the original corporations. *Langhorne v. Richmond R. Co.*,

91 Va. 369, 22 S. E. 159, reversing, on rehearing, 1 Va. Dec. 787.

As to effect on exemptions from taxation, see the title TAXATION.

2. Remedy.

"There has been some question whether the consolidated company could be sued in an action at law for the liabilities of the companies composing it, or whether the proceeding must be in equity. But the better view seems to be that when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old companies upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he desires to do so, in the first instance, to the corporation which by the terms of the consolidation is made liable to him. The privity, some cases say, necessary to support this action, is created by the statute authorizing the consolidation and the purchase and conveyance made under it. Other authorities place the right to bring such action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation." Buchanan, J., in *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. 159, reversing, on rehearing, 1 Va. Dec. 787.

Where the plaintiff instituted his action to recover damages from the consolidated corporation for the injury alleged to have been done him by the

corporation consolidated with it, it was necessary for him to allege generally the authority of the old companies to consolidate, against which company the liability arose, and the fact that they had consolidated, and under what name, in order to show the liability of the new or consolidated corporation, for the injury sued for. *Langhorne v. Richmond R. Co.*, 91 Va. 369, 375, 22 S. E. 159, reversing, on rehearing, on another point, 1 Va. Dec. 787.

In other words, he must also state a good cause of action against the original corporation and the new one with which it has been consolidated. *Langhorne v. Richmond Co.*, 91 Va. 369, 22 S. E. 159.

Either Liable, but Not Both Jointly.

—Where a corporation, liable for personal injuries inflicted by its agents, becomes merged into, or consolidated with another corporation, which by authority of law or act of the parties is responsible for such liability, an action at law may be maintained for such injuries against either of said corporations, but not a joint action against both. They are not jointly liable. One is liable for committing the alleged tort, the other is liable by reason of the consolidation. In a joint action it must appear from the declaration that the contract or tort upon which the action is brought is a joint contract, or a joint tort; otherwise, the declaration will be bad on demurrer for misjoinder of causes of action and of parties. *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. 195, reversing, on rehearing, on this point, 1 Va. Dec. 787.

3. On Powers and Privileges.

Where two railroad corporations unite, or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subjected to all the restrictions and liabilities, of those out of which it is

created. Dictum in *Langhorne v. Richmond R. Co.*, 91 Va. 369, 373, 22 S. E. 159, reversing, on rehearing, 1 Va. Dec. 787.

B. SUCCESSION OF CORPORATIONS.

1. Liability of Successor Corporation for Contracts and Torts of Former Corporation.

Where a railroad company buys the property of another insolvent railroad, it succeeds to its property, rights and easements and becomes responsible for its liabilities under any agreement entered into by the former company for the acquisition of land, especially where it has estopped itself by vouching such agreement to defeat an action of ejectment. *Steenrod v. W. Va.*, etc., R. Co., 27 W. Va. 1.

Change of Name—Liability to Suit.—See ante, "Corporate Name," X.

Where one corporation is a mere continuation of a former corporation with additional franchises, under a new name, it is liable to be sued on contracts made with the old corporation, and whether such is the case is a mixed question of law and fact to be submitted to the jury. *Wilson v. Chesapeake, etc.*, R. Co., 21 Gratt. 654. See *Swann v. Summers*, 19 W. Va. 115, 130.

Anderson, J., said, obiter, in *Wilson v. Chesapeake, etc.*, R. Co., 21 Gratt. 654, that when a corporation changes its name after the making of a contract it must be sued by its new name.

Continuation of Business under Extension of Charter and Modified Name.

—The Richmond R. Co. was incorporated May 17, 1860, under act March 20, 1860, in which said company was subject to chs. 56, 57, Va. Code, 1849, and not to ch. 61 of said Code. The company continued to run cars as the R. R. Co. until November 20, 1890. It executed three deeds of trust, the last two of which were foreclosed March 15, 1881, and were purchased by its stockholders and officers, who claimed to act under ch. 61, Va. Code,

1849, and business was carried on as the R. C. R. Co. On May 17, 1882, one of said purchasers, who was president of the R. C. C. Co., obtained from the city of Richmond an extension of the charter of R. R. Co. to January 31, 1900, and by act of March 17, 1884, the R. C. R. Co. was recognized as the same corporation as R. R. Co., under which act on October 14, 1890, the R. R. Co. conveyed to R. R. & E. Co. all its property and franchises, the last company assuming all debts and liabilities of R. R. Co. Held, in an action for personal injuries suffered in 1880, that as defendant acquired the supposed right to be a new corporation under ch. 61, Va. Code, 1849, from which it was expressly excluded by its organic act, it had no right to the exemptions therein given to new purchasers of corporate property from the debts of the old concern, and that, as the sale was only of an equity of redemption, and not of all the property, the corporate life of the R. R. Co. was not obliterated. *Langhorne v. Richmond R. Co.*, 1 Va. Dec. 787, 797, reversed, on rehearing, on another point, in 91 Va. 369, 22 S. E. 159.

"The purchasers at the sale of the 15th of March, 1881, did not adopt any of the provisions of law for the formation of a new corporation; but did apply for and obtain an extension of the charter of the corporation, an equity of redemption in whose property they had bought. As a new corporation, they had no right to apply for and obtain an extension of the charter of the corporation whose chartered life had been extinguished, if it had been dissolved by the sale; no one but the old corporation could do that; and the business of the Richmond Railway Company was resumed and operated under the extended charter of that company, with a mere addition to its name, which did not imply or create a new corporation, without any of the methods prescribed by law for the formation of a new corpora-

tion. *Bank v. Sachtleben* (Tex. Sup.) 3 S. W. 733. The purchasers at the sale consolidated their purchases with the franchises of the old corporation, which was not dissolved; and, by so doing, the old corporation, which was not dead, was continued under its extended charter, with all its rights and responsibilities (*Ang. & A. Corp.* [11th Ed.] §§ 773, 780, pp. 849-867; *Longley v. Stage Co.*, 23 Me. 39), and the purchasers became corporators in the old corporation, with an addition to its name, but without dissolution or change of identity (*Lea v. Canal Co.*, 3 Abb. Pr. [N. S.] 1)." *Langhorne v. Richmond R. Co.*, 1 Va. Dec. 787, 795, reversed, on rehearing, on another point, in 91 Va. 369, 22 S. E. 159.

Scope of Provision.—Chapter 61 of the Virginia Code of 1849 provided that, upon the sale of all the works and property of a railroad corporation under lien, the purchasers might become a new corporation by any name they might select and record, not subject to any debts or liabilities of the sold corporation, except such as may have been assumed at the sale. *Langhorne v. Richmond R. Co.*, 1 Va. Dec. 787, reversed, on another point, on rehearing, in 91 Va. 369, 22 S. E. 159.

Quære, whether the act embodied in §§ 28, 29, ch. 61, of the Virginia Code of 1860, in relation to the effect of the sale of the works and property of a public service corporation to a succeeding company, applied to a sale by a trustee of a mere equity, conveying no legal title, or whether anything short of the sale and transfer of the legal title, together with the property, privileges and franchises, can merge the old company in a new corporation under the statute. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592, 624. See now Va. Code (1904), § 1294b, (12), (14), which are similar to repealed §§ 1233-1235 of the Virginia Code of 1887, as amended by acts of 1891-2, p. 623.

This section applies expressly and

only to a sale under a deed of trust or mortgage by a company on all its works and property, and not merely on a specific part thereof. *Alexandria, etc., R. Co. v. Graham*, 31 Gratt. 769, 782.

The purchaser of a railroad under a decree in a suit brought to foreclose a mortgage thereon is discharged from the performance of all contracts of the old company which do not constitute liens on the property, and from the payment of all liens which are subordinated to the mortgage, where the purchase price is not sufficient to pay the mortgage creditors and those having priority over the mortgage. The purchaser takes the property free and discharged of all such contracts and liens. In the case at bar the contract of the old company to make the city of Portsmouth a terminus of its road is not binding on the purchaser, although he had notice of the contract. *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291, 26 S. E. 943. See the title RAILROADS.

2. Effect of Acquisition of Entire Capital Stock.

See ante, "Corporation as Entity Distinct from Shareholders," II, C.

Does Not Give Legal Title to the Property of Corporation.—A conveyance of all the capital stock of a corporation to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. *Park v. Petroleum Co.*, 25 W. Va. 108.

Real estate once vested in the company could be divested only by a conveyance executed by the company. A transfer of all the stock by the old or new stockholders, would not destroy the relation in which creditors stood to the company and its property. *Barksdale v. Finney*, 14 Gratt. 338, 356.

Liable to the Extent of Property Received.—Where, by authority of the

legislature, a corporation has accepted a transfer of the entire stock of another corporation, and has taken possession and held the property of the old corporation after the expiration of the time limit of its charter, it places itself in the position of a successor to the latter corporation, liable, to the extent of the property received, to the debts, and entitled to all the rights of the latter. *Barksdale v. Finney*, 14 Gratt. 338.

H. owns or controls all the stock of the "B" corporation, and contracts with third persons to obtain a charter for another corporation of which they shall be the incorporators, and to transfer to the new corporation all the stock, and convey all the real estate and other property (except slaves) of "B," as also some real estate of his own. The charter is obtained, and the stock is transferred, but there is no conveyance of the real estate; but the new corporation takes possession of it and holds it as its own. The new corporation is the successor of "B," and takes the property subject to pay the debts of the corporation of "B," to the value of the property received. *Barksdale v. Finney*, 14 Gratt. 338.

"The law, while it authorizes a conveyance, also provides for a transfer of the stock. If a mere vesting of the property was all the law contemplated, there would have been no use in a transfer of the stock. By providing for both, the authority was given to step into the place of the corporation so merged in the one newly created; and the new corporation, by accepting the transfer of the entire stock, have thereby, under the authority given by their charter, placed themselves in the position of successors to the former corporation, liable, to the extent of the property received, to the debts, and entitled to all the rights of the former corporation." *Barksdale v. Finney*, 14 Gratt. 338, 358.

And Only to That Extent.—When a new corporation, with different stock-

holders, is formed, it can not be sued by the creditors or held liable for the debts of the old corporation, except upon some special ground, such as having received assets of the old corporation without giving value therefor. *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

3. When Former Corporation Not a Necessary Party.

And in such a case, where the former corporation is wholly insolvent and has "passed out of existence," it need not be made a party to a suit for specific performance of such an agreement against the successor corporation. *Steenrod v. W. P., etc., R. Co.*, 27 W. Va. 1. See ante, "Suits Brought and Defended in Corporate Name," XIV, B.

4. Convention of All Creditors Unnecessary.

A creditor of a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation, and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone. *Barksdale v. Finney*, 14 Gratt. 338, 339.

And a creditor of the old corporation prosecuting his claim against its successor, is not bound to make the judgment creditors of the former owner of the stock, to whom the successor has contracted to pay an annual rent, parties in the suit. *Barksdale v. Finney*, 14 Gratt. 338.

5. Liability Must Be Enforced in Equity.

Where one corporation by legislative authority takes charge of the property and franchise of another, the first corporation can not be garnished by a creditor of the second corporation; his remedy is in equity. *Swann v. Summers*, 19 W. Va. 115.

6. Assumption of Obligation Must Be Alleged, When Liability Is Based on Contract.

In a suit brought against a corpora-

tion which has assumed the obligations of a defunct corporation, failure to allege that the new corporation has assumed said obligations, when the proof shows the obligation sued on to be that of the defunct corporation, is a variance, and plaintiff's evidence will be struck out. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891.

7. Corporation Succeeding a Partnership.

Where a debt is due a partnership and the partners are afterwards incorporated, the debt becomes a debt of the corporation and they may sue for it in the corporate name in a court of equity. *Griffin v. Macaulay*, 7 Gratt. 476.

XVI. Reorganization.

Suit to Set Aside Reorganization—Laches.—A trust deed was executed in 1870 by a street railway company to secure its bonds. In 1873, becoming insolvent, the company suspended. W., holder of 1,874 of the 2,000 shares and of \$49,000 of the \$50,000 of bonds being elected president, expended much money and greatly improved the situation. Trustees having vacated, W. had others substituted by the court. W. then became the purchaser. He failing, there was a second sale. In the meantime no objections were made. In 1886, the property having become valuable, G., owning three shares, brought suit for himself and the other stockholders to set aside the reorganization and sale on the ground of some alleged informality in the notice on which the order of substitution was made; it was held, that by laches complainant lost, if he ever had, any right to relief. *Godwin v. Whitehead*, 88 Va. 600, 14 S. E. 344.

XVII. Insolvency, Winding Up, Dissolution and Ouster.

A. JURISDICTION AND GENERAL PRINCIPLES.

1. Jurisdiction of Equity.

Equity has no inherent jurisdiction

to dissolve a corporation; its powers in that respect are wholly derived from statute. *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858. See *Pixley v. Roanoke Nav. Co.*, 75 Va. 320.

Equity Has Exclusive Jurisdiction.

A Creditor Can Not Obtain a Preference by Levying an Attachment.—

There can be no suit against a defunct domestic corporation, except one in equity as provided in §§ 57, 59, ch. 53, W. Va. Code, 1899, to wind up its affairs for the benefit of creditors and stockholders. No creditor can, by levying an attachment, obtain priority over other creditors. *Stiles v. Laurel Fork Oil, etc.*, 47 W. Va. 838, 35 S. E. 986.

2. Constitutional and Statutory Provisions.

• "Provision shall be made, by general laws, for the voluntary surrender of its charter by any corporation, and for the forfeiture thereof for nonuser or misuser." Va. Const. (1902), art. 12, § 154.

Statutes, When Constitutional.—A statute, whose whole object is to provide a convenient and judicious mode for winding up an insolvent corporation and distributing its assets equitably amongst those entitled thereto, violates no contract and impairs no right of the corporators and should be upheld in Virginia as it certainly would be by the state enacting it. *Bockover v. Life Ass'n*, 77 Va. 85.

3. Proper Parties.

a. Rule in Virginia.

Stockholders Not Proper Parties.—

Under Va. Code, 1887, § 1103, the corporation, though dissolved or expired, is the proper party defendant in a creditor's suit against the corporation, and the stockholders are not proper parties. The fact that there has been an assignment of the corporate assets to trustees only alters the case so far as to make the trustees necessary parties. *Hambleton v. Glenn*, 85 Va. 901, 9 S. E. 12.

The stockholders individually are

neither necessary nor proper parties to suit to wind up the affairs of a corporation, but they are bound by the decree, and where they never appealed from the decree they can not question its validity in a collateral proceeding. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

Relief Sought against Shareholders.—Where no relief is sought against the shareholders, they are sufficiently represented by the corporation. *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110. But where relief is sought against the shareholders themselves, they should be made parties. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591; *Cason v. Seldner*, 77 Va. 293.

Suit to Declare Null.—A corporation being a defendant to a suit in equity, which seeks to have it declared null, the holders of stock in it are not proper parties to defend the suit. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592.

But in such a case, the holders of the stock, claiming that if the corporation is annulled they have equitable interests in the property, may be admitted as parties defendants to protect their interests. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592.

b. Rule in West Virginia.

Stockholders Necessary and Proper Parties.—In a suit in equity under § 59, ch. 53, W. Va. Code, 1899, by a creditor to assert a debt against a defunct domestic corporation and to wind up its affairs, the stockholders are necessary parties and the decree must both ascertain the debts against the corporation and the shares of the stockholders in the surplus. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 986. See also, *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 227, where it is said: "In a suit to wind up the affairs of a corporation, the stockholders are proper and necessary parties to the suit, being interested, and entitled to the assets after the payment of the debts of the corpora-

tion, and the stockholders should be parties in order to a proper distribution of the assets."

c. Corporation a Necessary Party.

If one of the main objects of a chancery suit is to obtain a decree declaring a corporation dissolved, it would seem clear, on principle, that a corporation is a necessary party to such a suit. *Hurst v. Coe*, 30 W. Va. 158, 3 S. E. 564, 570.

4. Assessments of Stockholders in Suit to Wind Up.

See the title STOCK AND STOCKHOLDERS.

B. INSOLVENCY.

See post, "Dissolution at Instance of Corporation or Stockholders," XVII, C. See the titles BANKS AND BANKING, vol. 2, p. 312; CREDITORS' SUITS; RECEIVERS.

1. Insolvency Does Not, Per Se, Work Dissolution.

Insolvency, per se, does not work a dissolution of a corporation, nor invalidate an assignment of its effects for the benefit of creditors. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Weigand v. Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

But see *Kahle v. Oil Co.*, 51 W. Va. 313, 317, 41 S. E. 233, where it is said, quoting from Thompson on Corp: "All authority holds that when a corporation becomes notoriously insolvent it is, in the eyes of the law, a dissolution. 3 Thompson Corp., s. 3335, 3347. Insolvency works de facto dissolution, so as to let in creditors to their equitable remedies. 5 Thomp. Corp., s. 6666. No one will dispute that the assets of an insolvent corporation are a trust fund for the benefit of creditors. 5 Thomp. Corp., s. 6555."

2. Ground for Winding Up.

"The affairs of an insolvent corporation may be settled and its property be sold for the satisfaction of its debts of every description, whether secured by liens or not, upon a bill filed for a

settlement of its affairs in which its insolvency is made to appear." *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 398, 25 S. E. 110.

"And who can dispute that a court of equity may properly entertain a suit by one creditor for himself and all others, to marshal and administer the property of such corporation to meet demands against it? *Graham v. Railroad*, 102 U. S. 148, 161. When a bill is brought by one creditor of an insolvent corporation for himself and others, any creditor may have its benefit for whatever are his legal rights. 5 *Thomp. Corp.* 6567." *Kahle v. Oil Co.*, 51 W. Va. 313, 317, 41 S. E. 233.

3. Assets a Trust Fund.

See ante, "Corporate Property a Trust Fund," II, F; "To Prefer Creditors and Assign for Their Benefit," XI, G; post, "Assets, after Dissolution, a Trust Fund," XVII, F, 7.

The assets of an insolvent corporation are a trust fund for the benefit of creditors. *Kahle v. Oil Co.*, 51 W. Va. 313, 317, 41 S. E. 233. See *Swann v. Summers*, 19 W. Va. 132; *Lamb v. Laughlin*, 25 W. Va. 300.

"The capital is the fund the creditors trusted, and to which, with the after-acquired property or assets, they can alone look for indemnity. Both stand pledged for the indemnity of the corporate debts, and a court of equity will follow them into the hands of the stockholders, or other persons receiving them with notice, for the benefit of the creditors. From this view it seems to be a necessary consequence, that after the admitted insolvency of the corporation, and the nonusers of its franchises, the officers and stockholders of the corporation, in whose hands the assets remain, hold them as quasi trustees for the creditors, who, as the beneficial or equitable owners of such assets, occupy as to them the position of *cestuis que trust*." *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909-917.

"In *Lamb v. Pannell*, 28 W. Va. 666, *Snyder, J.*, said: 'Both in law and in reason there is a wide difference between an insolvent corporation not using its franchises and a solvent one in the full exercise of all its powers and franchises. Neither the corporation itself nor its stockholders have any beneficial interest whatever in its property or assets after it has become wholly insolvent, and unable to exercise its franchise or carry on its business. By the insolvency of the corporation it is rendered incapable of pursuing the object for which it was created. Its officers or agents properly cease to use its franchises after the insolvency has been ascertained, but their responsibility as to its assets does not cease. They continue to hold them as before, not for themselves, or for the use and benefit of the stockholders, but necessarily for its creditors. While it was solvent and in the full enjoyment of its franchises, the entire beneficial interest in its property belonged to its stockholders. But after the insolvency, while the legal ownership of the assets may continue as before, the beneficial interest of the stockholders clearly no longer exists. A state of insolvency presupposes that the capital stock and assets of the corporation are insufficient to meet its liability to its creditors. The stockholders, having incurred no personal liability for the debts, have in point of fact no interest in the disposition of the corporate assets after the insolvency. In equity, therefore, as well as in law, the beneficial interest in the assets must of necessity belong exclusively to the creditors; for the corporation, its officers and stockholders, being simply the holders of the legal title, and nothing more, the beneficial interest must belong to some other than them, and as there are none such others except the creditors, they must be the sole beneficial or equitable owners.'" *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909-916.

Powers of Creditors and Majority of

Stockholders over Assets of Insolvent Corporation.—Where a corporation has but one asset, namely, a decree for a certain sum against a railroad company, and a decree for the sale of its road, etc., to satisfy the same, after first satisfying prior liens and charges to a large amount, the creditors and the owners of a greater part of the stock may, if they see fit, give to outside parties, out of the amount decreed to them, a bonus, for a guaranty that at the commissioner's sale, the railroad, etc., shall be made to bring at least enough to pay their claim, as well as the prior liens and charges. And, if such bonus is made to appear to have been that, without which neither creditors nor stockholders would have received anything, then the court will charge the fund thus brought into the cause with the payment of such bonus, and, after the payment of the creditors, distribute the surplus, if any, among the stockholders according to their respective interests. *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 91.

Notes Received on Condition.—The makers of notes, delivered to an insolvent corporation on conditions which have not been complied with, can not be held liable to creditors of the corporation whose debts were not contracted on the faith of such notes, and who did not know of their existence until after their debts were contracted. *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980. See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

4. Single Creditor's Right to Appeal.

See the title **APPEAL AND ERROR**, vol. 1, p. 418.

Creditor's Bill—Insolvent Corporation—Appeal.—On a creditor's suit to convene the creditors of an insolvent corporation, a creditor whose debt, or its lien, is disallowed by a decree, may appeal without awaiting further action of the court as debts of other creditors. *Kahle v. Oil Co.*, 51 W. Va. 313, 41 S. E. 233.

Commissioner's Report—Appealable Decree.—On a suit by one creditor for all, against an insolvent corporation, a report by a commissioner, of various debts against it, an exception by one creditor to the allowance of a debt of another, a decree sustaining that exception and adjudging the debt no lien, but only a general debt, and recommitting the report to ascertain liens, debts and assets, is appealable as to the creditor whose debt is thus disallowed. *Kahle v. Oil Co.*, 51 W. Va. 313, 41 S. E. 233.

5. Insolvency as Ground for Receivership.

See the title **RECEIVERS**.

C. DISSOLUTION AT INSTANCE OF CORPORATION OR STOCKHOLDERS.

1. Statutory Methods in West Virginia.

Resolution by Majority of Stockholders Works a Dissolution.—A resolution by the stockholders of a joint stock company to discontinue its business under § 56, ch. 53, W. Va. Code, 1891, operates as a voluntary surrender of the corporate franchise and a dissolution of the corporation. *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858.

"The statute provides two ways in which a corporation may be dissolved. One is under § 56, ch. 53, W. Va. Code, 1891, providing that the stockholders may at any time, in general meeting, resolve to discontinue the business of the corporation, a majority of the capital stock being represented, and voted in favor of such discontinuance, and may divide the property and assets that may remain after paying all debts and liabilities of the corporation. The other mode is as provided in § 57, as above cited, where not less than one-third in interest may file their bill for the purpose, and, on showing sufficient cause, the court will dissolve it." *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803, 808.

Not less than one-third in interest of the stockholders of a corporation have

a right under § 57, ch. 53, W. Va. Code, 1891, to file their bill in equity, and on showing sufficient cause the court will dissolve the corporation. *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

But in such suit the court can not make a decree of dissolution unless cause be shown, even though a majority in interest are plaintiffs and they had an absolute right to dissolve the corporation by their majority vote at a general meeting of the corporation. West Virginia Code, ch. 53, § 56. But the mere fact that a majority in interest are plaintiffs and had another remedy does not deprive the circuit court of its jurisdiction, on sufficient cause being shown, from decreeing a dissolution. *Hurst v. Coe*, 30 W. Va. 158, 3 S. E. 564.

"The power of the court of chancery, if proceedings are instituted under this fifty-seventh section (see page 403, W. Va. Code, 1868), is 'to make such orders and decrees as justice may require, or to decree, if sufficient cause be shown therefor, a dissolution of the corporation.'" *Hurst v. Coe*, 30 W. Va. 158, 3 S. E. 564.

Loss or Alienation of Assets Immaterial.—A corporation is not dissolved by the fact, that it has lost or conveyed all its assets away; and, notwithstanding such fact, not less than one-third in interest of the stockholders of such corporation have a right, under § 57, ch. 53, W. Va. Code, 1891, to file their bill in equity, showing sufficient cause for dissolution thereof. *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

Corporation a Necessary Party.—The corporation is a necessary party to a bill filed by not less than one-third in interest of its stockholders, under § 57, ch. 53, W. Va. Code, 1868, who desire to wind up its affairs, and ask the court to decree a dissolution of such corporation, and sell its property, real and personal, and distribute the proceeds of

the sale among those entitled thereto. *Hurst v. Coe*, 30 W. Va. 158, 3 S. E. 564.

Receivership.—When a dissolution of a joint stock corporation has been made by resolution of its stockholders, under § 56, ch. 53, W. Va. Code, 1891, if a creditor ask a court of chancery to administer its assets through a receiver or otherwise, the bill must state, as a basis of jurisdiction, the failure of the corporation to provide ample funds to sufficiently secure the debts of the corporation, as required by that section. *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858. See the title RECEIVERS.

2. In Virginia.

Winding Up under Acts, 1901, Page 326.—Under acts, 1901, page 326 (repealed acts, 1904, p. 302), providing for winding up abandoned, insolvent, and unprofitable corporations at the suit of stockholders, a court of equity has no jurisdiction to wind up a land and improvement company, at the instance of a stockholder, where it appears that the company owes no debts, its expenses are not in excess of its income, it is not wasting its assets, its management has not been abandoned by its officers or directors, its affairs are not grossly mismanaged, and it still owns a part of the real estate originally purchased by it, and is ready and willing to sell the same to purchasers, and the evidence is conflicting as to the future of the company, but leaves a reasonable expectation that existing conditions will improve. *Radford, etc., Land Co. v. Cowan*, 101 Va. 632, 44 S. E. 753. See now § 105a (15), Va. Code (1904).

Suit to Wind Up Corporation—Order of Reference—Claims for Expenses.—A bill filed, in conformity with the statute, to wind up an unprofitable corporation, charges that the company's property is being operated and managed by the company. There was no demurrer to the bill. The company's property was sold by consent, and a consent order of reference was made in order to

ascertain the liabilities of the company. Under this order, the president and general manager preferred a large claim for the expense of running the company for some time prior to the institution of the suit. This was opposed on the ground that he was, during this time, lessee of the property, and the debt was his personal debt, and not a debt of the company. The trial court having so held, objection is made in this court, that under the pleadings, alleging that the property was operated and managed by the company, the trial court erred in allowing complainants to claim that the property was under lease. It was held, the objection is without merit. The president and general manager was in the attitude of a plaintiff asserting a claim against the company under an order of reference to which he had consented, and the complainants had the right to resist its correctness. They could not have anticipated that such a claim would be preferred, nor be expected to allege in their bill facts as the basis of defense to a claim of which they were ignorant. *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

3. By Voluntary Surrender.

A corporation may be extinguished by the surrender of its rights and franchises, as to whom the unanimous assent of every individual is not requisite. The will of the majority must prevail in this, as in other cases. *Currie v. Mut. Assurance Soc.*, 4 Hen. & M. 315, 351. See *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592, 615, where it is said that a corporation may forfeit its franchises by nonuser or abandonment thereof.

D. AT INSTANCE OF CREDITOR.

Simple Contract Creditor—Abandoned and Insolvent Corporation.—A court of equity has jurisdiction to entertain the suit of a simple contract creditor who has no lien, brought for the purpose of administering the assets

of an insolvent and abandoned corporation. *Nunnally v. Strauss*, 94 Va. 255, 26 S. E. 580; *Finney v. Bennett*, 27 Gratt. 365, approved (two judges dissenting).

As a general rule where a creditor has no lien on, or interest in, the property to be subjected, he must obtain judgment and execution against his debtor before he can proceed in equity to subject his property, and this is usually as true in the case of corporations as it is in the case of individuals. The rule, however, is different where it appears that the corporation proceeded against is insolvent, has ceased to do business, has been abandoned by its officers and directors, and has no one to administer its affairs or realize on its assets, and apply the same to the satisfaction of its debts. *Nunnally v. Strauss*, 94 Va. 255, 260, 26 S. E. 580. See *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591, as to subjecting unpaid subscriptions. And see the title STOCK AND STOCKHOLDERS.

A Return of "No Effects" on an Execution Justifies a Resort to Equity.

Where a creditor of a corporation has obtained judgment against it, upon which execution has been issued and returned no property found, he has the right to sue in equity for the benefit of himself and all other creditors who will join in the suit to subject the assets of the corporation, including the unpaid subscriptions of its stockholders, as far as may be necessary, to the payment of its debts. It is in the nature of a creditor's bill, and by it the equitable assets of the corporation can be reached. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Creditors' Bills.—The road and franchises of a railroad company are liable, on a creditor's bill, to the payment of judgments recovered against the company, and where the amount of the judgment is small and the rental value of the road large, the road and franchises should be leased for as short a period as is practicable, but the cred-

itors have a right to have them leased, even though the proceeds be far in excess of the judgment, if the lease can not be made for a shorter period. It is proper to make another railroad in possession of the road in suit, a party to the suit, to ascertain its interest in said road and on failure of that company to respond or show what its interest is, a decree for leasing the road is proper. *Winchester, etc., R. Co. v. Colfelt*, 27 Gratt. 777.

A bill to wind up the affairs of an insolvent corporation, and to distribute its assets among its creditors, is a creditors' bill, and is in many respects analogous to a bill in behalf of creditors of a decedent. *Finney v. Bennett*, 27 Gratt. 365.

Necessary Parties.—In a suit in equity under § 59, ch. 53, W. Va. Code, 1891, by a creditor to assert a debt against an expired domestic corporation, and wind up its affairs, and administer its property for the benefit of creditors, the stockholders are necessary parties. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

Decree.—And the decree must both ascertain the debts against the corporation, and declare the share or interest of the stockholders in the corporation, and in the surplus proceeds of the property decreed to be sold. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

E. FORFEITURE, OUSTER AND EXPIRATION OF CHARTER.

1. Necessity for Judicial Ascertainment.

a. At State's Instance.

Franchise Continues Till Forfeiture Claimed by State.—See ante, "Statute of Mortmain Not in Force in Virginia," XI, B, 3.

The charter of a corporation does not expire by reason of acts of omission or commission on the part of the corporation, even where they constitute a sufficient ground for declaring a forfeiture; but the franchise continues in full force until a forfeiture is claimed by the

state granting it, and this can be done only in a proper legal proceeding by which the cause of forfeiture is ascertained and dissolution adjudged. *Moore v. Schoppert*, 22 W. Va. 283; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319, 324; *Pixley v. Roanoke Nav. Co.*, 75 Va. 320, 324.

A cause of forfeiture can not be taken advantage of, or enforced against a corporation, collaterally or incidentally, or in any other mode than by a direct proceeding, for that purpose, against a corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such proceedings, since it may waive a broken condition of a contract made with it as well as an individual. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 50, 3 S. E. 227, quoting from *Angell and Ames on Corporations* (10th Ed.) § 7777, and citing *Banks v. Poitiaux*, 3 Rand. 136, to sustain the proposition. See *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 286, 292, 24 S. E. 1016; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 85, 40 S. E. 633; *Newport News, etc., R. Co. v. Hampton, etc., R. Co.*, 102, Va. 795, 47 S. E. 839; *Pixley v. Roanoke Nav. Co.*, 75 Va. 320; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319.

So, where a bank buys land, in violation of § 1163, Va. Code, 1904, the law imposes no forfeiture for its violation, and the only effect would be to subject the bank to proceedings in behalf of the state to vacate the charter. *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6, citing *Banks v. Poitiaux*, 3 Rand. 136; *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 286, 24 S. E. 1016.

"In *Crump v. U. S. Mining Co.*, 7 Gratt. 352, it was held, as stated in the first point in the syllabus: 'In an action by a corporation, the question whether a corporation has forfeited its charter is not open to inquiry, unless the forfeiture has been ascertained, by

the sentence of a court, in a proper proceeding for the purpose.' This was decided in 1851, and as this principle, so stated, is in entire accord with all the authorities, this decision is as binding in authority on us as if pronounced by our own court, it having been rendered before the formation of this state, and we have no disposition to question it, or to re-examine the question of law so decided." *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227, 231. See *Shinn v. Com.*, 32 Gratt. 899. See, in accord, *Bank v. Poitiaux*, 3 Rand. 136.

The fact of the commonwealth being a stockholder in a corporation and partner with individual stockholders, is no reason why she should not, in her sovereign capacity, proceed against the corporation for the purpose either of destroying its charter, or depriving it of any of its franchises. *Com. v. President, etc., James River Co.*, 2 Va. Cas. 190.

Nonpayment of License Tax.—This is as true when the cause of forfeiture is the nonpayment of a license tax to the state, as it is of any other cause of forfeiture, the law in this respect not having been altered by § 8, ch. 20, acts, 1889 (W. Va. Code, ch. 32, §§ 88, 89), declaring a forfeiture and providing for publication of the fact. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

A legislative provision that a corporation should forfeit its charter to the state if a certain license tax was not paid, merely provides a cause of forfeiture, and the state can exercise a discretion as to having a forfeiture pronounced by a court on quo warranto or other judicial proceedings against the corporation. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

Failure to Appoint Officers, etc.—Forfeiture of the charter for failure to appoint officers or other acts of non-user, can not be inquired into collaterally, unless there is evidence that the charter has been ascertained to be for-

feited by the sentence of the proper court in a proper proceeding for the purpose. *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319.

Want of Stockholders Competent for Directorate.—Where the charter of a corporation provided for a certain number of directors, the concentration of the capital stock of the said company in the hands of a certain number of shareholders, not less than the number required by the charter, when by reason of legal disability some of these stockholders can not be directors of the company, still does not work a dissolution thereof, although it may be ground for a court to order such dissolution, when several years have elapsed since a stockholders' or directors' meeting. *Hurst v. Coe*, 30 W. Va. 158, 3 S. E. 564.

Forfeiture by Abandonment Inures to State.—Although a corporation may forfeit its franchises by nonuser or abandonment thereof, such forfeiture would inure to the sovereignty, and individuals could not lawfully seize upon them, and could not form a new company to take possession of such franchises. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 592, 615.

Declaration and Publication of Forfeiture Insufficient.—Chapter 20, § 8, p. 40, acts, 1885, in providing for the publication, by the auditor, of "a list of such corporations as have forfeited their charters, under the provisions of this section, within the preceding year," does not intend to substitute a mere publication for the judicial sentence of a court, as a means of ascertaining and completing a forfeiture. It was not intended thereby to surrender the discretion of the state, as to declaring a forfeiture, to a mere ministerial officer. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

To hold that this publication by the secretary of the state, a mere ministerial act, in the making of which he

could exercise no discretion, was intended as a substitute for the sentence of a court that the charter of a corporation had been forfeited, and which sentence could never be pronounced, if the state deemed it injudicious to ask for it by instituting regular legal proceedings by quo warranto, or otherwise, against the corporation, and not then, till it had an opportunity to be heard, and its failure to pay its \$10 tax at the proper time had been established, would make the constitutionality of the act very questionable. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227, 232.

b. Express Provision for Forfeiture in Charter — No Inquisition Necessary.

Where the charter of a railroad authorizes the company to issue bonds and secure them by a mortgage, but also provides that if the road is not completed to a certain point by a certain day, it shall forfeit to the state its corporate franchises and rights, together with the roadbed and all other property, the two clauses are to be taken together, and on the failure to complete the road in the specified time its property is forfeited to the state free from the incumbrance of the mortgage, it appearing that the holders of the bonds were the officers of the road and that none of the proceeds had been expended on the road, and consequently they were neither purchasers for value or without notice. Such forfeiture, the state having elected to enter for the forfeiture, is absolute and no inquisition or judicial proceedings of any kind are required to consummate it. *Silliman v. Fredericksburg, etc.*, R. Co., 27 Gratt. 119.

And where a statute amending the charter of a corporation by extending the time for the completion of its work, provides for a forfeiture of all corporate franchises and rights, including its property, upon failure to complete its works within the time extended, and such extended charter was accepted by

the company and bonds were issued and a deed of trust executed to secure them, and the company failed to comply with the time condition, the state can proceed to declare the charter forfeited, and turn over all property and franchises to other parties to whose benefit the forfeiture inured, either from the trust deed or the bond secured thereby. *Silliman v. Fredericksburg, etc.*, R. Co., 27 Gratt. 119.

Upon the failure of the company to complete the road to the point fixed by the day prescribed, the forfeiture became absolute and complete; and the state having entered and elected to hold under the forfeiture, no inquisition or judicial proceedings, or inquest or finding of any kind, was required to consummate the forfeiture. *Silliman v. Fredericksburg, etc.*, R. Co., 27 Gratt. 119.

But, although the act incorporating a corporation may declare the charter null and void if certain acts were not done within a certain time, the forfeiture may be waived by the state, and the charter does not become ipso facto void and inoperative because of failure to comply with such provisions. *Baltimore, etc.*, R. Co. v. Supervisors, 3 W. Va. 319. See post, "Forfeiture of Charter Waived," XVII, E, 5.

Failure to Complete without Company's Default.—But where the failure of a street railway company to complete its road within the time limited by its charter is due to extrinsic causes, and not to the fault of the company, as by an injunction of a court, the rights of the company are not lost. *Newport News, etc.*, R. Co. v. Hampton, etc., R. Co., 102 Va. 795, 47 S. E. 839.

c. Expiration of Charter Period of Existence.

See ante, "Expiration of Charter and Its Effect," IV, E.

If the charter or governing statute of the corporation, fixes a definite period of time at which its corporate life shall expire, when that period is reached, the corporation is ipso facto dissolved with-

out any direct action to that end, either on the part of the state or of its members; and it has no further power to adopt by-laws. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891.

It can not set up the defense of by-laws made by it as a de facto corporation to avoid its contracts. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891.

"The extinction of a corporation by efflux of time can not be distinguished, as regards disability, from that of an individual by death. Both are placed upon the same footing by *Tucker, P.*, delivering the opinion of the court in *Rider v. Union Factory*, 7 Leigh 154, and by Judge Stannard, delivering the opinion of the court in *Bank v. Patton*, 1 Rob. 499." *May v. State Bank*, 2 Rob. 56, 74.

2. Equity Has No Jurisdiction.

A forfeiture can only be enforced in a court of law, and a court of chancery can have no jurisdiction to stop a corporation from the exercise of its franchises conferred by the legislature, until the forfeiture of its charter has been declared by proper proceedings in a court of law. This results from the very nature of an act of incorporation. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320, 324.

A court of equity has no jurisdiction by way of injunction or restraint against the exercise of the rights and franchises of a corporation, but the proper remedy is at law by information in the nature of quo warranto. This court has affirmed, in effect, the same doctrine in *Banks v. Poitiaux*, 3 Rand. 136, and in *Crump v. U. S. Mining Co.*, 7 Gratt. 352. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320, 325.

Except where a public nuisance results, and in the case of trusts for charitable purposes. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

Thus a court of equity has no jurisdiction to restrain a navigation company from collecting tolls on the

streams to which their charter refers, on the ground that the company had failed to improve the streams as their charter prescribed, or to keep them in order, but the only mode of proceeding against a corporation in such case is by quo warranto at the suit of the commonwealth. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

3. Quo Warranto the Proper Remedy.

An information in the nature of a quo warranto is the proper remedy by which to try and decide whether the charter of a corporation ought to be nullified and vacated. *Com. v. President, etc., James River Co.*, 2 Va. Cas. 190.

Even if a bank violated its charter, the only proceeding against it would be by quo warranto, and the purchasers of the houses can not resist a specific performance of their contracts by alleging that the bank had exceeded its powers in erecting and selling the houses. *Banks v. Poitiaux*, 3 Rand. 136; *Litchfield v. Preston*, 98 Va. 534, 37 S. E. 6. See the title QUO WARRANTO, for discussion.

The only remedy is in a court of law by the writ of quo warranto, instituted by the state. The court saying: "A charter of incorporation is not a contract between the corporate body on one hand and individuals whose rights and interests may be affected by the exercise of its powers, on the other, but it is a compact between the corporation and the government from which they derive their powers. Individuals can not therefore take it upon themselves, in the assertion of their private rights, to insist on breaches of the contract of the corporation, as a ground for resisting or denying the exercise to a corporate power." *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

4. Causes of Forfeiture.

See ante, "At State's Instance," XVII, E, 1, a.

A corporation may be guilty of such

offenses as to forfeit its existence. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591.

A Mere Discontinuance of Business Does Not Effect a Dissolution.—A mere cessation or discontinuance by a corporation, of its corporate business, will not operate as a dissolution. *Law v. Rich*, 47 W. Va. 634, 35 S. E. 858.

5. Forfeiture of Charter Waived.

The forfeiture of a corporate charter, by failure to complete its works within a certain time, may be waived by the state and the municipality concerned, and a waiver of such forfeiture is not the granting of a new right. *Newport News, etc., R. Co. v. Hampton, etc., R. Co.*, 102 Va. 795, 47 S. E. 839; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 50, 3 S. E. 227.

Although the charter of an incorporated company may be forfeited, yet the government which granted it may not choose to enforce the forfeiture and may give it validity by recognizing its existence, and by the extension of further franchises; and when the company accepts the provisions of such extension the former grant of incorporation must give way to it, wherever the provisions are inconsistent. *Baltimore, etc., R. Co. v. Supervisors*, 3 W. Va. 319.

F. EFFECTS OF DISSOLUTION AND OUSTER.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 54, et seq.; APPEAL AND ERROR, vol. 1, p. 531. See ante, "Expiration of Charter and Its Effect," IV, E; "Power to Sue and Be Sued," XIV, A.

1. On Right to Sue and Be Sued in General.

See ante, "Actions by and against Corporations," XIV.

After the dissolution of a corporation, or its expiration by efflux of time, suits may be brought or defended, and all other lawful acts done in the corporate name in like manner as before dissolution. *Miller v. Newburg Orrel*

Coal Co., 31 W. Va. 836, 8 S. E. 600; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227; *Donnally v. Hearn-don*, 41 W. Va. 519, 23 S. E. 646; *Hall v. Bank of Va.*, 14 W. Va. 584. See Va. Code, § 1105e (30-34), formerly § 1103 of the Code of 1887, repealed 1902-3-4, p. 659; see § 1072 for conditions of repeal. See, also, § 1294b (16); W. Va. Code, ch. 53, § 59.

And a plea to an action for a tort, that the charter of the corporation had expired, and that it had ceased to exist in law at the time the alleged cause of action arose, is bad, as not averring that the corporation had wound up its business, and ceased to exist in fact as well as in law. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

Under Va. Code, 1873, ch. 57, § 26 (Code, 1887, § 1103), a corporation, though dissolved or expired, might be sued to enforce its liabilities, and its stockholders were not necessary parties. *Hambleton v. Glenn*, 85 Va. 901, 9 S. E. 129.

Notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while alive and going, and may sue and be sued as before; and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties. *Hambleton v. Glenn*, 85 Va. 901, 905, 9 S. E. 129.

And such suits do not have to be carried on under the direction of the directors then in office, or such receiver as may be appointed. *Hall v. Bank of Va.*, 14 W. Va. 584.

But at common law, no suit could be instituted against an expired or dissolved corporation, because it was dead, without heirs or officers for service of process. All suits against it abated. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

Scope and Terms of Statute of West Virginia.—The suit allowed by this

section has for its mission the winding up of the affairs of a defunct corporation by decreeing upon its assets, first, for payment of its debts, next, for distribution of the surplus among the stockholders. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

The unreasonable rule of the common law, leaving the corporation vested with no property to pay debts, and creditors no remedy, was obviated by the good sense of equity jurisprudence, which entertained a suit by a creditor to enforce their demands against the property of the company. 6 Thomp. Corp., § 7860. But, while the common law did not allow any suit after expiration of the charter, our statute (§ 59, ch. 53, W. Va. Code, 1899) adopts the principles of courts of equity before its adoption, namely, that for some purposes the corporation still owned its property; that is—first, for the payment of the creditors; and, secondly, for the purpose of giving the residue of assets to the stockholders. This is a radical change from the common law. Further than this statute allows, a defunct corporation can not be sued. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986-989.

Again, there can be no suit against an expired domestic corporation, except one in equity, as provided in §§ 57, 59, ch. 53, W. Va. Code, 1899, to wind up its affairs for the benefit of creditors and stockholders. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

See, however, *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, where it is said: "It is no doubt true that the legislature, in passing this statute, had special reference to winding up the affairs of defunct corporations, and disposing of their assets to those entitled thereto, by proceedings in equity, and thus to destroy the common-law rule, which was regarded as unjust and inapplicable to modern private business corporations. But the terms employed in the statute do not

confine its operation to equity proceedings. It provides, in general terms, that suits may be brought or defended in the corporate name with like effect as before the dissolution, so far as shall be necessary for collecting the debts and enforcing the liabilities of the corporation. This language is certainly sufficiently comprehensive to embrace any suit, whether at law or in equity, which is proper for collecting the debts due to, or enforcing the liabilities against, the corporation; and this seems also necessary to give effect to the general object and purpose of the statute."

"It was evidently intended to be for the mutual benefit of the creditors of the corporation, as well as for the stockholders and the corporation itself." *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

And if either had a cause of action, which could, according to law and its rules of practice, be enforced only in a court of law, the purpose of this statute was manifestly to permit the bringing suit upon it in a court of law, for otherwise the general object of the statute could not be obtained. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

The precise point involved in *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986, was, however, whether a creditor could obtain a preference by levy of an attachment after the expiration of the charter of a domestic corporation, and not the more general one, whether any action at law would lie.

Attachment Not Allowed.—There can be no attachment for debt against an expired domestic corporation. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

Terms of Decree.—And when a debt is decreed against an expired corporation, and its property subjected thereto, the decree must both ascertain the debts against the corporation, and declare the shares or interests of the stockholders in the corporation, and

in the surplus proceeds of the property decreed to sale. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

Right to Defend Doubtful Claim.—After the suspension, by appointment of a receiver and dissolution of a corporation, the receiver, or any stockholder, creditor, or other person in interest, may, in the corporate name, defend any doubtful claim presented for payment out of the assets of such corporation. W. Va. Code, 1899, ch. 53, § 59. *Griffith v. Blackwater Lumber Co.*, 46 W. Va. 56, 33 S. E. 125.

2. On Debts, Contracts, and Other Liabilities.

See the title **CONTRACTS**, ante, p. 307. See ante, "Liabilities," XII.

By the principles of the common law, debts of a corporation, either to it or from it, are extinguished by its dissolution. *Barksdale v. Finney*, 14 Gratt. 338, citing *Rider v. Union Factory*, 7 Leigh 154; *May v. State Bank*, 2 Rob. 56; *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986; *Board v. Livesay*, 6 W. Va. 44; *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

"Afterwards, and no doubt in consequence of the suggestion contained in the opinion in that case (*Rider v. Union Factory*, 7 Leigh 154), the act of February 13th, 1837, now incorporated in the Virginia Code, was passed. That act prescribed general regulations for the incorporation of manufacturing and mining companies which might thereafter be incorporated, and provided that when such corporation should be dissolved by lapse of time or other cause, the corporate name, with the right to sue and be sued, should continue for the purpose of collecting and paying debts and the distribution of its property." *Barksdale v. Finney*, 14 Gratt. 338, 359. See Va. Code (1907), § 1105c (30).

But § 59, ch. 53, W. Va. Code, 1899, says the property and assets of a dissolved corporation, whatever the cause

or manner of its dissolution may be, shall be subject to the payment of the liabilities of the corporation. *Griffith v. Blackwater Boom, etc., Co.*, 55 W. Va. 604, 612, 48 S. E. 442.

After a corporation shall expire, or be dissolved, its assets remain subject to the payment of its liabilities, and suits may be brought against such corporation to enforce its liabilities. See W. Va. Code (Ed. 1891), p. 511, ch. 53, § 59. *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

On Contracts of Corporation.

Executory Contracts Avoided.—Where an insolvent corporation is forced into liquidation and dissolution, all its executory contracts perish with it, for this is an implied condition of their execution. Such, however, is not the law where a solvent corporation is voluntarily dissolved. By its own act it can not relieve itself from its contracts, but its assets will be held liable for breaches thereof. *Griffith v. Blackwater Broom, etc., Co.*, 46 W. Va. 56, 33 S. E. 125.

It must be taken as an implied condition of all such contracts, that such corporation will not voluntarily try to escape or evade fulfilment, and, if it does, equity will not recognize its dissolution, nor permit the distribution of its assets until its contracts are satisfied. *Griffith v. Blackwater Lumber Co.*, 46 W. Va. 56, 33 S. E. 125, 127.

Thus, when an executory contract with a corporation, necessitating in its execution, work, labor, and the expenditure of money for materials, machinery, tools and appliances, and the construction of roads, and other improvements, as well as in carrying on the work, is terminated by dissolution of the corporation in consequence of its insolvency, the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses as aforesaid, subject to a deduction of all sums

paid to him by the corporation and of the value of such materials, machinery and other property on hand. *Griffith v. Blackwater Broom, etc., Co.*, 55 W. Va. 604, 48 S. E. 442.

And when such a contract between a corporation and one of its directors has been entered into openly and without fraud, and the disinterested directors and stockholders are fully informed of its terms and permit it to be partly executed without disapproval or notice of an intention on their part to annul it, the same rule of compensation and reimbursement to the contractor applies upon the subsequent abrogation of the contract by a court of equity at the instance of the stockholders and creditors of the corporation. *Griffith v. Blackwater Boom, etc., Co.*, 55 W. Va. 604, 48 S. E. 442.

Where the contract is not invalid, everything done under it is in part performance thereof, and the dissolution of the corporation can not have the effect of rescission or rendering it void ab initio and undoing anything that has been performed under it. Dissolution, even upon the theory adopted by those courts which adhere to the doctrine of *People v. Globe Mutual Life Ins. Co.*, is simply a contingency in view of which the contract was made, and which it was understood should, upon its happening, end the contract on a date earlier than that specified. Under that doctrine, full compensation is paid for so much of the contract as has been performed at the date of the dissolution, and profits which would have arisen from the performance of the part remaining unexecuted are denied and refused. It is difficult to conceive or express any reason why, upon the same principle, money expended in the performance of a contract which is not one of mere agency or service, should not be recovered. It is laid out and expended upon the faith of the contract, at a time when that contract is recognized by the parties as valid and binding. If neces-

sarily expended, as it must be if recoverable in any sense, it is of the very essence of performance, an act of performance, a thing without which there could be no performance. *Griffith v. Blackwater Boom, etc., Co.*, 55 W. Va. 604, 612, 48 S. E. 442.

And a receiver, under the direction of the court, may adopt an executory contract, and require compliance therewith, and if such contract is afterwards found to be unfair and burdensome, and is abandoned and abrogated by order of the court, the contracting party is not entitled to damages as for a breach of such contract, but is only entitled to a just compensation for the actual expenditure of labor and money by him in fulfillment of his contract, subject to a deduction of all sums paid him thereunder; which compensation is entitled to a preference of payment out of the corporate assets in the hands of the receiver in equal priority with the other obligations of the receivership. *Griffith v. Blackwater Boom, etc., Co.*, 46 W. Va. 56, 33 S. E. 125. See same case in 55 W. Va. 604, 48 S. E. 442.

3. On Title to Land.

See ante, "Expiration of Charter and Its Effect," IV, E.

"By the common law, if lands are given to a corporation which is afterwards dissolved, the donor shall have the lands again; for the law annexes such a condition in every grant to a body politic. Co. Litt. 14 b." *Turpin v. Lockett*, 6 Call 113, 146. See *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986; *May v. State Bank*, 2 Rob. 56; *Rider v. Nelson, etc., Union Factory*, 7 Leigh 154.

4. On Title to Personality.

At common law, upon the death or dissolution of a corporation, its personal property escheated to the king. *Board v. Livesay*, 6 W. Va. 44; *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 830, 8 S. E. 606; *Rider v. Union Factory*, 7 Leigh 154; *May v. State Bank*,

2 Rob. 56; *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

But this rule, which had its origin when corporations were either municipal or ecclesiastical, private business and commercial corporations being unknown, has become practically obsolete, both as to real and personal property. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute, and obviated by the good sense of equity jurisprudence, which entertains a suit by a creditor to enforce demands against property of an expired or dissolved corporation. *Stiles v. Laurel Fork, etc., Co.*, 47 W. Va. 838, 35 S. E. 986; *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600. See ante, "On Right to Sue and Be Sued in General," XVII, F, 1.

5. On Officers' Tenure.

When the charter of a corporation expires, it ceases to have a president and directors. Their powers wither with the termination of the existence of the body of which they are members. Nor can a new president and new directors ever be elected, as the corporation itself is extinct. *Rider v. Nelson, etc., Union Factory*, 7 Leigh 154, 155.

Functions of Directors Suspended.—

When the stockholders have taken the necessary steps to effect the dissolution of the company, and are trying to liquidate its indebtedness with the least loss to themselves, the functions of the directors are, in effect, suspended; they can not purchase for the company the stock of one of its shareholders, with the company's property, thereby diminishing its assets, both the directors and the said shareholders being aware of the facts. The directors can make no disposition of the corporate property which will not inure to the equal benefit of all the shareholders. *Augsburg Land, etc., Co. v. Pepper*, 95 Va. 92, 27 S. E. 807.

6. On Powers.

See ante, "After Dissolution," XI,

B, 6; "On Powers and Privileges," XV, A, 3.

7. Assets, after Dissolution, a Trust Fund.

See ante, "Corporate Property a Trust Fund," II, F; "Assets a Trust Fund," XVII, B, 3.

After a corporation has ceased to exist or has abandoned its business, its assets become a trust fund for the payment of creditors and stockholders, creditors first and the residue if any, to the stockholders, who are simply deferred creditors. *Crumlish v. Railroad Co.*, 28 W. Va. 623.

The contributions of its stockholders, are held, independently of statute, to constitute a trust fund, into whosoever hands they may come, for the benefit of creditors and stockholders. Very soon after *Rider v. Factory*, 7 Leigh 154, was decided, and according to a suggestion of the court in that case the act of 1836-7 was passed by the general assembly of Virginia, Va. Code, 1897, § 1163, which act was incorporated into the W. Va. Code, ch. 53, § 59, providing in substance that when a corporation shall expire or be dissolved, its assets shall, under the direction of the board of directors then in office or such receiver as may be appointed, be subject to the payment of the liabilities, and the surplus, if any, be distributed among the stockholders. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227; *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646; *Hall v. Bank of Va.*, 14 W. Va. 584. See Va. Code, § 1105e (30).

8. Distribution of Assets.

In a suit to administer assets of a corporation, some of the stockholders having paid in full for their stock before the war, others during the war, and still others having paid nothing on their stock, while the payment in confederate money must be taken as valid without abatement, still, in the accounting between the stockholders to ascer-

tain the dividend each one is entitled to in the distribution of assets, the payments of stock in confederate money, in whole or in part, after January 1, 1682, should be scaled as of the date of payment, and each stockholder is entitled to share in proportion to his input, thus ascertained. Before a division accounts should be taken upon these principles. *Hartman v. Ins. Co.*, 32 Gratt. 242.

After such accounting each stockholder in arrears should be credited with a dividend and ordered to pay the balance due on his stock, to be divided among the other stockholders in proportion to their respective dividends. *Hartman v. Ins. Co.*, 32 Gratt. 242. See the title STOCK AND STOCKHOLDERS.

Compensation for Property Put in.

Personal Liability for Deficiency.—Four persons made an agreement to

form a joint stock company for the purpose of mining coal, all putting in jointly a tract of land to form the basis of the company, and two of them putting in another tract, and it was stipulated that these two were to receive, from the profits of the first coal marketed, compensation for the excess in value that they then put into the company. A charter was procured according to agreement, but before any profits were realized the lands were sold. It was held, that these two were entitled to receive such agreed compensation from the proceeds of the sale, if sufficient to pay them, but the remainder of the stockholders would not be personally liable to them for their relative proportions of such compensatory sum, unless they had actually received the proceeds of the sale of the lands, or the proceeds of the coal marketed. *Bainbridge v. Gehring*, 3 W. Va. 240.

CORPUS DELICTI.—See generally, the titles CONFESSIONS, ante, p. 96; CRIMINAL LAW. See also, the titles ARSON, vol. 1, p. 726; BURGLARY AND HOUSEBREAKING, vol. 2, p. 661; HOMICIDE; RAPE.

In *Goldman v. Com.*, 100 Va. 865, 42 S. E. 924, it is said: "It devolves upon the commonwealth to prove—First, the *corpus delicti* (that is, the fact that the crime charged has been actually perpetrated)." See also, *Nicholas' Case*, 91 Va. 750, 21 S. E. 364; *State v. Hall*, 31 W. Va. 505, 7 S. E. 423, 424.

Correspondence.

See references under LETTERS.

CORROBORATE.—In *Mills v. Com.*, 93 Va. 815, 22 S. E. 863, it is said: "The fourth instruction as asked for was in the following words: 'That the facts of the promise of marriage and the seduction can not be proved by the unsupported testimony of the said Berta Puryear, but there must be some independent evidence in addition to hers to support the said facts of the promise of marriage and the seduction.' The corporation court struck out the word 'independent,' and substituted the word *corroborating*, so as to make the latter clause of the instruction read: 'But there must be some *corroborating* evidence in addition to hers to support said facts of the promise of marriage and the seduction.' * * * The instruction under consideration, as given by the court, seems to us properly to expound the law. Indeed, the word 'independent' might have had a misleading influence upon the minds of the jury, and the word *corroborating* is the word apt and fitting and generally adopted by judges and law writers to indicate the confirmatory evidence required in this and like cases."

Corroboration.

Of accomplices, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 77. Of confessions, see the title CONFESSIONS, ante, p. 98. Of witnesses, see the title WITNESSES.

CORRUPT CONDUCT.—B., an election official, is indicted under Virginia Code, 1873, ch. 8, § 43, for acting unlawfully as such official. On motion to quash, held, though he may have acted unlawfully, it does not follow that he was guilty of **corrupt conduct**, for the punishment whereof that statute was intended, and the indictment is insufficient. *Boyd v. Commonwealth*, 77 Va. 52. See generally, the titles ELECTIONS; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; PUBLIC OFFICERS.

CORRUPTLY.—An indictment for perjury charged that the defendant did feloniously, willfully, and **corruptly** depose, swear and testify. It was held defective in that it omitted the word falsely. The court, quoting from Russell on Crimes, said: "A man might swear **corruptly** under some **corrupt** influence, and yet swear the truth." *Fitch v. Com.*, 92 Va. 835, 24 S. E. 272. See generally, the title PERJURY.

CO-SECURITIES.—In *Rosenbaum v. Goodman*, 78 Va. 127, it is said: "But the right of mutual contribution exists only amongst those who are **co-securities**—that is, sureties for the same thing, and bound for the discharge of the same duty, whether by the same or different instruments, at the same or different times, and with or without the knowledge of one another. *Harrison v. Lane*, 5 Leigh 414; *Stout v. Vause*, 1 Rob. 179." See also, the titles CONTRIBUTION AND EXONERATION, ante, p. 461; SURETYSHIP.

Co-Servants.

See the title FELLOW SERVANTS.

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CROSS REFERENCES.

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As to costs in particular actions or prosecutions, see appropriate titles.

I. In General.

Nature.—The general principle is that costs are considered as an appurtenance to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, as an increase of damages by the court. *M'Rea v. Brown*, 2 Munf. 46; *Ashworth v. Tramwell*, 102 Va. 852, 47 S. E. 11011, *Douglass v. McCoy*, 24 W. Va. 725.

It has been held, that costs are in the nature of a penalty. *Harvey v. Preston*, 3 Call 495.

Costs as Part of Fine.—Upon an indictment for assault the defendant was fined one dollar and costs, and he paid it to the clerk before execution issued, and directed him to apply it to the fine. It was held, that the costs were a part of the fine, and the prisoner being taken upon a *capias pro fine*, could only be released by paying the costs as well

as the fine; that the costs were necessarily incident to the fine, and as much a part of the judgment of the court as the fine. *Com. v. Fields*, 33 Gratt. 291. See also, *Com. v. Webster*, 8 Gratt. 702.

Interpretation of Laws Relating to Costs.—It is expressly provided by statute, that the laws of costs shall not be interpreted as penal laws. Va. Code (1887), § 3547; W. Va. Code (1899), ch. 138, § 10.

II. Right to and Liability for Costs.

A. IN CIVIL PROCEEDINGS.

1. Origin and Basis of Right and Liability.

The general rule is that unless a statute allows costs none can be given. Costs were not recoverable at common law. The amercement of the offending party being his only punishment. It is true that in actions in which dam-

ages were given the costs of the plaintiff were in reality considered and included in the quantum of damages, and thus, he indirectly recovered his costs or their equivalent. But he could not do this in actions in which no damages were given, and the defendant could not, in any case whatever, recover his costs, either directly or indirectly. It is by virtue of the statute law alone that any judgment for costs, *eo nomine*, can be rendered in favor of either party. They were first allowed, *eo nomine*, by the statute of Gloucester, 6 Edward I, to plaintiffs, and subsequently 23 Henry VIII, to the defendants, in like manner as the plaintiff would have had if he had recovered. 3 Blackstone Com. 399; 4 Minor's Ins. (3 Ed. 969); Gresham v. Ewell, 85 Va. 7, 6 S. E. 700; West v. Ferguson, 16 Gratt. 270; Roberts v. Paull, 50 W. Va. 531, 40 S. E. 470; Wilkinson v. Hoke, 39 W. Va. 403, 19 S. E. 520.

2. Allowance and Apportionment.

a. General Statutory Rule as to Recovery on Action or Motion.

Except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party; and when the action is against two or more, and there is a judgment for, or discontinuance as to some, but not all of the defendants, unless the court enter of record that there was reasonable cause for making defendants, those for whom there is such judgment, or as to whom there is such discontinuance (and order otherwise), they shall recover their costs. Va. Code, 1887, § 3545.

Ejectment.—A general judgment for costs against two defendants in ejectment is proper, though one of them had not entered himself defendant until there had been one trial of the cause, and a large portion of the costs had been incurred. Middleton v. Johns, 4

Gratt. 129. See generally, the title EJECTMENT.

b. As a Matter of Course.

The court of appeals has no discretion as to the costs of an appeal, but must allow them to the party substantially prevailing. And this is true, although in form, the decision be adverse to the party substantially prevailing. Cocke v. Pollok, 1 Hen. & M. 499; Ellzey v. Lane, 2 Hen. & M. 589; Allen v. Shriver, 81 Va. 174; Bryan v. Sal-yards, 3 Gratt. 188; Ashby v. Smith, 1 Rob. 55; Hylton v. Hunter, Wythe 195; Ashworth v. Thamwell, 102 Va. 852, 47 S. E. 1011; Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; Darby v. Gilligan, 37 W. Va. 59, 16 S. E. 507; Sprinkle v. Duty, 54 W. Va. 560, 46 S. E. 557; Anderson v. Snyder, 21 W. Va. 632; Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309; Va. Code (1887), par. 3548. See also, Adkins v. Edwards, 83 Va. 300, 2 S. E. 435.

c. As a Matter of Discretion.

(1) On Final Judgment.

See ante, "General Statutory Rule as to Recovery on Action or Motion," II. A, 2, a.

In General.—The general rule is that costs lie within the discretion of a court of equity, and are properly awarded to the party prevailing. This general rule has statutory sanction, the Virginia Code, 1887, § 3547, providing that nothing in ch. 173, Va. Code, 1887, a chapter treating costs generally, shall be construed as affecting the discretion of a court of equity over the subject of costs, except a provision that in other cases the party substantially prevailing in an appellate court shall recover costs. Hylton v. Hunter, Wythe 195; Adkins v. Edwards, 83 Va. 300, 2 S. E. 435; Dillard v. Dillard, 77 Va. 820. See also, W. Va. Code, 1899, ch. 138, § 10.

It is considered as the exercise of a sound discretion to forbid the imposition of costs, on a party nowise in the wrong, and the very fact that an appeal will not lie from the court of chan-

cery merely on the ground that the appellant has been improperly decreed to pay costs, renders the lower courts all the more careful in the exercise of the discretion given them on this subject, and in cases of doubt or great novelty the court will refuse to award costs to either party against the other, and not unfrequently the result is that each party is decreed to pay his own costs. *Farmers' Bank v. Reynolds*, 4 Rand. 188; *Pennington v. Hanby*, 4 Munf. 144; *Ashby v. Kiger*, 3 Rand. 165; *Jones v. Mason*, 5 Rand. 577; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. 435; *Beverley v. Brooke*, 4 Gratt. 187; *Zane v. Zane*, 6 Munf. 417; *Tabb v. Boyd*, 4 Call 461; *Jackson v. Cutright*, 5 Munf. 321; *Lewis v. Thornton*, 6 Munf. 98; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. Rep. 109; *Turner v. Turner*, 3 Munf. 66.

Bill Setting Up Lost Note.—In order to maintain a bill in equity setting up a lost negotiable note and praying a decree against the makers and indorsers of the debt, it seems that it is not necessary that the bond of indemnity should be tendered before suit is brought; still the question of costs in the case is for the court to determine according to equity. *Exchange Bank v. Morrall*, 16 W. Va. 546.

Limitation upon Jury's Discretion.—Under a statute it was expressly declared that in actions for assault and battery, if the jury should find under a certain sum, the plaintiff should not recover any costs. Construing this provision in *Bills v. Harris*, 2 Va. Cas. 26 (1815), the court held, that this act limited the discretion of the jury, and they had no right to give costs where the law said they should not be given.

(2) Interlocutory Proceeding.

No complaint can be made even by the party substantially prevailing, against nonallowance of costs upon an interlocutory decree, as upon final decree the question of costs can be properly adjusted. *Yost v. Porter*, 80 Va. 855.

And it is not error for a decree, not final, though adjudicating the principles of a cause, to reserve the question of costs for future adjudication, and to refuse costs to the party prevailing. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. 387.

d. Matters Affecting Allowance and Apportionment.

(1) Suit Brought in Wrong Name.

Where a suit is brought against the president and directors of a branch bank, it is held, to be such error as to bar recovery, but the defendants can not have judgment for costs. They can no more have judgment against the plaintiff, than he can have judgment against them. *Mason v. Farmers' Bank*, 12 Leigh 84.

(2) When Each Party Fails to Sustain Pretensions.

Where the plaintiff and defendant each set up pretensions greater than they sustain, though each succeed in part, each may be decreed to pay his own costs. *Beverley v. Brooks*, 4 Gratt. 187.

(3) Amount in Controversy.

Where two creditors by several judgments file separate bills in chancery, impeaching a conveyance of land by a debtor, as fraudulent, and the chancellor, on the motion of the plaintiff, consolidates the causes, but the final decree dismisses the bills respectively, and the plaintiffs respectively appeal, if the amount in controversy in one of the suits is insufficient to give the court jurisdiction, the appeal in that suit will be dismissed, but without costs. *Clairborne v. Gross*, 7 Leigh 331. See the title APPEAL AND ERROR, vol. 1, p. 418.

While it is error to decree interest on the aggregate of principal and interest from a time anterior to the rendition of a decree, which would require a decree to be corrected, yet where the difference is insufficient to give the court of appeals jurisdiction, the decree should be reversed, if there was no

other error, with costs to the appellee. *Lamb v. Cecil*, 25 W. Va. 288; *Bee v. Burdett*, 23 W. Va. 744; *Ross v. Gordon*, 2 Munf. 289.

(4) Tender and Offer to Confess Judgment.

Tender.—It seems that the effect of a tender in proper time is to relieve the debtor from subsequent interest and costs, if the money is unqualifiedly refused. *Cary v. Macon*, 4 Call 605; *Ross v. Austin*, 4 Hen. & M. 502; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812. See generally, the title TENDER.

Offer to Confess Judgment.—There is a statutory provision in West Virginia to the effect that a defendant may before trial make an offer to the plaintiff in writing, to confess judgment for property or a sum specified in such offer. If the plaintiff does not accept the offer, or give notice to defendant of his acceptance, and at the trial does not recover a more favorable judgment, the justice, in whose court this provision applies, shall adjudge the plaintiff to pay all costs of the action from the time of the offer. See statute for proceedings, W. Va. Code, 1899, ch. 50, § 113; *White v. Emblem*, 43 W. Va. 819, 28 S. E. 761; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244. See generally, the title CONFESSION OF JUDGMENTS, ante, p. 64.

(5) Set-Off or Counterclaim.

If a party resorts to equity to obtain discounts against a judgment at law, to which he is not justly entitled, claiming also other discounts, to which he is justly entitled, but which his creditors were willing to allow him, the costs should be decreed against him. *Tapp v. Beverly*, 1 Leigh 80. See generally, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Where an inferior court has erred in not allowing the defense of set-off on a forthcoming bond, and the judgment is reversed, on writ of error to the appellate court, and the cause remanded, the appellant (defendant below) will be

entitled to his costs expended in prosecuting the writs of supersedeas in the appellate court. *Allen v. Hart*, 18 Gratt. 722.

(6) Want of Jurisdiction.

Where a claimant, while in possession of property, pays off certain costs of suits purporting to be liens on the property, he will not be entitled to charge the owner with such costs, when it appears either in a direct or collateral suit or proceeding that the court which decreed costs to be paid had no jurisdiction to render such decree against either the owner or the property. *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260.

(7) Matters Affecting the Record.

Where Record Duplicated.—Where on one appeal, two copies of the record are sent to the appellate court, and docketed on the motion of the appellant, the appellant must pay the costs occasioned thereby to the appellee. *Harrison v. Lane*, 4 Munf. 495.

Inserting Impertinent or Immaterial Matter in Record.—If an appellant has copied into the record portions of the record in the court below, which are immaterial to the determination of the matter involved in the appeal, a court will as a general rule not vary its decree or judgment on that account or give any direction to the clerk in reference to taxing the costs in such a case, as the court as a general rule leaves it to counsel to determine what parts of the record of the court below should be copied. But if this privilege of counsel is so abused, that there is copied into the record presented to the appellate court a large amount of matter, which is obviously immaterial and can have no weight in determining the matters in controversy on the appeal, the court will correct such abuse by varying its decree or judgment or by giving instructions to the clerk as to the taxation of costs; and if the record has been so unnecessarily increased, the court in such an extreme case will at

the instance of the appellee apply a similar correction. *Spang v. Robinson*, 24 W. Va. 327.

If an answer contain impertinent or scandalous matter, it will be referred to a commissioner to expunge such matter, at the cost of the party filing the answer. *Mason v. Mason*, 4 Hen. & M. 414.

If a party have an account taken as to a subject, before decided by the court, in the same cause, so much of the report will be at his own cost. *Corbin v. Beverley*, 4 Hen. & M. 448.

(8) In Particular Actions or Proceedings.

(a) Personal Action Not on Contract.

In General.—The judge of a circuit court acts judicially in awarding or refusing costs under the West Virginia Code of 1899, ch. 138, § 6, providing that in any personal action not on contract, which might be brought and prosecuted to judgment in a justice's court, if a verdict be found for the plaintiff, on an issue or otherwise, for less damages than fifty dollars, he shall not recover, in respect to such verdict, any costs, unless the court enter of record that the object of the action was to try a right besides the mere right to recover damages for the trespass or grievance in respect of which the action was brought, or that the said trespass or grievance was willful or malicious. A writ of mandamus does not lie to control his discretion. *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

Assault and Battery.—In assault and battery, the jury found for the plaintiff, six cents and the costs. Held, that they had no right, under the statute, to find the costs. *Bills v. Harris*, 2 Va. Cas. 26. See also, the title ASSAULT AND BATTERY, vol. 1, pp. 729, 736.

(b) Attachment and Garnishment Proceedings.

In General.—If an attachment demands only a specified sum and costs,

not including interest, the court can not give judgment for interest. *George v. Blue*, 3 Call 455.

Attachment for Contempt.—Where a motion for an attachment for contempt in obstructing a decree was overruled, costs were taxed, including an attorney's fee. *Jones v. Jones*, 1 Hen. & M. 3.

(c) Creditors' Suit.

See the title CREDITORS' SUITS.

Right to Separate Costs.—Where several creditors have several claims against the same debtor, each plaintiff is entitled to a decree for his separate costs, though the causes were heard together. *Barger v. Buckland*, 28 Gratt. 850; *Umbarger v. Watts*, 25 Gratt. 167. See post, "Persons Suing for Use of Another," II, A, 2, d, (8), (s), (aa), (bbb).

Separate Suits.—A creditor, who with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay the costs. *Stephenson v. Taverners*, 9 Gratt. 398; *Kent v. Cloyd*, 30 Gratt. 555; *Laidley v. Kline*, 23 W. Va. 565; *Bilmyer v. Sherman*, 23 W. Va. 656.

(d) Interpleader.

Where a bill of interpleader was filed in the circuit court, and demurrer thereto overruled, and \$600 paid into the hands of the "receiver" of the court, and on appeal the demurrer to the bill was sustained, the appellate court on reversing the decree remanded the cause with instructions to order the money to be returned whence it came, and then to dismiss the bill with costs. *Hechmer v. Gilligan*, 28 W. Va. 750. See generally, the title INTERPLEADER.

Where a bill of interpleader was filed by a certain party against two others, in order that it might be litigated and determined between them which was entitled to a sum of money in his hands, and the bill was filed in consequence of a demand for the money made on him

by one of the parties to the litigation, and the court determined that the other party, at whose instance the bill was not filed, was entitled to the money in question, it was held, proper for the court to decree that the latter have his costs of the suit paid him by the one at whose instance the interpleader was filed. *Beers v. Spooner*, 9 Leigh 153.

(e) Motion to Quash Execution.

Variance from Amount Confessed.—

Where a judgment has been confessed for a certain sum, interest and costs, subject however to certain credits, and an execution issues thereon without endorsing the credits, the judgment debtors, after levy, giving notice to the judgment creditor that they would move to quash for variance, and the credits are endorsed after notice given of motion to quash, the judgment debtors are entitled to the costs of their motion. *Williamson v. Ong*, 1 W. Va. 84. See generally, the title EXECUTIONS.

(f) Forthcoming Bond.

Where judgment was obtained upon a note having two indorsers and an execution issued against the goods and chattels of the first indorser, whose representative executed a forthcoming bond as surety, such forthcoming bond being paid by a subsequent indorser, it was held, in a suit by the surety on the forthcoming bond against the payee of the note, that it was error to decree costs on the forthcoming bond where the subsequent indorser was trying to fix the liability on the prior indorser. *Conaway v. Odber*, 2 W. Va. 25. See generally, the title FORTHCOMING AND DELIVERY BONDS.

(g) Injunction Proceedings.

See generally, the title INJUNCTIONS.

To Prevent Collection of Debt.—A defendant who is properly enjoined from collecting a debt, though not from prosecuting it to judgment, is liable for costs of the injunction proceedings.

Shipman v. Fletcher, 95 Va. 585, 29 S. E. 325.

Judgment for Purchase Money Enjoined.—If a plaintiff properly comes into a court of equity to enjoin a judgment on account of defects in the title of the land for the purchase of which the debt was contracted, he is entitled, upon the removal of the objections, to have his costs. If, however, he has another case pending where the same questions are involved, and where he could have had the relief asked for, by a proceeding in that case, he will not be allowed his costs. *Young v. McClung*, 9 Gratt. 336.

A purchaser coming into equity to enjoin a judgment for the purchase money of land, though the title is afterwards perfected, is entitled to his costs. *Reeves v. Dickey*, 10 Gratt. 138.

Joint Devisee Improperly Restrained.

—Where a joint devisee has, at the instance of a tenant claiming under the other devisee, been improperly restrained by injunction from entering upon land, a court of equity, on motion, will dissolve the injunction and dismiss the bill, and decree costs against the tenant. *Baldwin v. Darst*, 3 Gratt. 132.

Perpetuation of Injunction.—As a general rule, if an injunction be perpetuated at the hearing as to any part of the sum enjoined, the complainant will recover his costs; but this is not always the case, as it is a matter resting in the sound discretion of the court under all of the circumstances. *DeGraffenreid v. Donald*, 2 Hen. & M. 10; *Ross v. Gordon*, 2 Munf. 289. See also, *Tuley v. Barton*, 79 Va. 387.

And the error of awarding costs in such case is sufficient, upon the complainant's appeal, to reverse the decree, though right in every other respect. *Ross v. Gordon*, 2 Munf. 289.

Where an injunction to a judgment at law is perpetuated as to part, being the amount of just discounts claimed by the plaintiff in equity, of which he might avail himself at law if he had made defense, and is dissolved as to

the residue, the chancellor decreeing that the plaintiff in equity shall pay the defendant there, his costs, such decree for costs is right. *Donally v. Ginnatt*, 5 Leigh 359.

Error in Perpetuating in Part.—When a decree, by which an injunction is made perpetual in part is considered erroneous (to the injury of the appellee), in not having made it perpetual in toto, the court of appeals will affirm so much as allows him his costs, in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in the appellate court. *Defarges v. Lipscomb*, 2 Munf. 451.

Dissolution.—Upon a bill against two persons, an assignor and assignee of a debt, for which judgment had been recovered at law against the plaintiff in equity, praying an injunction, the assignee appeared and answered that the assignor was not brought before the court by regular process. It turned out that the plaintiff had no just claim to relief against the assignee, but might have one against the assignor. The injunction was dissolved, and the bill dismissed, generally. Held, that the appellee (assignee) should have his costs in the appellate court. *Lockridge v. Sharrot*, 5 Leigh 376.

Upon the dissolution of an injunction it is not only proper, but it is required by § 12 of chapter 78 of the acts of 1882, that a personal decree should be rendered against the defendant for the judgment, interest, costs and damages at ten per cent, in lieu of interest while the judgment was enjoined. *Wamsley v. Currence*, 25 W. Va. 543, 544.

Where, upon a bill filed to enjoin a void judgment, the plaintiff is denied all relief for the reason that he has an adequate remedy at law, it is error to enter a personal decree against the plaintiff, for the amount of the judgment enjoined, upon the dissolution of the injunction. In such case, the only power possessed by the court is to dis-

solve the injunction, and dismiss the bill, with costs. *Kanawha, etc., R. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924.

(h) Proceedings Relating to Property.
(aa) For the Recovery of Specific Property.

Detinue.—If in detinue, a jury find for the plaintiff, the chattel, if to be had, or in lieu thereof a certain sum, the value of the chattel, and specified damages, it is not error for the court to render judgment for the chattel, if to be had, and if not, the price found by the jury, with the damages and costs, even though no price or value had been laid in the declaration. *Bates v. Gordon*, 3 Call 555. See generally, the title DETINUE AND REPLEVIN.

Unlawful Entry and Detainer.—If the verdict of the jury, or the finding of the justice, when a case of unlawful detainer is tried without a jury, be that the defendant unlawfully withholds the premises in controversy, or any part thereof, from the plaintiff, judgment shall be for the plaintiff that he do recover possession, and his costs. *W. Va. Code*, 1899, § 215, ch. 50; *Mann v. Bryant*, 12 W. Va. 516; *Lawson v. Dalton*, 18 W. Va. 766. See generally, the title FORCIBLE ENTRY AND DETAINER.

Writ of Right.—Where a defendant is permitted to abandon the controversy in a real action by a simple entry of disclaimer on the record book, after the plea of not guilty has been put in, no judgment for costs subsequently incurred should be given against him. *Fisher v. Camp*, 26 W. Va. 576.

Ejectment.—Where a defendant knowingly brings ejectment in the name of a deceased demandant, he is liable for costs. *Howard v. Rawson*, 2 Leigh 733. See generally, the title EJECTMENT.

A landlord, who is entitled to be substituted in the place of or joined with the defendant in ejectment, and without causing himself to be made a

party, defends such action unsuccessfully in the name of the original defendant, will be ordered to pay the costs of the plaintiff, after execution against the defendant, on the record, has been returned unsatisfied. *Johnston v. Mann*, 21 W. Va. 15.

A general judgment for costs against two defendants in ejectment is proper, though one of them did not enter himself a defendant until there had been one trial of the cause, and a large portion of the costs had been incurred. *Middleton v. Johns*, 4 Gratt. 129.

(bb) Defending Title.

See generally, the title **VENDOR AND PURCHASER**.

Where a vendee purchases land on credit, takes possession, and a deed is made to him, with covenants by vendor to sell and convey a perfect title, and vendee subsequently defends a claim by a third party to the land, the litigation extending over many years, and resulting in a confirmation of the vendee's title, the vendee is not entitled to have his costs of defending such suit set off against the interest due on the purchase money. The vendor's covenants are complied with on confirmation of the title. *Selden v. James*, 6 Rand. 465.

Though a sale of land be made with covenant of general warranty, yet the purchaser can not claim against the vendor for costs expended by the purchaser in defense of a suit by an adverse claimant of the land, which suit resulted in favor of the purchaser, and the title which he acquired by his purchase. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68.

Land was sold by executory contract in 1848, and conveyed absolutely in 1850, the vendee executing an obligation to pay a debt due for the purchase money on the land from vendor, and to sell the land and pay the vendor "one-third of the proceeds of such land and the realization from any sale or sales thereof." The lands were not

sold for thirty-four years. Held, that the costs of the suit brought by the vendee to claim the title, resulting in sustaining the title, were not to be charged to the vendor to any extent, especially as it did not appear that the adverse claim existed at the date of the sale, or was one for which the vendor, and not the vendee, was responsible. *Caperton v. Caperton*, 36 W. Va. 479, 15 S. E. 257.

(cc) Proceedings to Sell.

Where a vendee of land obtains an injunction to stay the sale thereof under a deed of trust securing a residue of unpaid purchase money thereon, and at the date of the deed therefor to the vendee the vendor's title to a portion of the land is defective, and the vendor after the injunction is granted procures a deed of release from a third party for such portion, an order granting the injunction is proper until the title is settled, but the procuring and having recorded a deed of release by the vendor is a sufficient settlement of the title to allow the vendor to proceed to collect the unpaid purchase money by a sale of the land, and an order dissolving the injunction after such release is right, but upon further proceedings in the court below the vendee ought to recover his costs there. *Lovell v. Chil-ton*, 2 W. Va. 410.

Land was sold by executory contract in 1848, and conveyed absolutely in 1850, the vendee executing an obligation to pay a debt due for the purchase money on the land from vendor, and to sell the land and pay the vendor "one-third of the proceeds of such land and the realization from any sale or sales thereof." The lands were not sold for thirty years. Held, that the costs of a suit brought by the vendee's administrator against his heirs and creditors to settle his estate and sell his lands, among them the land included in the executory contract, to pay his debts, were not to be charged to the vendor to any extent. *Caperton v. Caperton*, 36 W. Va. 479, 15 S. E. 257.

Land was sold and conveyed, and a bond given by the vendors with condition to perfect the title. Subsequently a bill was filed by the vendors to subject the land to sale for payment of the purchase money, and the vendee answered, and objected that title had not been perfected. The cause lingered for some years, partly by fault of vendee. Subsequent events made a sale proper, although a sale was improper at the time of the institution of the suit. Held, that as the vendee was not in default when the suit was commenced, he was entitled to have a decree for his costs. *Peers v. Barnett*, 12 Gratt. 410.

A court of equity has no power to decree a sale of infant's lands for the payment of debts incurred for necessities, and upon a bill to subject an infant's real estate for such debts, the bill will be dismissed with costs to appellant. *Gayle v. Hayes*, 79 Va. 542.

(dd) Suit for Conveyance of Legal Title.

See generally, the title **VENDOR AND PURCHASER**.

Where a person has the equitable title to lands, mortgages it, and afterwards sues for a conveyance of the legal title to the lands, the heirs of the vendor, retaining the legal title to the land, ought not to be compelled to pay costs. *Pennington v. Hanby*, 4 Munf. 140.

(ee) False Claim of Title.

Where a court is satisfied, and so declares by its decree, that certain parties "have no title or color of title" to certain tracts of land, the land not being embraced in a trust deed under which they purchased, such parties having litigated their pretensions in that respect by their answers to the plaintiff's bill, the court should decree costs against them. *Tracy v. Tracy*, 14 W. Va. 243.

(i) Proceeding Relating to Personal Status.

Divorce Suits.—In divorce suits costs

may be awarded to either party, as equity and justice may require. *W. Va. Code*, 1899, ch. 64, § 8; *Hitchcox v. Hitchcox*, 2 W. Va. 435. See the title **DIVORCE**.

It is proper for a decree in favor of a husband, granting a divorce a mensa et thoro from the wife, to provide that he shall pay the costs of the suit, where he had been rude and dictatorial in his speech, unkind and negligent in his treatment, and there is no other act of misconduct upon her part than desertion not upon legal grounds. *Carr v. Carr*, 22 Gratt. 168.

Where a wife by deed for an adequate consideration releases all her claims for alimony, against her husband, such deed does not preclude her from asking the court to decree her all costs and expenses in a suit for divorce against her by her husband, where such suit has failed. *Engleman v. Engleman*, 97 Va. 487, 34 S. E. 50.

(j) Suits Relating to Contracts.

Specific Performance.—Where a party is not bound to take the title to property until the existence and validity of a certain conveyance has been judicially ascertained, the burden of establishing these facts devolving on the vendor, the vendor is liable for the costs of a suit brought to enforce specifically a contract to pay for the property when a lawful title is conveyed. *Wade v. Greenwood*, 2 Rob. 474. See generally, the title **SPECIFIC PERFORMANCE**.

(k) Proceedings Relating to Judgments.

See the title **JUDGMENTS AND DECREES**.

To Relieve against.—On a bill to be relieved against a judgment at law, if the relief is granted in part only, the defendant is entitled to his costs at law, and must pay the costs in equity. *Thompson v. Davenport*, 1 Wash. 125; *Pugh v. Jones*, 6 Leigh 299.

A complainant whose remedy was complete at common law, but who by

accident was prevented from making defense there, may be relieved against the judgment, but ought to pay the costs in chancery. *Degraffenreid v. Donald*, 2 Hen. & M. 10; *Mosby v. Haskins*, 4 Hen. & M. 427.

Motion to Quash Execution for Variance.—O. and M. confessed a judgment in favor of W. for five hundred dollars, interest and costs, subject, however, to sundry credits. Execution was issued thereon without indorsing the credits. After a levy had been made, O. and M. gave notice to W. that they would move to quash the execution because no credits were indorsed, and hence it was a variance from the judgment. Previous to any sale by the sheriff under the levy, the clerk who issued the execution indorsed the credits on it, and they were allowed to O. and M., by the sheriff, in the sale of the property and settlement of the execution. But the credits having been indorsed after notice given by O. and M. of motion to quash, it was held, that they were entitled to the costs of their motion. *Williamson v. Ong*, 1 W. Va. 84.

Proceedings to Reverse or Correct.—As to the recovery of costs on motion to reverse or correct a judgment, see Va. Code, 1887, § 3451; *Erwin v. Vint*, 6 Munf. 267; *Davis v. Com.*, 16 Gratt. 134; *Richardson v. Jones*, 12 Gratt. 53.

To Enjoin Defective Judgment.—Though a plaintiff coming properly into court to enjoin a judgment on account of defects in the title of the land for the purchase of which the debt was contracted, is entitled, upon the removal of the objections, to have the injunction dissolved without damages, and to have his costs; yet if he had another case depending where the same questions were pending, and where he could have had the relief asked for, by petition or supplemental bill, he will not be allowed his costs. *Young v. McClung*, 9 Gratt. 336.

(1) Relating to Wills.

Where a paper purporting to be a will is offered for probate by the nominated executor, and its probate is opposed by some of the next of kin, the costs should be paid out of the estate. *Roy v. Roy*, 16 Gratt. 418. See the title WILLS.

(m) Arbitration Proceedings.

Where the court makes a reference, in a suit pending, to arbitrators, the court may give costs, although the award by the arbitrators does not mention them. *Coupland v. Anderson*, 2 Call 106. See the title ARBITRATION AND AWARD, vol. 1, p. 687.

(n) Discovery.

Where to a bill calling for discovery and alleging fraud, there is a responsive answer positively denying the allegations, and they are unsustained by evidence at the hearing, the bill must, of course, be dismissed with costs. *Saunders v. James*, 85 Va. 936, 9 S. E. 147. See the title DISCOVERY.

Where a party files a bill in equity for the discovery of certain facts, and the evidence shows that he knew the facts at the time, or had the means of knowing them, and such call for discovery is the only ground of equity jurisdiction, the bill should be dismissed, with costs. *Hale v. Clarkson*, 23 Gratt. 42. See also, *Bryan v. Lofftus*, 1 Rob. 21.

(o) Proceedings for Accounting.

On a mortgagor's bill for an account of profits, and a conveyance of the mortgaged premises, if he still be indebted on the mortgage, his equity of redemption should be allowed him, but the costs of the suit should be decreed against him. *Turner v. Turner*, 3 Munf. 66. See the title ACCOUNTS AND ACCOUNTING, vol. 1, pp. 82, 100.

(p) Election Contests.

See the title ELECTIONS.

Contested Elections—No Authority to Award Costs.—In cases of contested

elections before the county court, under § 160 Va. Code, 1887, the county court has no authority to give a judgment for costs to either party. *West v. Ferguson*, 16 Gratt. 270. And if in such a case the county court does give a judgment for costs to either party, a writ of prohibition from the circuit court is a proper proceeding to arrest the judgment. *West v. Ferguson*, 16 Gratt. 270. See the title ELECTIONS.

(q) Application for Establishment of Road.

It is error in the county court to direct all costs of an applicant for a road established, to be provided for and paid out of the county levy; his costs, except the costs of the inquest, should be recovered against the contestant. *White v. Coleman*, 6 Gratt. 138.

(r) Partition.

See the title PARTITION.

In a suit for partition, where no sale is necessary and none is made for the purpose of partition, the court is without jurisdiction to sell the land assigned to one of the parties to satisfy his share of the costs of partition. The judgment for such costs would probably be a preferred lien on the land, but would have to be enforced like other judgment liens by a bill in equity. If such a decree could be held to bind the parties to the suit, it certainly would not bind a third party, claiming an interest in the land, who was not a party to the suit, and had no notice of the proceedings. After the purposes of the suit have been accomplished and costs decreed, the suit is ended. *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661, 662, 49 S. E. 984.

(s) Proceedings by or against Particular Parties.

(aa) Persons Acting in a Representative Capacity.

(aaa) Fiduciaries.

(aaaa) Executors and Administrators.

Issue for Administrator on Plea of Fully Administered.—Where an administrator defendant pleads the single

plea of "fully administered," and the issue is found for him, the plaintiff ought to have judgment for the debt and costs, when assets, etc., and the defendant is entitled to a judgment against the plaintiff for the general costs of the action. *Timberlake v. Benson*, 2 Va. Cas. 348. See the title EXECUTORS AND ADMINISTRATORS.

Statutory Rule as to Personal Liability.—As to when a judgment or decree for the costs of any proceedings shall be rendered against the representative personally, see Va. Code, 1887, § 2677.

Costs in Defending Demands against Estate.—An administrator is allowed his legal costs and reasonable counsel fees expended in defending a litigable demand against the estate, whether in the circuit or appellate court, if he acted in good faith in making such defense. *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476.

Action by Executor against Estate.—

Where an executor declares on an assumpsit to himself for transactions subsequent to the death of the testator, the judgment for costs should be against the executor, "to be levied of the goods and chattels of the testator in his hands, to be administered, if so much thereof he hath; but if not, then to be levied of his own proper goods and chattels." *Carr v. Anderson*, 2 Hen. & M. 361; *Thornton v. Jett*, 1 Wash. 138.

Legatee against Executor.—Pending a suit in chancery by legatees against an executor to recover for legacies, the executor died. Process was awarded to revive the suit against the administrator; and the administrator dying, process was issued and an order entered to revive the suit against his representative. But afterwards that process was quashed and that order set aside; and then, by consent of parties, the suit was revived against the administrator de bonis non of the executor,

and by like consent it was entered that the cause was not to abate by the death of any of the parties. A personal decree was subsequently obtained by the legatees against the administrator *de bonis non*, from which he appealed. Pending the appeal he died. Whereupon though the two former grants of administration on the executor's estate had been by the court of Orange, the court of Hanover granted administration on the same estate; not in the form of a grant *de bonis non*, but of an original grant. At the instance of the legatees, a *scire facias* issued to revive the appeal against this new administrator (calling him administrator *de bonis non*) which was duly executed, and the later decree was affirmed. In the caption to the decree of affirmance, the name of the administrator *de bonis non* against whom the decree of the court below was entered, did not appear as a party, but the new administrator was mentioned therein as appellant. Afterwards a bill of revivor and supplement was filed in the court below, convening before the court, and seeking to charge the representatives of the first administrator and of the first administrator *de bonis non*. On dismissing the bill as to the representatives of the first administrator and of the administrator *de bonis non*, it was held, that it should be done without costs. *Burnley v. Duke*, 2 Rob. 102.

Withdrawal of Replication to Plea of Fully Administered.—If a plaintiff having replied to the plea of "fully administered," afterwards withdraws his replication by consent of the court, the defendant may at that time object to it, unless on the terms of the plaintiff's paying the costs occasioned by the replication. If he neglects to do so, it will be construed to be an admission that he is not entitled to recover such costs, and there can be no judgment at any future term for the separate costs on account thereof, if the issue of non-assumpsit is found against him. *Timberlake v. Benson*, 2 Va. Cas. 348.

Plea of Nonassumpsit and Fully Administered Filed.—Where the defendant administrator pleads nonassumpsit and "fully administered," and the first is found for the plaintiff and the second for the defendant, the judgment ought to be for the plaintiff for the debt and costs, to be levied on the goods of the estate, *quando acciderint*, but for the defendant for the separate costs of the second issue. *Timberlake v. Benson*, 2 Va. Cas. 348.

Suit for Distribution Prior to Receiving Assets.—Where a suit was brought against an administrator for distribution before any assets came into his hands and, during the progress of the cause, the administrator received assets of the estate, it was held, that though the plaintiff was entitled to a decree for the assets, the administrator was not chargeable with the costs of the suit, as he had been guilty of no default. *Eidson v. Fontaine*, 9 Gratt. 286.

Effect of Duration of Litigation.—When administrators, after many years of litigation, conducted chiefly at their own expense, recover a large sum of money and costs, they should not be debited with the amount of the costs so recovered. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

Affirmance of Judgment on Appeal.—Where an executor appeals, the damages, on affirmance of the judgment, as well as the costs in the appellate court, ought to be entered, "to be levied of the goods, etc., of the testator in the hands of the executor, if so much he hath; if not, then of his own proper goods." *Hawkins v. Berkley*, 1 Wash. 204. See Va. Code, 1887, § 2677.

Probate of Will.—If a person named executor in a paper purporting to be a will, offers it for probate in the district court, and it is there established, but the judgment is reversed by the court of appeals, the executor does not pay the costs in the district court. *Spencer v. Moore*, 4 Call 423.

(bbbb) Trustees.**Equity Discretion in Awarding Costs.**

—In suits by and against trustees, a court of equity has wide discretion in awarding costs. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

Legatee against Trustee.—Where a testatrix bequeathed certain property to her daughter for life, for her separate use, remainder to daughter's children and descendants, and appointed a trustee, to whom her executor was to deliver the property, and directed that any receipts given by the daughter of the trustee, for either principal or interest, should be a full discharge to him, a decree of the lower court sustaining legatee's claim of principal as against the trustee was affirmed by the court of appeals, with costs to be paid out of the estate. *Brown v. George*, 6 Gratt. 424.

Suits between Trustee and Cestui Que Trust Relating to Trust Funds—General Rule as to Costs.—In the case of suits between the cestui que trust and the trustees in relation to the trust fund, the general rule that guides, rather than governs, a court of equity is, that the trustees shall have their costs either out of the trust fund, or from the cestui que trust personally, who may be found to be in fault, and this rule applies whether the trustees be plaintiffs or defendants. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

Default as Affecting.—Wherever a trustee is free from fault he should not pay costs, but where he is not he should. *Sorrell v. Procter*, 4 Hen. & M. 431, citing *Barr v. Barr*, 2 Hen. & M. 26.

Personal Liability.—Where there were two conflicting trusts and the fund was decreed to one to the exclusion of the other, the excluded trustee resisting the plaintiff's claim, and failing in his defense, was decreed to pay the costs de bonis propriis, especially as he was also a cestui que trust deeply interested in and chiefly conducting the

controversy. *Beverley v. Brooke*, 4 Gratt. 187.

A trustee defendant, resisting the plaintiff's claim, and failing in his defense, will not be permitted to charge against the fund, money expended in attorney's fees, unless it appears that such defense was reasonable and proper. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

Appeal from Decree Construing Trust.—Where a trustee appealed from a decree construing the trust and allowing costs to be paid out of the trust fund, and, on appeal, the decree was affirmed, it was affirmed with costs. *Brown v. George*, 6 Gratt. 424.

(cccc) Next Friend.

Personal Liability.—The general doctrine is that the *prochein ami* is liable to pay the costs of the suit. *Burwell v. Corbin*, 1 Rand. 131.

When Prochein Ami and Feme Liable to Appellant.—A suit being brought in the name of a feme by her next friend, and a decree in her favor being reversed, and the bill as to the appellant ordered to be dismissed, the appellant will recover his costs, both in the appellate court and the court below, as well against the next friend as against the feme. *Spencer v. Ford*, 1 Rob. 648.

(dddd) Guardian Ad Litem.

A court may compel a person so appointed, to act as guardian ad litem, but he shall not be liable for costs of the suit. See Va. Code, 1887, § 3255. See the title INFANTS.

The object of § 24, ch. 50, W. Va. Code, 1899, requiring the appointment of a guardian ad litem for an infant plaintiff before bringing suit and taking consent in writing of such guardian to accept such appointment, and to be responsible for costs if the action fail, is to protect the defendant in the matter of costs, that he may have some responsible person to look to in case he succeeds in his defense. *Blair v.*

Henderson, 49 W. Va. 282, 38 S. E. 552.

(bbb) Persons Suing for Use of Another.

In General.—When suit is in the name of one person for the benefit of any other, if there be a judgment for the defendant's costs, it shall be against such other. Va. Code, 1887, § 3546; W. Va. Code, 1899, ch. 138, § 9.

This was held to be proper even before the statute. *Pates v. St. Clair*, 11 Gratt. 22.

Name Need Not Appear on Record.

—Whether the fact be endorsed upon the declaration or writ, or not, if the fact appears of record, the party for whose use the suit is, though brought in another name, is liable for the costs of the suit. *Hayes v. Mutual Prot. Ass'n*, 76 Va. 225; *Johnston v. Mann*, 21 W. Va. 15.

When a suit is in the name of one person for the benefit of any other, if there be judgment for the defendant's costs, it shall be against such other person for whose benefit the suit was brought. Va. Code, 1887, § 3546; *Pates v. St. Clair*, 11 Gratt. 22; *Morgan v. Hale*, 12 W. Va. 713.

(bb) Sureties.

Creditors' Bills—General Rule as to Liability for Costs.—As a general rule, when one creditor, suing for himself and others, who may come in and contribute to the expenses of the suit, institutes proceedings for their common benefit, those who derive a benefit shall bear their proportion of the expense and not throw the whole burden on one. But it only applies to those creditors who derive a benefit from the services of counsel in a cause in which they are not specially represented by counsel. If a creditor has his counsel in the cause he can not be required to contribute to the compensation of others. And this contribution must come from the creditors, as the debtor can not be charged with it. *Stovall v. Hardy*, special court of appeals of Vir-

ginia, reported in Va. Law Journal, 1879, p. 109; *Citizens' Nat. Bank v. Manoni*, 76 Va. 802; *Gurnee v. Bausemer*, 80 Va. 867. See ante, "Creditors' Suits," II, A, 2, d, (8), (c). And see the title CREDITORS' SUITS.

In General.—A surety is not entitled to recover from his principal a greater amount than he has paid for him, but he is entitled to interest on that amount from the date of its payment, and necessary costs. *Feamster v. Withrow*, 12 W. Va. 611, 612. See the title SURETYSHIP.

Subrogation to Rights of Judgment

Creditor.—Where a security on an appeal bond was subrogated to the rights of a judgment creditor, and had the benefit of his lien, it was held, that the lien included the costs recovered by the original judgment, also costs to which the judgment creditor became entitled by the judgment of affirmance. *McClung v. Beirne*, 10 Leigh 394.

Supersedeas—Quashed by Appellate

Court.—Where a surety recovers several judgments for debt against a principal in the county court, and at the instance of the principal the circuit court awards one supersedeas to the several judgments, and reverses them by a single judgment, and to this judgment, the court of appeals, at the instance of the surety, awards a supersedeas, and reverses the judgment of the circuit court, ordering the supersedeas awarded by the circuit court to be quashed as improvidently awarded, the surety is entitled to his costs in the circuit court as well as in the court of appeals. *Ayres v. Lewellin*, 3 Leigh 609.

Liability of Surety for Costs Accruing on Appeal.—The surety on a bond for the prosecution of an injunction is not liable for the costs and damages which may accrue on an appeal to a superior court. *Woodson v. Johns*, 3 Munf. 230.

Several Motions for Several Debts.—

A surety having paid several sums of

money for his principal, may maintain several motions, and recover several judgments, for the debts, and for the costs of each motion. *Ayres v. Lewellin*, 3 Leigh 609.

Forthcoming Bond—Recovery of Costs against Principal in Original Bond.—A surety in a forthcoming bond, is not entitled to a decree for the costs of awarding the execution on the forthcoming bond, either against the principal in an original bond, or his sureties, but only against the principal in the forthcoming bond. This principle was laid down upon the following facts: The principal of a bond became insolvent. Judgment was obtained against one of several sureties, and execution levied on his property. This surety then executed a forthcoming bond, having as his surety upon the latter bond one of the sureties upon the original bond, against whom no judgment had been obtained. The bond was forfeited, and the surety in the forthcoming bond paid it, with interest, costs, etc. *Preston v. Preston*, 4 Gratt. 88.

(cc) Proceedings for Removal of Officer.

Costs are not recoverable in a proceeding in a circuit court to remove an officer under § 7, ch. 7, W. Va. Code, 1899. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470.

(dd) By Vendee against Vendor.

The omission by the purchaser of goods to give notice to his vendor of a suit pending, brought against the purchaser by the real owner of the goods, will prevent a recovery by the purchaser of costs of that suit, in a subsequent action against his vendor. *Byrnside v. Burdett*, 15 W. Va. 702.

(ee) Paupers.

Poor persons are allowed services from counsel and officers without fees or costs. Va. Code, 1887, § 3538; W. Va. Code, 1899, ch. 138, § 1.

(ff) Taxpayers.

It was formerly held, that a citizen

was entitled to make himself a party to proceedings in the county and circuit courts to oppose the granting of a liquor license. In such case such citizen renders himself liable for costs, and may recover costs as in other cases. *Leigton v. Maury*, 76 Va. 865.

(gg) Nominal Party.

In a suit by or against a wife regarding her separate estate, if the husband is joined only for conformity, he is not bound to pay the costs. *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132; *Hayes v. Va. Mut. Prot. Ass'n*, 76 Va. 225; *Farley v. Tillar*, 81 Va. 275.

(hh) Against Deputy by Principal for Default.

A sheriff, against whom a judgment is rendered for the default or misconduct of his deputy, is entitled to recover of such deputy, not only the amount of the original judgment, but all additions arising thereto from coroner's commissions, included in a forthcoming bond, costs of a judgment on that bond, costs and damages on appeal, or arrest of supersedeas, until its final affirmance by the court of appeals. But a judgment against the deputy, in the sheriff's favor, if rendered for more damages than have been recovered against the sheriff, ought to be reversed with costs. *Stowers v. Smith*, 5 Munf. 401.

(t) Dismissal.

At Instance of Plaintiff.—A plaintiff may, in general, obtain an order to dismiss his own bill, with costs, as a matter of course; and, such dismissal on such motion of plaintiff having been entered, a motion by a defendant, made at the same term, to set aside such order, does not of itself have such effect, neither does it have the effect to suspend the operation of such order. It can not be rescinded or suspended by any such indirect method. *Glascock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102.

Fraud on Jurisdiction.—If a plaintiff, in order to give jurisdiction to the

court, in a case where defendants live in another county, unites in the action, a party whom he knows is not a party to the contract, the court will on motion dismiss the suit with costs. *Bush v. Campbell*, 26 Gratt. 403.

Bill for Injunction Dismissed after Full Hearing.—In all cases where a bill is merely for an injunction, and there is but a single defendant, if there is a decree dissolving the injunction, and that decree is made not on a mere motion to dissolve, but after the cause has been set down for a full and regular hearing, the case is not then to be retained for any further proceedings, but the bill will thereupon be dismissed with costs. *Rowton v. Rowton*, 1 Hen. & M. 110; *Byrne v. Lyle*, 1 Hen. & M. 7.

Bill Denied as to All Material Averments.—An attachment in equity was issued out for a claim for damages, and a bill filed averring a breach of warranty in a sale, whereby the plaintiff was damaged, and also alleging fraud and insolvency. The defendant appeared and demurred to the bill, and moved to abate the attachment, and answered denying every material allegation in the bill. Held, that though the demurrer should be properly overruled, yet, notwithstanding the motion to abate the attachment might not be properly sustainable, the bill being denied as to all its material averments, should be dismissed with costs to the defendant. *Boyce v. McCaw*, 76 Va. 740.

(u) On Orders and in Proceedings before and after Verdict or Judgment.

Amendment.—After a special demurrer to a bill, the plaintiff may have leave to amend, on payment of costs. *Rose v. King*, 4 Hen. & M. 475.

The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant, or after such appearance if substantial justice will be promoted thereby. But if such amendment be made after the ap-

pearance of the defendant, the court may impose such terms upon the plaintiff as to a continuance of the cause, and the payment of the costs of such continuance, as it may deem just. The plaintiff may also at any time before or after the appearance of the defendant, in the vacation of the court wherein the suit is pending, file in the clerk's office, with the other papers in the cause, an amended declaration or bill, supplemental bill, or bill of revivor; whereupon the clerk shall issue a summons against the defendant, requiring him to plead to, or answer such amended declaration or bill. But if the court shall be of opinion that the same was improperly filed, it shall dismiss such declarations or bill at the costs of the plaintiff. *W. Va. Code*, 1899, ch. 125, § 12; *Baylor v. Baltimore*, etc., *R. Co.*, 9 W. Va. 270; *Henry v. Davis*, 13 W. Va. 230; *Harmison v. Loneberger*, 11 W. Va. 175; *Norris v. Lemen*, 28 W. Va. 336; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Hinton v. Ellis*, 27 W. Va. 422.

Proceedings for Correction of Clerical Errors.—The clerk of the court having made an error in entering a judgment, which error is merely clerical, and amendable upon motion, at a subsequent term, the injured party may, if he pleases, proceed by writ of error coram nobis, although, in such proceeding, he is not entitled to costs. *Gordon v. Frazier*, 2 Wash. 130.

(v) Bill of Review.

Where a bill of review to a final decree confirming the accounts of a trustee is dismissed on the trustee's motion, he will not be allowed to open the final decree, so as to obtain compensation for the cost of employing counsel. *Guggenheimer v. Rogers*, 95 Va. 711, 29 S. E. 874.

A plaintiff having been compelled to resort to a bill of review for the purpose of relieving himself from an error of the original decree, should recover his costs. *Moores v. White*, 3 Gratt. 139.

(w) In Appellate Proceedings.**(aa) On Appeal.****(aaa) In General.**

In every case in appellate court, costs shall be recovered in such court by the party substantially prevailing. Va. Code, 1887, § 3548; W. Va. Code, 1899, ch. 138, § 11; *Handly v. Snodgrass*, 9 Leigh 484; *Heffner v. Miller*, 2 Munf. 43; *Cunningham v. Patteson*, 3 Rand. 66; *Armstrong v. Pitts*, 13 Gratt. 235; *George v. Richardson*, Gilmer 230; *Harman v. Odell*, 6 Gratt. 207; *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 38; *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507; *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135. See ante, "As a Matter of Course," II, A, 2, b.

(bbb) Settlement Pending Appeal.

As a general rule, if the matter in controversy in the suit be settled, pending an appeal or writ of error, a court will simply dismiss the appeal or writ of error without deciding the merits merely to determine as to the costs, and will therefore not pass on the costs. *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 38.

(ccc) Dependent on Jurisdiction.

Where a party brings a suit in equity which can not be entertained for want of jurisdiction, and permits such a decree to be entered, without objection, as would bar another suit for the same matter, he is not entitled to costs in the appellate court upon a reversal of the decree. In such case, he is not the party substantially prevailing in the true sense of the term. *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135.

(ddd) Dependent on Outcome or Disposition.**(aaaa) On Affirmance.**

General Rule as Respecting Costs.—Except in case of palpable error, the court of appeals upon affirming a decree on its merits, will not reverse it with respect to the costs. *Wimbish v. Blanks*, 76 Va. 365.

Vendee Appellant—Decree for Resale—Appeal.—Where a purchaser resisted

a decree for a resale of land, and took an appeal from a former decree in the cause, such decree being affirmed, it was held, proper to subject him to the payment of the costs of the proceedings under the rule. *Jones v. Tatum*, 19 Gratt. 720.

Correction of Mistake in Decree and Affirmance.—A commissioner having by mistake omitted a credit in ascertaining the amount due upon a bond, the appellate court will correct the decree in this respect, and affirm it with costs. *Tazewell v. Saunders*, 13 Gratt. 354.

Refunding Bond—Omission to Require.—Where it is apparent that the omission in a decree, in favor of a legatee against an executor, to require a refunding bond was not intentional, but resulted entirely from inadvertance, an appellate court, if the decree be right in other respects, will affirm it so far as it has gone, with costs to the appellee, as the party substantially prevailing. *Handly v. Snodgrass*, 9 Leigh 484; *Heffner v. Miller*, 2 Munf. 43.

Affirmance as to Appellant, Reversal as to Third Party.—Where a judgment of the court below in favor of the appellee is affirmed so far as it affects the appellant, although the appellate court reverses so much of the judgment as affects a third party who has not appealed, costs will be given to the appellee as the party substantially prevailing. *Harman v. Odell*, 6 Gratt. 207.

(bbbb) On Dismissal or Reversal of Appeal.

In General.—If the judgment below be in part favorable to the appellant and it is reversed as to that part on appeal, the appellant shall pay the costs of the appeal. *Pendleton v. Vandevier*, 1 Wash. 381.

Appeal from Interlocutory Decree.—On an appeal from an interlocutory decree, correct on the merits, but erroneous for want of proper parties, the court will reverse the decree, but allow the appellees to recover costs as the

parties substantially prevailing, because an appeal from an interlocutory decree, is only given to prevent the payment of money or change of property, or to settle principles. *Cunningham v. Patteson*, 3 Rand. 66; *Handly v. Snodgrass*, 9 Leigh 484; *Armstrong v. Pitts*, 13 Gratt. 235.

Reversal of Decree Injurious to Appellee.—On reversing a decree because injurious to the appellee, costs will be allowed if he substantially prevails. *George v. Richardson*, Gilmer 230.

A decree, though erroneous, will not be disturbed at the instance of an appellant not prejudiced thereby. But if it prejudices the appellees, at their instance the appellate court will reverse the decree at the appellant's costs. *Little v. Bowen*, 76 Va. 724.

When Costs Decreed in Favor of Appellee.—Although a cause be reversed, it sometimes happens that costs are decreed in favor of the appellee. This is the result when the decree is affirmed, the appeal dismissed, or the cause remanded to the lower court after being affirmed. *Kent v. Matthews*, 12 Leigh 573; *Strother v. Hull*, 23 Gratt. 652; *Williamson v. Howard*, 2 Rob. 39; *Harman v. Odell*, 6 Gratt. 207; *Handey v. Snodgrass*, 9 Leigh 484; *Boyce v. Smith*, 9 Gratt. 704; *Blessing v. Beatty*, 1 Rob. 287; *Marks v. Hill*, 15 Gratt. 400.

Co-Appellees — Apportionment of Costs.—The court of appeals in reversing a decree, there being three appellees, one of whom gets by the decision in the appellate court what was sought by his bill and denied by the court below, and another of whom prevails in the appellate court to the same extent that he prevailed in the court below, will decree that the third appellee pay to the appellant his costs. *Breckenridge v. Auld*, 1 Rob. 148.

Plaintiff Sets Up Want of Jurisdiction.—As consent can not confer jurisdiction, a plaintiff, upon whose bill there is a final decree and adjudication against him upon the matters set up in the bill, is not estopped to assert, upon ap-

peal, that the court to which he resorted had no jurisdiction of the subject matter. In such case, although the decree will be reversed at the instance of the plaintiff, the costs in the appellate court will be awarded against him. *Freer v. Davis*, 52 W. Va. 1, 5, 43 S. E. 164.

Decree Subjecting Land to Payment of Judgment.—Upon a bill by S. against G. and P. to subject the land of G. to satisfy a judgment recovered against G., P. and others, it appeared and was so decided by the circuit court upon appeal from a judgment of the county court on a scire facias to revive the judgment, that no process had been served on P., and that he had not entered his appearance in the original action, and the scire facias was dismissed for a variance between the writ and the evidence. Upon appeal from the decree of the circuit court, it was held, that the bill should have been dismissed at the hearing of the court below as to P., and that court having made a decree subjecting G.'s land, and having made no decree against P., upon appeal by G. and P., the appellate court would dismiss the suit as to P., but without the costs of the appeal; but would amend and affirm it as to G. *Gray v. Stuart*, 33 Gratt. 351.

Decree Erroneous in Not Permitting Amendment.—A bill in chancery by proper allegations should show on its face, that proper parties are made to the suit; and if it claims to have set aside a sale made under a decree in another chancery cause, which is ended, for fraud or for other reasons, and that a resale should be made of the land, and the proceeds should be distributed among the parties entitled to such proceeds, so much of the substance of such chancery cause and the decrees in it, as will fully show the character of such suit and its objects, and especially as will show the parties interested in such suit and sale and the disposition of the proceeds, if made by the court, should be set out, so as to give the court definite information as to these matters.

If this be not done, where there is a demurrer to such bill setting out as grounds of demurrer only such grounds, as effect the merits of the cause, and not that the proper parties do not appear to be before the court, and the bill shows on its face a cause, which should be considered on its merits, if the proper parties appeared to be before the court, and these necessary allegations were made, the court should give leave to the plaintiff to amend the bill, and not decide the cause, while in this condition, by sustaining the demurrer and dismissing the bill; and if it does, and the plaintiff appeals, the decree will be reversed, and costs will be given to the appellants. *McKay v. McKay*, 28 W. Va. 514.

(ccc) In Special Proceedings.

Mill Cases.—On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the court of error. *Eppes v. Cralle*, 1 Munf. 258.

Suits to Set Aside Fraudulent Conveyance.—In a bill by creditors to set aside a deed of trust for payment of debts, on the ground that the deed was fraudulent on its face, the bill did not ask for an account, but there was a general prayer for relief; the deed was sustained as valid, and the bill in the lower court was dismissed generally, it not appearing that the plaintiffs asked for an account, or that the court considered the question. The court of appeals affirmed the decree of the lower court sustaining the deed, and reversed it as to the account but held that appellees should pay costs. *Marks v. Hill*, 15 Gratt. 400. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Caveat Proceedings.—Damages are not to be given upon an affirmance of a judgment in cases of caveat, but costs will be given to the appellee. *Harvey v. Preston*, 3 Call 495.

Will Contest.—In a contest relative to a will, a person who was not a party

in the county court may, by becoming interested after an appeal to a higher court (district court) be admitted a party there, and carry up the cause to the court of appeals; but, on reversing the judgment of the court below (district court), and affirming that of the county court, such party can only recover the costs in the lower court (district court). *Cogbill v. Cogbill*, 2 Hen. & M. 467. See the title WILLS.

On Motion to Dismiss.—It was held, the West Virginia Code, 1899, ch. 138, § 11, providing that, in an appellate court, costs shall be recovered by the party substantially prevailing, on overruling a motion to dismiss an appeal, the court could in its discretion, award costs against the moving party. *Workman v. Doran*, 34 W. Va. 604, 12 S. E. 770.

(bb) On Error.

Affirmance.—Where upon an appeal from a judgment against a married woman as a sole trader, to the circuit court, in which court the judgment of the lower court is affirmed, the husband and wife join, and go to the court of appeals by writ of error, and the judgment of the circuit court is affirmed, the plaintiffs in error will have to pay the costs. *Farley v. Tillar*, 81 Va. 275.

Dismissal.—When the matter in controversy is the possession of an office, and the plaintiff in error fails to file a brief or prosecute his writ of error until after the expiration of the term of the office in question, the writ of error will be dismissed, at the cost of the plaintiff in error. *Taylor v. Maynor*, 46 W. Va. 588, 33 S. E. 260.

When, pending a writ of error, without fault of a party, an event occurs rendering it impossible for the appellate court, if it should decide in favor of the plaintiff, to grant him substantial relief, the court will not decide the merits and give formal judgment, but will dismiss the writ of error, without awarding costs. *Elbon v. Hamrick*, 55 W. Va. 236, 46 S. E. 1029.

3. Primary and Secondary Liability.

a. Liability of Parties.

Two Defendants—Plaintiff and One Defendant Prevail.—Where the suit of a plaintiff is against two defendants, and the plaintiff and one defendant substantially prevail against the other defendant the latter will be decreed to pay the costs. *McNiel v. Baird*, 6 Munf. 316.

Successive Liability for Costs.—A bill against two defendants being dismissed as to one, and the costs decreed to be paid to him by the plaintiff, were also decreed to be paid by the other defendant to the plaintiff. *Spencer v. Ford*, 1 Rob. 648.

When Each Liable for His Own Costs.—Where the plaintiff and defendant set up pretensions greater than they sustain, though each succeed in part, each may be decreed to pay his own costs. *Beverley v. Brooks*, 4 Gratt. 187.

b. Surety.

The surety in a forthcoming bond is entitled to recover from the original debtors the principal, interest, and costs of the original judgment; but not the costs incurred by the execution and forfeiture of the forthcoming bond. *Robinson v. Sherman*, 2 Gratt. 178.

c. Strangers.

Court Erroneously Directs Persons to Be Made Parties.—A court of chancery ought not to give costs against complainants to a suit, when parties have been brought erroneously into the suit, by the direction of the court. *Lewis v. Thornton*, 6 Munf. 87.

B. IN CRIMINAL CASES.

1. Rights and Liabilities.

a. Liability of State or Municipality.

The W. Va. Code, 1899, ch. 161, § 13 provides that in no instance, in criminal cases, shall there be a judgment against the state for costs.

And the Va. Code, 1887, § 3556, provides that in no case, civil or criminal, except where otherwise specially provided shall there be a judgment for costs against the commonwealth.

The violation of the public ordinances of cities, towns and villages are strictly criminal in nature, being offenses against the public, and not merely private wrongs. In prosecutions for such offenses, costs are not recoverable against the city, town, or village. *Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152.

b. Informer or Prosecutor.

Voluntary Informer.—A voluntary informer ought to be made a prosecutor, and liable for costs in cases of failure. *Wortham v. Com.*, 5 Rand. 669; *Com. v. Dove*, 2 Va. Cas. 29.

If in prosecution for a misdemeanor, at the instance of a voluntary prosecutor, the defendant files a plea in abatement, that one of the grand jurors who found the indictment was not a freeholder, and the issue made upon that plea is found for the defendant, and the indictment quashed, the court should give judgment for the costs against the prosecutor. *Com. v. St. Clair*, 1 Gratt. 556.

Involuntary Informer.—But one who is compelled to be an informer can not be considered a prosecutor. *Wortham v. Com.*, 5 Rand. 669; *Com. v. Dove*, 2 Va. Cas. 29.

c. In Particular Prosecutions.

(1) Bastardy Proceedings.

Where one is accused of being the father of a bastard child, and upon being tried for same, is discharged, he shall recover his costs against the party in whose name the proceedings are had. W. Va. Code, 1899, ch. 80, § 4; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439; *Tennant v. Brookover*, 12 W. Va. 337; *Barbour Co. Court v. O'Neal*, 42 W. Va. 295, 26 S. E. 182. See the titles **BASTARDY**, vol. 2, p. 334, 342; **PARENT AND CHILD**.

(2) Contempt Proceedings.

See the title **CONTEMPT**, ante, p. 236.

Where a defendant in a suit in equity disobeys the process, order or decree of the court, the regular and proper pro-

ceeding for such contempt is for the plaintiff to file an affidavit setting up such fact, and move the court to issue a rule in the cause between the original parties; and when such rule is issued, served on the defendant, and returned to the court, then the contempt proceeding should be entirely separate from the chancery suit, and placed on the law docket, entitled the state of West Virginia, at the relation of the party at whose instance it was issued, against the offender, and be prosecuted on the law side of the court to judgment; and, if the rule is made absolute, the defendant should pay the costs, and, if it is discharged, it should be at the cost of the relator. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

When a process of supersedeas issued by the clerk of the supreme court of appeals states in accordance with the transcript of the record, that the decree superseded was rendered by a certain circuit court on a certain day, and no decree was rendered by the said court on that day, but a decree was rendered on the day succeeding the one named in the process, and no other decree had been rendered in the cause, which could be supposed to be the one, which the appellate court had superseded, such process is not void and inoperative. But if the special commissioner in such a case delays to make an application to the appellate court to ascertain, whether such process was effective, and the defendant moves the court to issue a rule against him for contempt, the court, though declining to punish him for the contempt, will adjudge against him the costs of the proceedings. *Hutton v. Lockbridge*, 21 W. Va. 254.

(3) Against Master for Permitting Slave to Run at Large.

In *Abraham's Case*, 1 Rob. 675, it was declared that a judgment in a county or corporation court, against a master for permitting a slave to go at large and hire himself out contrary

to law, was properly rendered for the costs of the prosecution, including jail fees, as well as for the fine. See generally, the title SLAVES.

(4) Assault.

Upon an indictment for assault, F. was fined \$1 and the costs. He paid one dollar to the clerk before execution issued, and directed him to apply it to the fine. Held, that the costs were a part of the fine, and F. being taken upon a *capias pro fine* could only be released by paying the costs as well as the one dollar. *Com. v. Fields*, 33 Gratt. 291. See the title ASSAULT AND BATTERY, vol. 1, pp. 729, 736.

d. Particular Items.

(1) Jury Fee.

The Virginia Code of 1849, ch. 208, § 10, Va. Code, 1887, § 4049, gives to all jurors sitting in criminal cases compensation at one dollar for each day he attends on such jury, and the court, upon the prisoner's conviction, will direct the clerk to include the allowance in the bill of costs. *Souther v. Com.*, 7 Gratt. 673. See generally, the title JURY.

(2) Fee of Attorney General.

As held in *Finch v. Com.*, 14 Gratt. 643, a prisoner who is convicted of a felony and obtains a writ of error to the court of appeals, where the judgment is affirmed, is not responsible for the fees of the attorney general.

(3) Fee of Clerk, Attorney or Sheriff.

The Virginia Code, 1887, § 4199, expressly declares that the prisoner shall only be subjected to such costs as the commonwealth is bound to pay; and therefore does not embrace the fees of the clerk, sheriff, or attorney for the commonwealth, and in the absence of express provision, they can not be imposed upon the prisoner. *Anglea v. Com.*, 10 Gratt. 696.

As held by Judge Samuels in *Finch v. Com.*, 14 Gratt. 643, a prisoner who is convicted of a felony, and obtains a writ of error to the court of appeals,

where the judgment is affirmed, is not responsible for the fees of the clerk.

2. Security.

Under Va. Code, 1887, § 3991, regulating criminal proceedings against persons, the prosecutor's insolvency or inability to pay costs is, ordinarily, good cause for ruling him to find security for such payment; but if, in the opinion of the court, public justice requires that the prosecution should proceed, it may refuse to dismiss the indictment, though the prosecutor be insolvent, and security for costs be not given. *Com. v. Hill*, 9 Leigh 601.

3. Effect of Pardon.

Where a person is convicted and sentenced for a felony or misdemeanor, and is afterwards pardoned by the executive, which pardon releases him from all fines, penalties and forfeitures incurred by the conviction and sentence, and previous to the pardon an execution has been issued for the costs incurred in his prosecution by the commonwealth, the pardon does not release him from these costs. *Anglea v. Com.*, 10 Gratt. 696; *Wilkerson v. Allan*, 23 Gratt. 10. See Va. Code, 1887, §§ 4199, 4200; W. Va. Code, 1899, ch. 14, § 22.

4. Review.

If a defendant confess judgment on a presentment for gaming for the fine and costs, although the presentment might have been defective on a special demurrer, yet that judgment ought not to be reversed on a writ of error. *Com. v. Offner*, 2 Va. Cas. 17.

III. Judgment for Costs.

A. FORM.

Costs Unascertained When Award Made.—An award that the defendant shall pay the costs of the suit, is good, without ascertaining the amount of the costs. *Macon v. Crump*, 1 Call 575.

Suit by Executor and Heir Dismissed.—On dismissing a bill filed by the heir and the executor of a vendee, to have a title made for the land purchased, and meanwhile to enjoin vendor from col-

lecting the purchase money, the decree for costs should not be against the plaintiffs jointly, nor against the executor de bonis propriis. *Long v. Israel*, 9 Leigh 556.

Against Personal Representative.

—A decree, and execution thereupon, against an executor or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels, and in such case an attorney's fee ought to be taxed as part of the costs. *Barr v. Barr*, 2 Hen. & M. 26.

Suit to Charge Lands in Hands of Fraudulent Vendee.—In a suit to charge land in the hands of a fraudulent purchaser with money, he yet holding the land, that must be subjected; and there can not be a personal decree against him for the money, though there may be for costs, if the land does not pay the money and costs. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176.

B. REVIEW.

Right to Review.—Whether a decree for costs is as it should be or not is a question that can not be looked into by the appellate court, when the appeal can not be supported on any other ground. *Bogges v. Robinson*, 5 W. Va. 402, 413; *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Ashby v. Kiger*, 3 Rand. 165.

While an appeal does not lie to the court of appeals from a decree for error of judgment in the court below for costs, still where the cause is properly before the court upon subjects other than costs, although the court sees no other error in the decree of the court than in its decree for the costs, the supreme court may correct the decree of the court below as to the matter of costs, and affirm the decree as thus corrected, although it will not reverse the decree because of error

as to costs alone. *Jones v. Cunningham*, 7 W. Va. 707; *Richardson v. Donehoo*, 16 W. Va. 685; *Farmers' Bank v. Woodford*, 34 W. Va. 481, 12 S. E. 544; *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245; *Ashby v. Kiger*, 3 Rand. 165; *Ross v. Gordon*, 2 Munf. 289.

In *Davenport v. Mason*, 2 Wash. 200, it was left a query whether an appeal can be taken from a decree dissolving an injunction with costs.

Error in Costs as Ground for Reversal.—Where there is no other error in a decree or judgment, the court of appeals will not reverse it on account of an error in costs merely. *Bogges v. Robinson*, 5 W. Va. 402; *King v. Burdett*, 12 W. Va. 688; *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461.

C. REMEDY TO PREVENT ENFORCEMENT.

Prohibition is the proper remedy to prevent the enforcement, by execution, of an unauthorized judgment for costs. *Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152.

IV. Taxation of Costs.

A. IN CIVIL PROCEEDINGS.

1. In General.

The laws requiring fees to be taxed for the commonwealth in any case have never been repealed nor amended, and the losing suitor has them to pay, whether they go into the state treasury or to the attorney general. The laws requiring such fees to be taxed in the costs and paid to the attorney are also unrepealed. *Thon v. Com.*, 77 Va. 289.

Statutory Provisions.—For general statutory provisions as to the taxation of costs, see Va. Code, 1887, ch. 173.

2. On Motion to Dissolve Injunction.

Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. *Barnett v. Spencer*, 2 Hen. & M. 7.

3. Particular Items.

a. Fee of Commissioner.

If, on a motion in a county court, on the common-law side thereof, it becomes proper to refer to a commissioner, longstanding and perplexed accounts, for the purpose of facilitating the investigation of the cause to the parties, and to the court, and such reference is made by order of court, and with the assent of the parties, the fee of the commissioner, for stating and reporting the accounts, ought to be taxed in the bill of costs, and a judgment for those costs ought to be rendered against the party who has to pay the general costs. If such taxation is made, and noted by the clerk of the county court at the foot of the record, it will be presumed by the appellate court, that the order for such taxation was made by the court itself (it not being a matter of course with the clerk, to include such fee in his taxation of costs), though it does not appear on the minutes of the court. *Leachman v. Overseers*, etc., 2 Va. Cas. 399.

b. Fee of Clerk of Chancery Court.

Where an appellant fails to bring up a copy of the record, within the time limited by law, and it is filed by the appellee, who obtains a dismissal of the appeal, the fee to the clerk of the chancery court for the copy of the record so filed, may be taxed in the bill of costs, as a part of the costs of defending the appeal; and the same rule exists, where the record is brought up by the appellant. *Mahone v. Long*, 3 Rand. 557.

c. Attorney's Fees.

The law taxes the defendant with certain costs for attorney and counsel fees, and the courts can not, directly or indirectly, impose upon him fees to the plaintiff's counsel beyond what is thus provided by law. *Stovall v. Hardy*, special court of appeals of Virginia, reported in *Virginia Law Journal* for 1879, p. 109; *Gurnee v. Bausemer*, 80 Va. 867; *Citizens' Nat. Bank v.*

Manoni, 76 Va. 802. See also, the title **ATTORNEY AND CLIENT**, vol. 2, pp. 144, 166.

A decree, and execution thereupon, against an executor or administrator, for a balance due on his administration account, should be against his own goods and chattels, and in such case as part of the costs, an attorney's fee should be taxed. *Barr v. Barr*, 2 Hen. & M. 26.

B. IN CRIMINAL PROCEEDINGS.

Where there was an indictment against four persons for an assault, and they pleaded severally, and there was a verdict that they were guilty, assessing several fines to each, it was held, that the attorney's fee was not to be taxed against each, but one attorney's fee against all the defendants. *Com. v. Sprinkles*, 4 Leigh 650. See also, *Com. v. Hooper*, 2 Va. Cas. 223.

V. Collection, Payment and Distribution.

A. MODES OF COLLECTING OR ENFORCEMENT OF PAYMENT.

1. By Rule.

The appropriate mode of requiring a person for whose benefit an action is brought, though his name does not appear of record, to pay costs, is by rule, requiring him to show cause why he should not be compelled to pay the same. *Johnston v. Mann*, 21 W. Va. 15.

2. Suit or Action.

Suit in Equity.—Where a judgment in an action of ejectment is obtained against a married woman and her husband for costs, such judgment can not be enforced by a suit in equity against the separate estate of the wife. *Thorn v. Sprouse*, 39 W. Va. 706, 20 S. E. 676, Brannon, P., dissenting.

Assumpsit.—When a county court, in prosecuting a condemnation proceeding under chapters 42 and 43 of the West Virginia Code, has made costs, and upon the agreement of the landowner to pay the costs, dismisses the

proceeding to take the particular parcel of land described and designated in its application, the relinquishment of its right to retain the advantages gained in such proceeding and the risk of future costs and trouble it incurs by dismissing constitute a sufficient consideration for the promise to pay the costs and they may be recovered in an action of assumpsit. *County Court v. Hall*, 51 W. Va. 269, 41 S. E. 119.

3. Writ of Capias Pro Fine.

Where there is a judgment in favor of the commonwealth for a fine and costs of prosecution, the writ may issue for the fine and costs; but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment. *Com. v. Webster*, 8 Gratt. 702. See also, Va. Code, 1887, § 4071; *Quinling v. Com.*, 2 Va. Cas. 494.

In Virginia the costs are a part of the fine, and the defendant, being taken upon a capias pro fine, can only be released by paying the costs as well as the fine. *Com. v. Fields*, 33 Gratt. 291.

4. By Execution.

The payment of costs adjudged against the defendant in criminal proceedings, may be enforced by execution against his property as in other cases; and the execution must issue from the court in which the proceedings are had, and judgment rendered. *Anglea v. Com.*, 10 Gratt. 696. See the title **EXECUTIONS**.

The fact that a decree for a specific sum against one person assesses the costs against such person and another jointly, does not warrant a joint execution against the two for the specific sum and the costs, there being no privity as to the specific sum. And on motion such execution will be quashed. *Taney v. Woodmansee*, 23 W. Va. 709.

5. By Attachment.

A writ of right having been brought in the name of H. against R. and P., a mise regularly joined on the mere writ, and the tenants showing by affidavits

that H., was dead before the writ issued, and that they had come to knowledge of the fact after the mise was joined, it was held, that unless W. within a reasonable time after rule given for the purpose produced proof that demandant was living at the commencement of the suit, it ought to be dismissed, and the payment of attorney's costs enforced, by attachment, against W. or his attorney. *Howard v. Rawson*, 2 Leigh 733. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

6. Payment Out of Fund in Court.

Where a suit in chancery was pending to subject land to the payment of liens charged thereon, and a decree of sale, and decree confirming the sale, were on petition of the debtor reversed in the appellate court, and a judgment there entered for the debtor against the first lien creditors for the costs in the appellate court, which judgment the creditor assigned to his attorney in part payment of his attorney's fee, and the cause was remanded, and it appeared that the property was sufficient to pay the first lien, and the court refused to allow the assignee and attorney to be paid out of the fund, but set off the judgment for costs against a part of the judgment against the assignor, it was held, that under the circumstances, the allowance of the set-off was inequitable, and should not have been made; but a decree should have been entered for the whole amount of the plaintiff's claim against the debtor, and then the decree should have required the creditor, out of the money realized, to pay the assignee and attorney the amount of his claim. *Payne v. Webb*, 29 W. Va. 627, 2 S. E. 330.

7. Requiring Payment as a Condition.

In General.—If a court make an order rejecting a plea, it may, in its discretion, at a subsequent term, allow the same plea filed, when it appears that it had been improperly rejected, imposing such conditions upon the moving party

as to costs or continuance of the case as may seem just. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821.

As Condition to Receiving Plea of Statute against Usury.—If a party tendering the plea of the statute against usury has been improperly allowed to file a bill of review, which has therefore been dismissed at his cost, it is unreasonable to require him to pay those costs in a limited time, as the condition of receiving his plea. *Ellzey v. Lane*, 4 Munf. 66.

Condition Precedent to New Trial.—It is error to grant a new trial except upon the terms of paying the costs. *Boswell v. Jones*, 1 Wash. 322.

Limitation of Issue.—P. brought assumpsit against M., who plead nonassumpsit, on which issue was made up, and on the trial there was a verdict for P. M. then asked for a new trial, and the court granted it on the condition that M. should pay the costs of the first trial, and agree that upon any future trial of the cause it should be tried solely upon the issue already made up, without any additional plea; and to this M. assented. The case was then sent to another court, and on the motion of M. he was permitted to file another plea; to which P. excepted. There was a judgment for M., and a writ of error by P. Held, that it was competent for the court to grant the new trial upon the condition stated. If M. objected to the condition, he should have excepted and spread the facts upon the record. Having accepted the condition, he was bound by his acceptance. *Prunty v. Mitchell*, 30 Gratt. 247.

Where a new trial has been granted conditioned on payment of costs, the appellate court will not entertain an assignment of error on that ground, unless an exception was taken to the ruling of the court so granting it. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222.

Effect Where Order Omits Requirement.—After a second trial the plaintiff

can not for the first time object that the order granting the new trial did not require, as a condition precedent, the payment of the costs of the former trial, especially when no motion was made to set aside the order granting the new trial, nor for an execution for the costs of the former trial. *Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606. See the title NEW TRIALS.

Necessity for Judgment Stating That Costs Be Paid before New Trial.—If a judgment awarding a new trial, directs the payment of costs of the first trial, without saying that the costs shall be paid before the new trial is had, it shall nevertheless be considered a precedent condition. *Rixey v. Ward*, 3 Rand. 52.

Time of Tender or Payment.—Where a new trial has been granted upon condition of paying the costs of the former trial, as provided by § 3542 of the Virginia Code, 1887, it is sufficient if the costs are paid or tendered at any time before the order granting the new trial has been set aside, and after such tender or payment it is error to rescind the order for the new trial. *Haupt v. Tebault*, 94 Va. 184, 26 S. E. 406.

Where a new trial has been granted, upon condition of the payment of the costs of the former trial, as prescribed by Va. Code, 1887, § 3542, but the costs are not paid at or before the next succeeding term of the court, the court may, on the motion of the opposing party, set aside the order granting it, and proceed to judgment on the verdict, or it may award execution for costs, as may seem best; but if neither is done, and the parties proceed with the new trial, objection can not thereafter be made, either in the trial court or the appellate court, that the costs have not been paid. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

Condition Precedent to Amending Plea.—When it is necessary for the defendant to amend his plea, the court, upon payment of costs, should permit the amendment. *Cooke v. Beale*, 1

Wash. 313. See the titles AMENDMENTS, vol. 1, p. 316; PLEADING.

Condition to Motion to Set Aside Order for Account.—A defendant, after an order for an account may move to set it aside and file his answer, on paying the costs which have accrued before the commissioner. *Lindsay v. Campbell*, 4 Hen. & M. 505.

B. INTEREST AND DAMAGES ON COSTS.

As a general rule interest will not be allowed on an amount recovered as costs. *Ashworth v. Tramwell*, 102 Va. 852, 47 S. E. 1011.

Costs at law bear no interest as costs. *Douglass v. McCoy*, 24 W. Va. 722.

If a defendant in a judgment for costs enjoins the collection of the judgment upon grounds which do not affect its validity, or furnish any foundation for restraining the plaintiff from prosecuting to judgment his claim, although it may be proper to stay its payment, he is liable for interest on the judgment from the time the injunction was granted. *Shipman v. Fletcher*, 95 Va. 585, 29 S. E. 325.

An act passed January 20, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," was held, not to authorize a judgment for interest upon the costs of a suit. *M'Rea v. Brown*, 2 Munf. 46.

In a given case the district court reversed a judgment in a county court so far as costs were awarded the defendant preceding a payment made by the defendant to the plaintiff's attorney, and affirmed it as to the residue; and entered judgment for the appellee for the costs incurred up to the time of such payment, and damages for retarding the execution thereof with the costs of the appeal. On appeal it was held, that the judgment of the district court was right in reversing the judgment of the county court in giving costs to the defendant, and awarding the plaintiff his,

but that the judgment would not be affirmed because it went further and awarded damages on those costs. *Hudson v. Johnson*, 1 Wash. 10.

C. MEDIUM OF PAYMENT.

Tender of Coupons in Payment.—Costs recovered in tax suits are not "taxes, debts or demands due the commonwealth." The officers of the court to whom they are due, are under no obligation to receive coupons in payment of their fees, and a tender of coupons of the state, genuine or spurious, in payment thereof, is not good. *Ellett v. Com.*, 85 Va. 517, 8 S. E. 246.

D. PRESUMPTION OF PAYMENT OR WAIVER.

Where a plaintiff is nonsuited, and is ordered to pay costs and damages, if by a subsequent order in the case the nonsuit is set aside, and the action is reinstated on the docket as recited in the order, upon the payment of costs, and at another day the parties appear by their attorneys, and waive a jury, and consent to submit the matters of law and fact to the court in lieu of a jury, and the trial is proceeded with, it must be presumed that the former order, requiring the payment of costs, has been either complied with or waived by the parties. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440.

VI. Security for Costs.

A. IN CIVIL PROCEEDINGS.

1. Irrespective of Residence.

Necessity for Giving.—If security for costs is required, the security must be given, but if not required it is not error to proceed without it. *Carter v. Washington*, 2 Hen. & M. 31; *Purvis v. Hill*, 2 Hen. & M. 614.

In Ejectment.—In ejectment where the lessor of the plaintiff dies, security for costs must be given. *Carter v. Washington*, 2 Hen. & M. 31.

Joint Appeal by Executors and Legatees.—Where executors and legatees jointly appeal, the legatees being in possession of the property in dispute

may be ruled to give security for the prosecution of the appeal. *Sadler v. Green*, 1 Hen. & M. 26.

2. In Proceedings by Nonresidents.

a. Statutory Provisions.

Statement.—By statute it is provided that in any suit, except where a pauper is plaintiff, there may be a suggestion on the record in court, or, if the case be at rules, on the rule docket, by a defendant, or any officer of the court, that the plaintiff is not a resident of the state, and that security is required of him. Va. Code, 1887, § 3539; W. Va. Code, ch. 138, § 2.

Security for Costs in Appellate Court.—It seems that a nonresident plaintiff can not be ruled to give security for costs incurred in a court of appeals, from which the suit was remanded for further proceedings. *Lambert v. Key*, 4 Hen. & M. 484. See also, *Bailey v. McCormick*, 22 W. Va. 95.

Constitutionality of Statute Requiring Costs.—The statute requiring of nonresident plaintiffs costs, is constitutional. *Nease v. Capehart*, 15 W. Va. 299.

Persons Included.—Where plaintiff's house is inside the state line, and he proves that he is living with his family there, proof that the sheriff had twice been there to serve process on him, but could not find him, does not sustain a motion under § 3539 of the Virginia Code, requiring such plaintiff to give security for costs, on account of nonresidence. *Evans v. Bradshaw*, 10 Gratt. 207.

In *Vance v. Bird*, 4 Munf. 364, it is left a query whether a person residing within the commonwealth at the time of commencing his suit, but removing to another state while it is pending, can be compelled to give security for costs on the ground of his absence from the state.

b. Time and Manner of Requiring.

(1) Motion for Security.

Time for Making Motion.—Section

3539, Va. Code, 1887, designates no particular time when the motion for security for costs may be made. The rule may be entered at any time when no prejudice to the plaintiff is caused by the defendant's delay in moving therefor. *Miller v. Norfolk, etc., R. Co.* (C. C.), 47 Fed. 264.

Notice of Motion.—Notice of motion for security for costs given to plaintiff's attorney is sufficient where he has no agent or attorney in fact. *Goodtitle v. See*, 1 Va. Cas. 123; *Vance v. Bird*, 4 Munf. 364.

Where the suggestion that plaintiff is a nonresident, and the requirement of security for costs have been entered of record, the law requires no other notice, nor the entry and service of any rule. *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

Exception to Opinion of Court on Motion.—There is no objection, upon a motion in equity against a plaintiff for security for costs, to take a bill of exceptions to the opinion of the court, in which bill the evidence introduced on the motion is stated. *Evans v. Bradshaw*, 10 Gratt. 207.

(2) Compliance with Requirements as to Time.

The plaintiff may give the required security at any time before the dismissal, notwithstanding the period of sixty days has elapsed. *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444; *Enos v. Stansbury*, 18 W. Va. 477.

Upon a rule requiring security for costs, if sufficient security be tendered, in court, at the first calling, after the expiration of the sixty days, it ought to be received, and the suit ought not to be dismissed. *Vance v. Bird*, 4 Munf. 364.

Although on a motion of the defendant ordering the plaintiff to give security for costs within sixty days, the bill should be dismissed if the plaintiff fails to do so, and it is error to proceed to hear the cause, yet the appellate court, on reversing the decree, may give the plaintiff a reasonable time within which

to comply with the order. *Anderson v. Johnson*, 32 Gratt. 558.

Where plaintiffs are nonresidents, and an order is entered for security for costs, to be given in sixty days, the plaintiff's attorney having notice of the order, and no security is entered within the sixty days, it is error to dismiss the suit for failure to give the security within sixty days, if sufficient security is offered at the time of the motion to dismiss. *Goodtitle v. See*, 1 Va. Cas. 123.

c. Failure to Give.

As Ground for Dismissal of Suit.—

By statute it is provided that after sixty days from the suggestion on the record that the plaintiff is a nonresident, the suit shall, by order of the court, be dismissed, unless, before the dismissal, the plaintiff be proved to be a resident of the state, or security be given before such court, or the clerk thereof, for the payment of costs and damages which may be awarded to the defendant, and of the fees due or to become due, in such suit, to the officers of the court. Va. Code, 1887, § 3539; W. Va. Code, 1899, ch. 138, § 2; *Anderson v. Johnson*, 32 Gratt. 558; *Vance v. Bird*, 4 Munf. 364.

Effect on Right to Rule Defendant to Trial on Motion for Continuance.—

It is error to rule a defendant to trial on a motion for continuance, when the plaintiff has failed until the term at which the motion is made, to give security for costs, after a rule to do so. *Jacobs v. Sale*, Gilmer 123.

Effect of Dismissal of Suit.—The dismissal of a suit for failure to give security for costs, is not such a voluntary failure to prosecute, as authorizes a judgment for nonsuit. *Pinner v. Edwards*, 6 Rand. 675.

d. Nature and Incidents of the Security.

Bond Required.—The security shall be by bond, payable to the commonwealth. Va. Code, 1887, § 3539; W. Va. Code, 1899, ch. 138, § 2.

Extent of Undertaking.—An undertaking executed by parties, as security

for costs in a suit brought by a nonresident in the form prescribed by W. Va. Code, 1899, ch. 138, § 2, does not bind the parties to pay the costs in the appellate court, but only the costs incurred in such suit in the court below. *Bailey v. McCormick*, 22 W. Va. 95. See also, *Lambert v. Key*, 4 Hen. & M. 484.

Number of Obligor.—There need be only one obligor in the bond given for security, if he be sufficient and a resident of the state. Va. Code, 1887, § 3539; W. Va. Code, 1899, ch. 138, § 2.

Judgment on Bond.—The court before whose clerks the bond for security is given, may, on motion by a defendant or officer, give judgment for so much as he is entitled to by virtue of the bond. Va. Code, 1887, § 3539; W. Va. Code, 1899, ch. 138, § 2.

e. Waiver.

The requirement of security for costs under W. Va. Code, 1899, ch. 138, § 2, may be waived, and such waiver may be presumed from the conduct of the defendant. *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444; *Enos v. Stansbury*, 18 W. Va. 477.

If after the order is made requiring security for costs to be given, the case is proceeded with though security is not given, if no objection is made by the defendant, the demand for security for costs will be presumed to have been waived. *Enos v. Stansbury*, 18 W. Va. 477.

The fact that subsequent to the defendant's suggestion and within the sixty days, the defendant demurred to the declaration, is not a waiver of such suggestion. *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444.

Where it was shown that the plaintiffs were nonresidents, and security for costs was required, and the court accepted an undertaking instead of a bond, and no objection was made thereto by defendants, who proceeded

to trial, the giving of the bond was held to be waived by them. *Rutter v. Sullivan*, 25 W. Va. 427.

A nonresident party, against whom a decree has been rendered upon order of publication, having appeared and filed his answer in the circuit court, stating therein grounds of error, and praying the court to set aside the proceedings had against him on account of said error, which the court upon hearing of the cause refused to do, may appeal to the supreme court from the decree so refusing to correct such error, without having first filed a formal petition for a rehearing of the cause, and giving bond for the costs as required by the statute; there having been no objection made in the circuit court to his filing his answer, or the want of such formal petition and security for costs, it is too late to object to the want of such petition and security for costs for the first time in the appellate court. *Haymond v. Camden*, 22 W. Va. 180.

f. Order of Dismissal.

An order that a suit be dismissed, unless security for costs be given with the clerk in sixty days, will not of itself operate as a dismissal of the case. But after the expiration of the sixty days an order must be made dismissing such suit for want of security. *Enos v. Stansbury*, 18 W. Va. 477.

B. IN CRIMINAL CASES.

Under § 66 of the act regulating criminal proceedings against free persons, 1 Rev. Va. Code, ch. 169, the prosecutor's insolvency or inability to pay costs is, ordinarily, good cause for ruling him to find security for such payment; but if, in the opinion of the court, public justice requires that the prosecution should proceed, it may refuse to dismiss the indictment, though the prosecutor be insolvent, and security for costs be not given. *Com. v. Hill*, 9 Leigh 601.

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See the titles CONTRIBUTION AND EXONERATION, ante, p. 461;
SURETYSHIP.

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See the title JOINT TENANTS AND TENANTS IN COMMON.

COULD BE FIRST TRIED.—See Kennedy v. Ehlen, 31 W. Va. 540, 8 S. E. 408.

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See the title MUNICIPAL CORPORATIONS.

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See the titles ATTORNEY AND CLIENT, vol. 2, p. 145; COMMON-WEALTH'S ATTORNEY, ante, p. 30.

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CROSS REFERENCES.

See the titles BONDS, vol. 2, p. 507; BRIDGES, vol. 2, p. 623; CLERKS OF COURT, vol. 2 p. 834; CONTRACTS, ante, p. 307; COURTS; ELECTIONS; EMINENT DOMAIN; JURISDICTION; MANDAMUS; MUNICIPAL, STATE AND COUNTY SECURITIES; PUBLIC OFFICERS; RECORDS; SCHOOLS; STREETS AND HIGHWAYS; TAXATION; TURNPIKES AND TOLLROADS; REVENUE LAWS.

I. Definition and General Considerations.**A. DEFINITION.**

A county is a local organization, which for the purpose of civil administration is invested with a few functions of a corporate existence, created almost exclusively with a view to the policy of the state at large, in the administration of justice, the support of the poor and the establishment and repair of public highways. *Bank v. Lewis Co.*, 28 W. Va. 286.

The counties are territorial and political divisions—integral parts—of the state. *Dinwiddie Co. v. Stuart*, 28 Gratt. 569.

A county is a political subdivision of the state. *Botetourt Co. v. Burger*, 86 Va. 533, 10 S. E. 264; *Fry v. Albemarle Co.*, 86 Va. 195, 9 S. E. 1004; *Norfolk, etc., R. Co. v. Supervisors*, 87 Va. 525, 12 S. E. 1009; *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 655.

"Our counties are parts of the state, political subdivisions of the state, created by the sovereign power for the exercise of the functions of local government. As was said by a learned judge in a case not now modern: 'Counties are at most but local organizations, which for the purposes of civil administration are invested with a few functions characteristic of a corporate existence. They are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them.'" *Fry v. Albemarle Co.*, 86 Va. 198, 9 S. E. 1004.

B. DISTINCTIONS.

"The distinction between municipal

corporations proper, such as cities and towns whether created by special charters or by general laws, and involuntary quasi corporations, such as counties, is this: The former are called into existence by the consent of the persons composing them for the formation of their own local private advantage and convenience; while counties are at most local organizations, which for the purpose of civil administration are invested with a few functions of a corporate existence, created almost exclusively with a view to the policy of the state at large in the administration of justice, the support of the poor and the establishment and repair of public highways. The public statutes confer on them all the powers they possess, prescribe all the duties they owe, and enforce all the liabilities to which they are subject. As corporate bodies of limited powers they rank very low down in the grade of corporate existence, and hence they are often called quasi corporations. (1 Dill. Mun. Corporations, § 18, 25.) In the construction of the powers granted to them, the courts adopt a strict rather than a liberal construction, the rule being that, where any ambiguity or doubt exists arising out of the terms used by the legislature, it must be resolved in favor of the public." *Bank v. Lewis Co.*, 28 W. Va. 286. See also, *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 655.

C. STATUS AS A CORPORATION.

"A county is not strictly a corporation, but a public quasi corporation." *Summers County v. County Court*, 43 W. Va. 207, 27 S. E. 307.

"Organizations as counties, are rather

political subdivisions of the state, or, as sometimes denominated, quasi corporations." *Fry v. Albemarle Co.*, 86 Va. 198, 9 S. E. 1004.

D. FUNCTIONS.

"The counties are political divisions of the state, created for public convenience; and to the county courts, by our constitution and laws, are committed certain legislative, executive, and judicial powers directly connected with the local affairs of the county. These powers, as well as the limits of the county, may be increased or diminished at the pleasure of the legislature, so far as not restrained by the constitution; and the legislature does habitually exercise such control over the county courts, and over all county agencies appointed by them requiring such public duties and functions to be performed by them as it deems proper. It is true that county courts are declared to be corporations, and, as such, they may be sued; but being political corporations, created thus, and organized for political purposes connected with the administration of the state government, they obviously differ entirely from private corporations, and are essentially different from town and cities, which are municipal corporations proper, and which are called into existence by either the solicitation or procurement of the persons composing them, for the promotion of their local convenience and private advantage. Counties, on the other hand, and county courts, are corporations in the state, are created almost exclusively with a view to the policy of the state at large, and to carry out this general public policy." *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 635.

"A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of

travel and of transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy." *Fry v. Albemarle Co.*, 86 Va. 197, 9 S. E. 1004. See also, *Norfolk, etc., R. Co. v. Supervisors*, 87 Va. 525, 12 S. E. 1009.

Public duties are required of such corporations as counties and districts, as a part of the machinery of the state government, and, in order that they may properly perform these duties, they are invested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times subject to the will of the legislature unless restrained by the constitution. *Board of Education v. Board*, 30 W. Va. 424, 4 S. E. 640.

In *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 354, the case of *Hamilton v. Mighels*, 7 O. St. 109, is referred to as showing what constitutes a county, and the objects of its creation; that it is a local subdivision of a state, created by the sovereign power of the state, of its own will, without the solicitation, consent, or concurrent action of the people who inhabit it, but superimposed on them by a sovereign paramount authority; that it is created almost exclusively with a view to the policy of the state at large, for the purpose of political organization and civil administration in matters of finance, of education, of provision for the poor of military organization, of the means of travel and transport, and especially for the general administration of justice.

E. LOSS OF IDENTITY.

"The declaration that there is 'want of identity' between the counties during the existence of the war and after its close is a declaration in another form that the counties perished or lost their identity during the war. It is

admitted that the states did not; and a fortiori the counties did not. If the state retained its identity, the counties a fortiori remained the same." *Dinwiddie Co. v. Stuart*, 28 Gratt. 549.

"This court has more than once decided that not even an excision of a part of its territory and incorporation of a part of its inhabitants with another county or municipality destroys the identity of a county. *Harrison v. Holland*, 3 Gratt. 247; *Wade v. Richmond*, 18 Gratt. 583. Within a few years past one-third of the population of the county of Henrico has been incorporated with the city of Richmond. Surely no one will contend that thereby the county of Henrico has lost its identity. It is still the same county that it was before. How can it be said, then, that the county of Dinwiddie as it stood in January, 1862, is not the same as it stands at the present day. Its territory is the same, its population is but little changed, and substantially the same body of laws govern it now as in 1862." *Dinwiddie Co. v. Stuart*, 28 Gratt. 549.

II. Creation and Subdivision.

A. CREATION.

1. In General—Power to Create.

The several counties like county organizations and county officers, exist only by virtue of the constitution and laws of the state. *Norfolk, etc., R. Co. v. Supervisors*, 87 Va. 521, 12 S. E. 1009.

The formation of counties is purely a legislative function. *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 307.

Our counties are created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. *Fry v. Albemarle Co.*, 86 Va. 198, 9 S. E. 1001; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 354.

"The creation of a new county is an exercise of legislative power. It is,

therefore, legitimate legislation, and within the scope of legislative power to make new counties; and the only limitation on the power in the legislature, is to be sought for in the constitution; and the only limitation there to be found, applicable to this case, is the prohibition contained in § 12, art. 7, of the constitution, which provides that: 'No new county shall be formed having an area of less than four hundred square miles; or, if another county be thereby reduced below that area; or, if any territory be thereby taken from a county containing less than four hundred square miles. And no new county shall be formed containing a white population of less than four thousand; or, if the white population of another county be thereby reduced below that number; or, if any county containing less than four thousand white inhabitants be thereby reduced in area,' etc. The power to form new counties, it is conceded, belongs to the legislature alone under the constitution, but before this power can be rightfully exercised, it must be made to appear affirmatively: 1. That the proposed new county does contain an area of at least four hundred square miles. 2. That no other county is thereby reduced below that area. 3. That no territory is thereby taken from any county containing less than four hundred square miles. 4. That the proposed new county contains at least four thousand white population. 5. That the white population of no other county is thereby reduced below four thousand; and 6, that no county containing less than four thousand white inhabitants is thereby reduced in area. When all these facts are made to appear to the satisfaction of the legislature, then, and not till then, an act creating the proposed new county may be passed." *Lusher v. Scites*, 4 W. Va. 14.

"Not only does the subject of making new counties belong to the legislature, but it belongs to no other department

of the government. To exercise the power, the legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the legislature alone must determine; and when so determined, it must conclude further inquiry by all other departments of the government; and the final action terminating in an act of legislation in due form, must of necessity presuppose and determine all the facts prerequisite to the enactment; and that too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case." *Lusher v. Scites*, 4 W. Va. 14. Accordingly, in that case the existence of Lincoln county was held, to be a political and not a judicial question.

Presumption.—The presumption is, that when the act creating the county of Lincoln was passed, all the facts prerequisite to the formation of the county had been proved to the satisfaction of the legislature, otherwise that body would not, and could not have passed the act. All its members were sworn to support the constitution of the state, and it is not to be presumed that they would violate their oaths of office by passing the act in question, without proof necessary to enable them to do so. *Lusher v. Scites*, 4 W. Va. 14.

Judicial Notice of.—"The act creating the county of Lincoln, and the several acts amending the same, are all public acts, and as judge, I am bound to take judicial notice of these and other acts of the legislature in relation to that county, and of the courts held therein from time to time, as in other counties of the state. My opinion, therefore, is, that no evidence can be admitted in court to contradict the facts affirmed by the passage of those acts." *Lusher v. Scites*, 4 W. Va. 16.

2. Construction of Acts Creating Counties.

The acts forming new counties are not to be construed with the same

strictness which is to be observed in the construction of a grant or a contract between individuals affecting rights of property, but a more liberal rule should be adopted, the object being to ascertain the true meaning and intention in any given act by considering the same in connection with all others in *pari materia* and with the general policy of the legislature, and to effectuate such intention. *Hamilton v. McNeil*, 13 Gratt. 389.

3. Act Creating Lincoln County.

Constitutionality.—"The passage of the act creating the county of Lincoln, and the act amending the same and reenacting the first section thereof, passed February 26, 1869, are in law, solemn affirmations of record by the only tribunal having jurisdiction in the case; that all the constitutional requirements had been and were complied with; that the said county of Lincoln had the territory and population required by the constitution, and that no other county was, by the creation thereof, reduced below the amount of territory or population required by the constitution." *Lusher v. Scites*, 4 W. Va. 14.

B. SUBDIVISION.

See post, "Boundary Lines," III.

1. Question Referred to Voters.

The question, says Judge Cooley, whether a county or township shall be divided and a new one formed, or two townships or school districts formerly one be reunited is always a question which may with propriety be referred to the voters of the municipality for decision. *Ex parte Bassitt*, 90 Va. 682, 19 S. E. 453.

2. Constitutional Division.

The second section of the seventh article of the Virginia constitution, under the head of "county organization," ordains as follows: "Each county of the state shall be divided into so many compactly located magisterial districts as may be deemed necessary, not less than three; provided, that after these have been formed no additional dis-

strict shall be made containing less than thirty square miles. *Ex parte Bassitt*, 90 Va. 631, 19 S. E. 453.

3. School Districts.

See the title SCHOOLS.

4. Adjustment of Property and Liabilities upon Division.

See post, "Adjustment of Liabilities upon Change of Boundaries," III, D.

Upon the division of an old public corporation, and the creation of a new one, out of a part of its inhabitants and territory, the legislature may provide for an equitable appropriation or division of the corporate property, and impose upon the new corporation or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. *Board of Education v. Board*, 30 W. Va. 424, 4 S. E. 640. See generally, the titles MUNICIPAL CORPORATIONS; SCHOOLS.

Where the legislature does not prescribe any regulation for the apportionment of the property, or that the new corporation shall pay any portion of the debt of the old, the old corporation will hold all the corporate property within her new limits, and be entitled to all the debts due the old corporation, and is responsible for all the debts of the corporation, existing before and at the time of the division; and the new corporation will hold all the corporate property falling within her boundaries, to which the old corporation will have no claim. *Board of Education v. Board*, 30 W. Va. 424, 4 S. E. 640.

The powers exercised in the division of public corporations being purely legislative, the power to prescribe the rule by which the property of the corporation shall be divided, and the debts apportioned, being incidental to the power to divide the territory, must also be strictly legislative, and the courts have no authority over the subject, and can only construe the act of the legislature, and see that the legislative will is carried into effect. *Board of Edu-*

cation v. Board, 30 W. Va. 424, 4 S. E. 640.

The legislature had the right to confer its power to divide public corporations on the county court, and though, in the act conferring such power, it gave no directions as to the apportionment of the property and debts of the old corporation, yet, as incident to the power granted, the county court had the same power in that regard as existed in the legislature before the act was passed; and if such court divide a district, and, by the order making such division, was silent as to the apportionment of corporate property and debts, the same result would follow as if the district had been divided by the legislature, and the act was silent as to the apportionment of the corporate property and debts of the old corporation. *Board of Education v. Board*, 30 W. Va. 424, 4 S. E. 640.

III. Boundary Lines.

A. POWER OF LEGISLATURE TO CHANGE.

See ante, "Creation and Subdivision," II.

The limits of a county may be increased or diminished at the pleasure of the legislature, so far as not restrained by the constitution. *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 655.

The formation of counties and the altering of their boundaries is purely a legislative function. *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 308.

"In *Laramie County v. Albany County*, 92 U. S. 307, which we have already cited several times, very able opinion of Mr. Justice Clifford shows the correctness of the several propositions we have announced. In that case it was held, unless the constitution of a state or the organic law of a territory otherwise prescribes, the legislature has the power to diminish or enlarge the area of a county whenever the public convenience or necessity re-

quires." *Board of Education v. Board*, 30 W. Va. 424, 4 S. E. 644.

B. DELEGATION OF POWER—APPEAL.

The legislature can delegate that power to form counties and fix and alter boundaries to subordinate agencies. *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278; *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 308.

"The legislature has delegated its function in settling boundary lines, and given a part of it to the circuit court, in the appointment of commissioners, and the balance to those commissioners. Such being the character of its action, no writ of error or appeal lies to this court, because the functions of this court are purely judicial, as above stated." *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 308.

C. METHOD OF DETERMINING BOUNDARIES.

1. Construction of Acts Relating Thereto.

In determining the territorial boundaries specified in acts forming new counties due weight should be given to the contemporaneous interpretation placed upon them by the courts and other lawful authorities within the same, and by the population at large residing therein. And maps of such territory made out and published by authority of law, may properly be referred to as evidence on the question. *Hamilton v. McNeil*, 13 Gratt. 389.

In a case of caveat upon a question involving the boundary line between two counties, the court in construing the acts in relation to their boundaries, may look to the acts forming other counties both before and subsequent, for the purpose of ascertaining the intention of the legislature as to said boundary line. *Hamilton v. McNeil*, 13 Gratt. 389.

It has been the general policy of the legislature to establish and preserve the top of the Main Allegany mountain as the line of boundary between the

adjacent counties on either side. And in the construction of the acts forming new counties this policy should be respected, and no intention to depart from it should be imputed to the legislature, unless it be plainly expressed, or the purpose be sufficiently manifested. *Hamilton v. McNeil*, 13 Gratt. 389.

To carry out this policy, a call in one of these acts which if taken literally would conflict with the intent, should be disregarded or modified, and any error in the same arising from an imperfect knowledge of the topography of the county or other fortuitous cause, should be corrected. *Hamilton v. McNeil*, 13 Gratt. 389.

In the arrangement of counties it has been the policy of the legislature to avoid inconvenient elongation or awkward or undue contractions, of the territory of a county, and to preserve the same in as compact a form as practicable; and especially to keep the same in one body; not separated by the interposition of another county. And in construing such an act it should be presumed that such was the intention of the legislature, and no different interpretation should be admitted, unless a contrary intention is clearly manifest. *Hamilton v. McNeil*, 13 Gratt. 389.

2. Appointment and Proceedings of Commissioners.

Generally.—"The W. Va. Code of 1891 (ch. 39, § 18), provides that, whenever a doubt shall exist or dispute arise as to the boundary line between any two counties, it shall be lawful for the circuit court of the counties interested, or the judge in vacation, to appoint from each of them three commissioners 'to ascertain and establish the true line so in dispute,' and that the commissioners shall choose an umpire, and they shall take an oath to ascertain the true line in dispute, and make true reports of the same, and that they may cause surveying to be done, and take evidence, and that 'when the disputed line shall be ascertained, fixed, and

marked,' they shall cause to be made three plats of the line, and return one to the clerk of the county court of each county, and the other to the secretary of state, where they shall be recorded, and such plats shall be evidence of the line." *Summers County v. County Court*, 43 W. Va. 207, 27 S. E. 308.

"When the county court of a county certifies, in the language of the statute, that a doubt or dispute exists as to such boundary line, it is entitled to have the question decided by the only power known to our laws to so decide it—the special commission provided by the statute. The merits of the controversy as to the line go before that commission. It can not be that the court may or may not, as it chooses, appoint such a commission, because the statute says it shall be lawful to do so, thereby, as claimed, giving the court a discretion to do or not to do what it is directed to do. It is a remedy provided for the benefit of the dissatisfied county, and the statute, in saying that it shall be lawful for the court to appoint commissioners, means that it shall be its duty when the state of facts exists pointed out by the statute. A circuit court does not try the merits of the controversy. It simply opens the way for a trial of them before the special tribunal created by the statute. That tribunal does not report to the circuit court its work, for the court's approval, but it goes to the clerks and the secretary of state, and there is no further action contemplated on it. That commission, not the court, hears the controversy. Those commissioners, in the very language of the statute, ascertain, fix, and mark the disputed line. It is not a lawsuit between the counties. It is simply a process pointed out by statute, by which the line fixed by the legislature in the formation of the county shall be ascertained and made certain." *Summers County v. County Court*, 43 W. Va. 207, 27 S. E. 308.

Mandamus to Compel Appointment.
—The function of a circuit court, un-

der W. Va. Code 1891, ch. 39, § 18, in appointing commissioners to settle lines between counties, is ministerial, and legislative or administrative, and the court is without power to refuse such appointment on application of a county court of one of the counties. In case of its refusal, mandamus from this court is the remedy, not a writ of error. This court has no jurisdiction of such a writ of error. The action of a circuit court in such matters is not the exercise of chancery jurisdiction, and should not be entered in the chancery order book. *Summers County v. County Court*, 43 W. Va. 207, 27 S. E. 308.

D. ADJUSTMENT OF LIABILITIES UPON CHANGE OF BOUNDARIES.

See ante, "Adjustment of Property and Liabilities upon Division," II, B, 4.

"In *Laramie Co. v. Albany Co.*, 92 U. S. 307, which we have already cited several times, the very able opinion of Mr Justice Clifford shows the correctness of the several propositions we have announced. In that case it was held, unless the constitution of a state or the organic law of a territory otherwise prescribes, the legislature has the power to diminish or enlarge the area of a county whenever the public convenience or necessity requires; and that where the legislature of Wyoming territory organized two new counties, and included in their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities, that the old county, being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claims on the new counties for contribution." *Board of Education v. Board*, 30 W. Va. 424, 4 S. E. 644.

E. EFFECT OF INCORPORATION OF CITY WITHIN LIMITS.

"The fact that a city is established within the territorial limits of a county does not alter the boundaries of the county, nor curtail its territorial limits,

although its court, by the incorporation of the city, is deprived of civil and criminal jurisdiction within the limits of the city." Board of Supervisors *v.* Cox, 98 Va. 270, 36 S. E. 382. See the title MUNICIPAL CORPORATIONS.

IV. County Seats.

A. STATUTES EFFECTING REMOVAL.

1. Constitutionality and Validity.

The county court of Calhoun county was established by the general assembly of Virginia, and a subsequent vote of the people, in 1858, at Arnoldsburg. The legislature of this state, by an act passed in January, 1867, located the county seat at another place in the county. The latter act was entitled "An act locating the county seat of Calhoun county." The third section provided that the board of supervisors of the county were authorized to sell any county property at Arnoldsburg. This act was repealed by an act passed by the legislature in March, 1865. Held, that the provisions of the act of January, 1867, authorizing the board of supervisors to sell county property at Arnoldsburg, is another and different object from that stated in the title of the act, and is therefore repugnant to the provision of the constitution found in art. 4, § 36, as follows: "No law shall embrace more than one object which shall be expressed in its title;" and the entire act is therefore void. Courts held at Arnoldsburg are therefore valid, and parties in custody under indictment found therein are lawfully detained. Cutlip *v.* Calhoun Co., 3 W. Va. 588.

So much of chapter 31 of the West Virginia acts of 1895 as provides for the relocation of county seats by a majority vote in cases where the county seat of any county in this state has, since the first day of January, 1872, been relocated by a special act of the legislature, is a special law, and as such is prohibited by § 39, art. 6, of the

constitution, and is therefore unconstitutional and void. Groves *v.* County Court, 42 W. Va. 587, 26 S. E. 460.

Where by an act of the general assembly, a vote was to be taken "after the present war is over," in regard to moving the county seat, and it was taken on the fourth Thursday in May, 1866, before the proclamation of the president of the United States, declaring that the insurrection was at an end, and that peace and tranquility reigned throughout the whole of the country, such vote is a nullity, being taken before the act had validity. Conley *v.* Supervisors, 2 W. Va. 416.

2. Scope.

The provisions of the statute law of West Virginia, prescribing the manner in which the county seat of a county may be relocated by a vote of the people at a general election, apply to all the counties in the state, including those whose county seats were declared permanent in the special act of the legislature creating such counties. Welch *v.* Wetzel Co., 29 W. Va. 63, 1 S. E. 337.

3. Authority of Supervisors and County Court.

"Under the (West Virginia) constitution of 1863 the board of supervisors, and under that of 1872 the county court, and under the amendment in 1879 of article 8 the county court, were given 'superintendence and administration of the internal police and fiscal affairs of their counties.' The location of a county seat falls under this head. If we look at the legislation upon this subject in all this time, we find that it gave supervisors and the county courts jurisdiction to entertain petitions for the removal of the county seats, and to order votes thereon, and to ascertain and declare their results. Acts passed in 1863, 1868, 1873, and 1881 show this. It was fit, under these constitutions, that the whole proceeding as to ordering a vote upon the question of removal of a county seat, ascertain-

ing its result, and then providing a courthouse and other buildings at the new county seat, should be committed to the county court." *Brown v. County Court*, 45 W. Va. 827, 32 S. E. 166.

B. MANNER OF EFFECTING REMOVAL.

1. By Vote—Power of Legislature.

In *ex parte Bassitt*, 90 Va. 682, 19 S. E. 452, the court quoting from Judge Cooley, says, that the question whether a county seat shall be located at a particular place, or after its location removed elsewhere, is always a question which may with propriety be referred to the voters of the municipality for decision.

"The legislature has, it seems to me, very wisely concluded that the voters of a county can more wisely determine where the county seat of a county should be, with reference to the convenience of the people of the state, including themselves, in the administration of the government and of justice, than can the legislature, who necessarily are in a large degree ignorant of the localities in a particular county, and of other facts which should have influence in the locating of a county seat. Hence, the legislature has very wisely left it to the voters of each county, in a prescribed manner, to relocate a county seat. There is, therefore, nothing in this first assignment of error for which the order of the circuit court complained of should be reserved." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 355.

"The fact that, in the act of 1846, which established Wetzel county, instead of simply saying that the county seat should be at New Martinsville, the act said the permanent county seat should be there, it seems to me, can have no effect upon the meaning of § 15, ch. 39, of the Amended Code of West Virginia. The truth would seem to be that this declaration of the legislature of Virginia in 1846, that New Martinsville should be the permanent county seat of Wetzel, never did have

any meaning or effect. The ordinary mode of fixing a county seat in an act organizing the county would have fixed the seat of the county there as permanently as the act organizing Wetzel county did. In neither case could the county seat be changed except by or under the authority of an act of the legislature; and by such an act, or under such authority, it could be just as well changed, when the legislature which formed the county declared that a designated place should be the permanent county seat, as when it did not. In either case the legislature might have changed the county seat by a special act designating where the new county seat should be, or by a general act authorizing it to be changed by a vote of the people." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 355.

2. The Election.

See generally, the title ELECTIONS.

a. In General.

"The voting on the relocation of a county seat, and the election of a large number of state and county officers under the law, occur at the same time at a general election, and are conducted by the same officers, and each voter uses one ballot, on which are the names of the several persons for whom he votes, and the office which each is to fill, and also the words 'for relocation' or 'against relocation.' But there is an essential difference under our present law as to the time and manner in which the result of election of officers, and the result of the vote on the relocation of a county seat, is ascertained and declared. The mode in reference to the election of officers is to be found in ch. 3, §§ 20, 21, Warth's Amended Code, and is as follows: The commissioners at each precinct make out at the close of the voting, and sign, two certificates, the form of which is given, stating how many votes at that precinct were given for each candidate for each office. The ballots are all

sealed up by the commissioners, who, or one of whom, within four days thereafter, deliver the ballots so sealed up, one set of poll books, and one of their certificates, to the clerk of the county court, and the other certificate and set of poll books to the clerk of the circuit court. On the fifth day after election the commissioners of the county court meet in special session at the courthouse, and these clerks lay before them the ballots, poll books, and certificates which have been left with them by the different commissioners at the different precincts; and they may require the attendance before them of these precinct commissioners of election, or any other person present at the election at any precinct, and examine them on oath, and make all proper orders necessary to procure correct returns and ascertain the true result of such election. And they may, upon the demand of any candidate, open and examine any of the sealed packages of ballots and recount the same, after which they must reseal them in another envelope. When they have made their certificate as to each of the officers elected in a prescribed form, they are required to deposit the sealed packages of ballots in the county court clerk's office, and he is required to carefully preserve them and the poll books for one year, and, if there be no contest for any office, they are then to be destroyed without opening the sealed packages, and, if there be such contest, they are to be destroyed at the close of the contest. The mode of proceeding, when at such election there has been a vote taken on the relocation of a county seat, is prescribed in § 15, ch. 39, Warth's Amended Code, pp. 255, 256. The vote is taken, superintended, and returned in the same manner as in the election of officers had at the same time; but the commissioners of election at each place of voting are required to make out and sign a separate certificate of the result of the vote on the relocation of the county seat,

and are not to put the result of the vote on this question in the other certificate made out by them as to the result in their precinct of the voting for the several officers. This separate certificate of the result of the vote on this question of the relocation of the county seat, these commissioners at each precinct are required to deliver to the clerk of the county court within four days after the election, and he is required to lay the same before the county court at the next session, and they are thereupon required to ascertain and declare the result of the said vote, and enter the same of record." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 358.

b. The Ballot—Injunction.

An injunction does not lie to restrain ballot commissioners from putting on the ballots to be used at a general election the question of the relocation of a county seat, when the county court has made an order submitting such question to a vote. Such an injunction is null and void, and does not render invalid a vote upon such question. *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182.

c. The Petition.

"The law, under which this proceeding was instituted is § 15, ch. 39, of the Code, as amended by ch. 5 of acts of 1881 (Warth's Code, p. 255) as follows: 'Whenever the citizens of any county desire the relocation of their county seat, they may file their petition for such relocation at a place therein, at any regular session of the county court in any year in which a general election is to be held in such county. But such a petition should not be filed at a session of said court within ninety days next preceding such election. None but legal voters of the county shall sign said petition, and an affidavit shall be appended thereto that the subscribers to said petition are, as the officers verily believe, legal voters of said county. Upon the filing of such peti-

tion signed by one-fifth at least of all the legal voters of the county, to be estimated by allowing one vote for every six persons, as shown by the last preceding census, said court shall make an order that a vote to be taken at the next general election to be held in said county upon the question of such relocation at the place named in said petition." *Doolittle v. County Court*, 28 W. Va. 179.

Under § 15, ch. 39, W. Va. Code, as amended by ch. 5, acts of 1881, the petition should conclude with a prayer, that the county court should make an order, that a vote be taken at the next general election to be held in the county upon the question of the relocation of the county seat at the place named in said petition; and this place is designated with sufficient certainty, when it is called a certain city or town, and there should be no designation of the particular locality in such city or town as the place, where the county seat is to be located, no matter how much extent of land is covered by the boundaries of such city or town, or how sparse in portions of these boundaries may be the population. And this law is complied with, if upon the filing of such petition it be shown, that it is signed by one-fifth of all the legal voters of the county estimated by allowing one vote for every six persons as shown by the last preceding census, though the petition be undated and no proof is offered to show, either when the petition was signed by any of the signers, or that any of them were voters, at the time it was signed. *Doolittle v. County Court*, 28 W. Va. 158.

"The number of voters required to sign this petition is, by said fifteenth section of chapter 39 of Warth's Amended Code, p. 255, fixed at one-fifth, at least, of all the legal voters of the county, to be estimated by allowing one vote for every six persons in the county as shown by the last census." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 356.

Meaning of "Persons" Used in Act of March 2, 1888.—Act of March 2d, 1888 (acts 1887-'88, p. 465), provides that the judge of the county court shall, upon the application of persons paying one-third of the taxes on real estate in the county of Warwick, order a poll to be opened to ascertain the sense of the qualified voters as to whether or not the site of the courthouse of the said county should be changed. Held, the word "persons" in said act includes "corporations." *Craford v. Supervisors*, 87 Va. 110, 12 S. E. 147.

Mandamus to Compel County Court to Allow Petition to Be Filed.—

The questions, whether such petition should be allowed to be filed, and whether the order asked for in the petition should be granted by the county court, are not judicial questions; but it is an absolute duty imposed upon the county court, when such a petition, as is prescribed by this law, is presented and duly verified by affidavit and signed by the requisite number of legal voters of the county, to permit it to be filed and to make the order prayed for in the petition; and the court having no discretion to refuse to permit such petition to be filed or to make such order, if it refuses so to do, such ministerial duty can be enforced by mandamus. *Doolittle v. County Court*, 28 W. Va. 159.

d. Giving Notice—Duties of Clerk.

The manner of giving notice that such a vote is to be taken, prescribed by the statute law, is substantially, though not literally, complied with when the clerk of the county court, after the adjournment of the court, makes out and certifies a copy of the order, made by such court at a regular session, that a vote be taken at the next general election to be held in said county upon the question of the relocation of the county seat at the place named in the petition to the county court, and printed copies of this order,

and of the certificate of the clerk of the court, including his signature, are posted at each of the places of voting at least 40 days before the day of election, and, if a newspaper is printed in said county, then the said court shall cause a copy of said order to be published therein at least once in each week for four successive weeks prior to said election. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

e. Majority Necessary to Carry.

"The statute relating to the subject of removal of county seats (§ 15, ch. 39, W. Va. Code, 1891) declares that, 'If three-fifths of all the votes cast at such election upon the question be in favor of relocation at either of the places voted for, the said county court shall enter an order declaring the place so receiving three-fifths of all the votes cast therefor to be the county seat of said county from and after said date; and another clause provides that the county court shall examine the certificates of the votes cast at the voting places, and that 'said court shall thereupon ascertain and declare the result of said vote, and enter the same of record.'" *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 8.

"The statute plainly means that if three-fifths of the voters vote for the relocation, and it be so found and declared and entered by the county court, from that date—the date of such declaration—the new point is the county seat. In one clause the statute provides for the ascertainment by the county court whether a three-fifths vote has been cast for relocation, and by another clause it enacts that, if such vote has been cast, the place receiving such vote shall thenceforth be the county seat. It is the vote when so ascertained to be a three-fifths vote that works the change." *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 9.

In a vote, at a general election for public officers, upon the relocation of a county seat, under ch. 31, W. Va. acts, 1895, requiring for relocation

"three-fifths of all the votes cast at said election upon the question," such relocation is carried if it receive only three-fifths of all the votes cast on that one question, though they are less than three-fifths of the votes cast on some other question, or for candidates for office. *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 830; *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 9. See also, *Minear v. County Court*, 39 W. Va. 627, 20 S. E. 659.

f. Ascertaining Result of Election.

(1) Duty to Declare Result—Notice.

Returns of a vote on relocation of a county seat, taken at either a general or special election, must be canvassed, and the result declared by the county court, not by the board of canvassers. *Brown v. County Court*, 45 W. Va. 827, 32 S. E. 165. In this case the court said: "The sole question in this litigation is, which body shall canvass the returns of a vote at a general election upon the relocation of a county seat—the county court as such, or the board of canvassers as such? Though these bodies are composed of the same persons, the county commissioners, yet they are in law not the same, but distinct, bodies. The board of canvassers is merely a body to canvass the returns of election for public officers, acting simply on the certificates sent from voting precincts by certain officers holding the election, and recounting ballots when demand is made. They may send for those precinct officers to ascertain the true result; but they hear no contests judicially, no evidence of fraud in the election. They act ministerially only. If any candidate claims that the election is fraudulent, or in any wise illegal, or that ballots are unlawfully counted against him, or not counted for him, he must get relief by contest as provided in the statute. *Brazie v. Commissioners*, 25 W. Va. 213. But a county court, as such, canvassing the returns of an election upon a vote upon a county seat relocation, is an entirely different tribunal, having

wider function. It canvasses the returns upon the certificate, can recount ballots, hear evidence of fraud and illegality, and do what, in the case of candidates for office, could be done by that court in hearing a contest. *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97. And that case, as also *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337, held, that returns of election on a county seat must go before the county court to be canvassed, and to have the result declared, and not before the board of canvassers."

(2) Giving Notice of Meeting to Declare Result.

Where the commissioners of a county meet as a canvassing board, five days after an election, for the removal of the county seat, for the sole purpose of declaring the result of said election, counting the vote, etc., no notice is required, as to the object of said meeting, to be posted, as is necessary when special sessions are to be held for other purposes. *Miner v. Tucker Co.*, 39 W. Va. 627, 20 S. E. 659.

(3) The Certificate.

The requirement that the commissioners of election of each place of voting shall make out and sign a separate certificate of the result of the vote, and deliver the same to the clerk of the county court within four days (excluding Sundays) after the day in which the election is held, is mandatory, and if it be not complied with at any place of voting, that fact vitiates the determination or the question whether the county seat shall be relocated by the votes cast at such election; and this provision of the law can not be regarded as substantially complied with, if the commissioners of election at each place of voting insert the result of the vote at each place of voting in the certificates, or in one of the certificates, which they are required to make and sign, of the result of the vote at such place of voting for each candidate voted for; such separate certificate, and the delivery of it by the commissioners of election at

each place of voting within four days (Sundays excluded) after the day on which the election was held, to the clerk of the county court, and the requirement that he shall lay it before the county court at its next session thereafter, being regarded as designed in part to prevent the fraudulent alteration of such certificates. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

"We can not without assuming legislative powers, require that there should be two certificates of the vote on relocation, or require the number of votes for and against to be written out in words; and the insertion of the vote on relocation in figures in the certificate of the result of the vote for officers returned to the clerk of the county court would suffice." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 361.

(4) Certiorari to Ascertain Result.

The writ of certiorari lies in this state from a circuit court or a judge thereof in vacation to the county court commissioners convened in special session to ascertain the result of an election. *Chenowith v. Commissioners*, 26 W. Va. 230. See also, *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 108.

A writ of certiorari is not a writ of right; but the issuing of it is dependent on a sound judicial discretion; and a refusal of a circuit court to award it, on a proper petition to review the proceedings of the county court, in ascertaining and declaring the result of the vote on a relocation of a county seat, may be reviewed by a writ of error issued by the supreme court of appeals. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337. See generally, the title CERTIORARI, vol. 2, p. 734.

(5) Mandamus.

A writ of mandamus lies to compel a county court to convene and ascertain and declare the result of a vote upon the relocation of a county seat, where it has failed and refused to do so. *Morgan v. County Court*, 53 W. Va.

372, 44 S. E. 182. See post, "Contesting Returns—Certiorari," IV, B, 2, f, (6).

(6) Contesting Returns—Certiorari.

The fifteenth section of chapter 5 of the West Virginia acts of 1881 (Worth's Amended Code, ch. 39, sec. 15) provides that the clerk of the county court shall lay before the county court, at its next session after an election wherein a vote has been taken on the relocation of a county seat, the separate certificates of the precinct commissioners of the vote on this question at each precinct, and the law then provides: "The said court shall thereupon ascertain and declare the result of said vote and enter the same of record." Held, under this law any voter of the county has a right to appear and contest the validity of these returns, and ask that the court go behind these returns and ascertain what was the actual legal vote cast at such election for and against relocation, and had a right to demand that the evidence he offers be heard on this question; and, if the court refuse to permit him to be heard, he has a right to demand of them to settle and sign a bill of exceptions, setting out the refusal of the court to permit him to be heard, or to introduce any evidence on the question before them. And if they refuse to sign and settle such bill of exceptions, the circuit court may by mandamus compel them to do so, and then perfect their record so that the action of the county court in this matter may be reviewed on writ of certiorari by the circuit court. *Poteet v. County Commissioners*, 30 W. Va. 58, 3 S. E. 97.

A voter or taxpayer of a county may contest before the county court, for any legal cause, a vote upon the relocation of a county seat. *Brown v. County Court*, 45 W. Va. 827, 32 S. E. 165.

C. WHEN REMOVAL EFFECTIVE.

Where, on petition to the county court by the requisite number of legal voters, an election has been ordered and held to determine the question of

relocating the county seat, under § 15, ch. 39, W. Va. Code, 1899, and the county court has ascertained its result and declared that three-fifths of the votes cast are in favor of relocation at a particular place, and entered the fact in its record book, this place is, from the date of said declaration, by operation of law, the county seat. *Minear v. County Court*, 39 W. Va. 627, 20 S. E. 659; *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 8.

D. INJUNCTION.

Who May Enjoin Removal.—Parties who are taxpayers and citizens of a county, and who own real estate in a town from which it is claimed other parties are about to illegally remove the county seat by carrying away the records, books, documents, etc., under a pretended act of the legislature, to the great damage, expense and injury of the citizens of the county generally, and the parties plaintiff in particular, can maintain a suit by injunction against the parties so endeavoring to remove. *Osburn v. Staley*, 5 W. Va. 85. See also, *Brown v. County Court*, 45 W. Va. 827, 32 S. E. 167.

Citizens and taxpayers of a county have such an interest in the matter of the relocation of a county seat that they may interpose in proceedings in such matter, and maintain appropriate legal process touching it. *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 8.

Disolution of Injunction Obtained in Aid of Relocation.—An injunction obtained without just legal grounds for the ostensible purpose of preventing the county court from incurring indebtedness inhibited by § 8, art. 10, W. Va. constitution, while its real purpose is to aid in the relocation of the county seat, when such purpose is accomplished, should be dissolved and not perpetuated. *Hanley v. County Court*, 50 W. Va. 439, 40 S. E. 389.

E. REPEAL OF ACT OF 1862.

An act passed in 1862 by the general

assembly of Virginia, provided, that at a certain time, after the war was over, a vote might be had by the people of C. county on the matter of removing their county seat. An act of the West Virginia legislature, passed in 1863, provided that if it became necessary or desirable to remove a county seat, and a majority of the board of supervisors deemed it so, and it was approved by three-fifths of the voters, etc., it might be done. Where the vote under the act of 1862 was not taken until May, 1866, it was held: 1. That the operative part of the act of 1862 was repealed by the act of 1863. 2. That it was also impliedly repealed by the same act which revised the whole subject matter, and was passed in pursuance of a provision of the constitution of West Virginia, which took effect after the passage of the act of 1862, and gave to the board of supervisors the superintendence of the internal affairs and fiscal concern, of the county. *Conley v. Calhoun Co.*, 2 W. Va. 416.

V. Public Property.

As to duties of various officers relating to public property, see post, "County Officers," VI.

A. PUBLIC BUILDINGS.

1. Ownership—Exemption.

The county court is not the owner of the county buildings. They belong to the citizens of the county, and are to be held and used in trust for public purposes alone. *Hall Safe, etc., Co. v. Scites*, 38 W. Va. 691, 18 S. E. 896.

2. Exemptions—Mechanic's Lien.

The public buildings of a county are wholly exempt from the operations of the mechanic's lien law, and can not be sold under execution or other process. *Hall Safe, etc., Co. v. Scites*, 38 W. Va. 691, 18 S. E. 895.

3. The Courthouse.

Necessity.—A suitable courthouse is a paramount public necessity in every county. *Hanley v. County Court*, 50 W. Va. 439, 40 S. E. 389.

Location—Effect of City within County Limits.—A courthouse must be located within the boundaries of the county, but the fact that a city is established within the territorial limits of a county does not alter the boundaries of the county, nor curtail its territorial limits, although its court is deprived of jurisdiction, civil and criminal within the limits of the city. The county may still keep its courthouse and other public buildings and hold its court within the city limits. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380.

In *Supervisors v. Cox*, 98 Va. 273, 36 S. E. 380, the court, quoting from Va. Code, 1887, said: "Section 3116 is as follows: 'Every circuit, county, or corporation court, for any county or corporation, shall be held at the courthouse of such county or corporation, except where some other place is prescribed by law, or lawfully appointed,' and § 3120 provides that 'no such place of session, for a circuit, county or corporation court, shall be without the limits of the county or corporation of which it is the court.'"

"The courthouse and other public buildings of a number of the counties of the state are situated in cities within the territorial limits of the counties, and it has been held, by this court that jurisdiction over the locality is in the court of the city, and not in the court of the county. *Fitch's Case*, 92 Va. 824, 24 S. E. 272; *Chahoon's Case*, 20 Gratt. 733." *Supervisors v. Cox*, 98 Va. 274, 36 S. E. 380.

Control by Judge.—A judge of a circuit court has authority to control the courthouse in which he administers justice, to the extent, at least, of preventing any interference with the discharge of the public business, and of having necessary jury rooms and other conveniences for that purpose. *Bedford Co. v. Wingfield*, 27 Gratt. 329.

And where there is any such interference by the board of supervisors of a county, or any one else, the judge certainly has the right to inquire into

it. If in doing so he violates the law or infringes upon the rights of others, his action may be corrected by a writ of error. But it is not a case in which prohibition will lie. *Bedford Co. v. Wingfield*, 27 Gratt. 329.

Transfer to New Courthouse.—When the place of holding the court of any county has been changed to another building in the same town temporarily, under § 7, ch. 114, W. Va. Code, 1899, for the reason that the courthouse has been destroyed, no form of ceremony or notice is necessary to authorize the holding of courts in the new courthouse provided upon the site of the old one, when the same is ready for occupancy and in possession of the county authorities. And whenever such new courthouse is ready for occupancy the reason of holding the court at such other place appointed has ceased, and courts are properly held in the new courthouse. *State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

4. Clerk's Office.

Location.—"Section 3176 provides that the clerk's office of the court of every county and corporation shall be kept at the courthouse of the county or corporation, unless there shall have been a failure by the proper authority to provide such office there, in which case the clerk's office may be kept at such other place within the county or corporation as the court may direct. It thus appears that the law, for the subservience of the public convenience, requires that the clerk's office of a county or city shall be kept at the courthouse of the county or corporation, as the case may be." *Norfolk Co. v. Cox*, 98 Va. 270, 36 S. E. 381.

Condemnation of Land within City Jurisdiction.—If, where a city is established within the territorial limits of a county, additional land within the city limits is needed for its clerk's office, and the same can not be purchased of the owner, it may be condemned by proper proceedings for the

purpose. *Norfolk Co. v. Cox*, 98 Va. 270, 36 S. E. 380.

The condemnation of land in an incorporated town for a county clerk's office does not subject the land to a conflict of jurisdiction between the city and county courts, as the city court has jurisdiction of the locality and the county court does not acquire the same by the condemnation proceeding. *Norfolk Co. v. Cox*, 98 Va. 270, 36 S. E. 380.

Removal of Records.—Where a city is established within the territorial limits of the county, the county may still keep its courthouse and other public buildings within the city limits, and the removal of the records to the clerk's office when erected therein, is not such a removal of them out of the county as is prohibited by law. *Norfolk Co. v. Cox*, 98 Va. 270, 36 S. E. 380.

B. THE PUBLIC SQUARE.

See post, "Rights in Public Square," VI, B, 1, b, (3), (g).

"In the case of *Com. v. Bowman*, 3 Pa. St. 203, it is held that: 'The foundation of the right of a county to reasonable accommodation for its courthouse and public offices in the great square of the county town is based upon one of the usages of our state which has acquired the consistence of law; and the extent of the right is limited to the single purpose sanctioned by that usage. A county has no inherent right of property in a public square which has been dedicated not to its use only, but to the use of all the citizens of the commonwealth as a public highway over which all have a right to pass without unreasonable let or hinderance. Such public square is as much a highway as if it were a street, and neither the county nor the public can block it up to the prejudice of the public or an individual. Where a building for a court room and public offices was erected on a part of the public square by county commission-

ers previously to 1800, which was used for the purpose of its erection from that time until 1829, when a new courthouse and offices were erected on another part of the same square, to which the court and public records of the county were removed, and a part of the old building was let by the commissioners at a yearly rent for a printing office, and the rest of it was used as the office of the county treasurer; held, that each of the purposes to which the commissioners appropriated the old building was unlawful, and that the duty of the commissioners required them to remove the materials of the old building, or to abandon them to the municipal authorities; and by omitting to do so they became obnoxious to a criminal prosecution for a public nuisance." *Sturmer v. County Court*, 42 W. Va. 724, 26 S. E. 535.

A public square in a town or village, which for more than eighty years has been treated as such by the county court of the county, has been recognized as such by the municipal authorities of the town, and used as a public square by the court and the public generally, must be considered as dedicated as a public square for the use of the public. *Sturmer v. County Court*, 42 W. Va. 724, 26 W. Va. 532.

C. PROPERTY DEDICATED TO PUBLIC USE.

If a lot on which there is a spring of water, in the plan of a town, be reserved for public use by the founder of the town, who owned the land on which the town is laid out, such reservation, though it may amount to a dedication of the lot for the public use, by the owner, does not vest the legal title thereto in the county or supervisors of the county, or necessarily vest the county or supervisors thereof with the equitable right to demand a conveyance from such owner or his alienee to the county or the supervisors thereof. *Supervisors v. Ellison*, 8 W. Va. 308.

D. LOT ON WHICH COURT-HOUSE BUILT.

The court of a county having caused a courthouse and jail to be erected, in or about the year 1754; and courts having been continually held in such courthouse, until the year 1801, it ought in a court of equity, to be presumed that the title to two acres of the land built upon, and adjacent, were duly vested in the court and their successors, although no deed from the original proprietor can be produced. *Boykin v. Smith*, 3 Munf. 102.

Quære, ought not such presumption to take place at law, as well as in equity? *Boykin v. Smith*, 3 Munf. 102.

VI. County Officers.

See the title PUBLIC OFFICERS.

A. IN GENERAL.

See post, "Particular Officers," VI, B.

1. Constitutional Provisions.

"The second section of the seventh article of the constitution, under the head of 'county organization,' ordains as follows: 'Each county of the state shall be divided into so many compactly located magisterial districts as may be deemed necessary, not less than three; provided, that after these have been formed no additional districts shall be made containing less than thirty square miles. * * * In each district there shall be elected one supervisor, three justices of the peace, one constable, and one overseer of the poor, who shall hold their respective offices for the term of two years.' 'But nothing in this article,' says the fourth section, 'shall be construed as prohibiting the general assembly from providing by law for any additional officers in any city or county.' Code (Va., 1887), p. 44." *Ex parte Bassitt*, 90 Va. 681, 19 S. E. 453.

2. Qualification.

a. Time of Qualification.

Under the constitution and laws of this state, county, municipal and district officers must qualify before the

day whereon their terms respectively begin, else their officers are vacant, and the incumbents continue to discharge the duties of the offices, after their terms of office have expired, until their successors have qualified. *Johnson v. Mann*, 77 Va. 265; *Branhan v. Long*, 78 Va. 352.

b. Effect of Failure to Qualify.

The general assembly has declared that the failure of any county, corporation or district officer to qualify before the commencement of his term of office, shall create a vacancy in his office. *Vaughan v. Johnson*, 77 Va. 300.

3. Election or Appointment.

See the title ELECTIONS.

Contest of Election—Certiorari.—

Sections 30, 31, 32, 33, of the acts of the West Virginia legislature, 1872-73, prescribing the time and manner in which the election of county and district officers might be contested, not being repugnant to the provisions of said amendment, continued in full force and effect, after the adoption thereof. *Fowler v. Thompson*, 22 W. Va. 107.

In the case of a contested election of a county or district officer, or of any or all of the commissioners composing the county court, the proper mode of bringing the proceedings before the circuit court for review, is by writ of certiorari, upon the hearing of which the circuit court, if there be no error, will affirm the same, but if they be erroneous, will reverse the judgment and remand the cause to the county court for further proceedings. *Fowler v. Thompson*, 22 W. Va. 107.

4. Limitation of Authority.

a. General Rule.—Ultra Vires Acts.

The agents, officers, or governing body of a municipal corporation or a county, can not bind the corporation or county by a contract which is beyond the scope of its powers. Such contracts are ultra vires and void, and, in actions thereon, the want of power to execute is a complete defense, and the county or corporation is not es-

topped from setting it up. *Alleghany Co. v. Parrish*, 93 Va. 615, 25 S. E. 882; *Franklin Co. v. Gills*, 96 Va. 332, 31 S. E. 507. See also, *Bank v. County*, 28 W. Va. 273.

"The several counties are but political subdivisions of the state; and, like county organization and county officers, exist only by virtue of the constitution and laws of the state, and were created as convenient instrumentalities for the administration of the state government. The counties, as such, can confer no authority other than such as is conferred by law; nor can any county officer perform any function without like authority. Hence, the authority delegated to the counties, and the jurisdictional functions to be performed by county officers, are, in general, restricted by the legislature to the limits of the counties respectively; and all that is done by way of assessing and levying taxes upon persons and property of both individuals and corporations, for either state or county purposes, must be done in obedience to law, and in the manner prescribed by the constitution and laws of the state." *Norfolk, etc., R. Co. v. Supervisors*, 87 Va. 525, 12 S. E. 1009. See also, *Fry v. Albemarle Co.*, 86 Va. 198, 9 S. E. 1004.

b. Third Persons Charged with Notice.

Officers are but public agents of a county and their duties being described by statutes or by charter, all persons are charged with notice thereof. *Franklin County v. Gills*, 96 Va. 332, 31 S. E. 507. See also, *Alleghany Co. v. Parrish*, 93 Va. 621, 25 S. E. 882.

"They who deal with the county authorities are charged with notice that such authorities are limited in their expenditures to the annual income derived from their power to levy taxes annually, and must make their contracts accordingly. To hold otherwise would place it in the power of such authorities to evade the constitutional limitation, and bankrupt every county

in the state." *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 374.

c. Estoppel of County to Deny Authority.

The county is not estopped from denying the authority of its agents to make the contracts sued on. *Alleghany Co. v. Parrish*, 93 Va. 621, 25 S. E. 882.

5. Removal—Constitutionality of Act.

Under § 4, Art. 9, W. Va. Constitution.—"Chapter 48, acts, 1897, is not repugnant to § 4, art. 9, of the state constitution, which is as follows: 'The presidents of the county courts, the justices of the peace, sheriffs, prosecuting attorneys, clerks of the circuit and county courts, and all other county officers, shall be subject to indictment for malfeasance, misfeasance, or neglect of official duty, and upon conviction thereof their offices shall become vacant.' *McDonald v. Guthrie*, 43 W. Va. 595, 27 S. E. 845. See also, *Arkle v. Commissioners*, 41 W. Va. 471, 23 S. E. 804.

Effect of Indictment.—If upon indictment for the offenses in § 4, art. 9, of the constitution, the party be convicted, the judgment would itself work his removal from office, without any other process to reinvestigate the fact. The conviction alone divests him of office as an unfit incumbent. *McDonald v. Guthrie*, 43 W. Va. 595, 27 S. E. 845.

B. PARTICULAR OFFICERS.

See ante, "In General," VI, A.

1. Board of Commissioners—County Court.

See generally, the title COURTS.

a. Definition and Status.

See post, "Powers and Duties," VI, B, 1, b.

"By the constitution of this state (see §§ 22-24, art. 8) the county courts to be composed of three commissioners, two constituting a quorum for the transaction of business, are given, under such regulations as may be prescribed by law, the superintendence and administration of the internal police and fiscal affairs of their counties; and by

ch. 39 of the Code the county court of every county shall be a corporation by the name of the 'County Court of _____ County,' by which name it may sue and be sued, plead and be impleaded, and contract and be contracted with; and by ch. 46 of the Code the county court of every county shall hereafter do and perform all the duties heretofore devolved upon the board of overseers of the poor, and by §§ 19, 20, may appoint an agent, who shall have charge of the county infirmary, or place of general reception for the poor of the county, but he shall be at all times under the control of the county court, and observe the rules and regulations prescribed by it." *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452. See also, *Chapman v. County Court*, 27 W. Va. 500.

"The county courts in Virginia act in a variety of characters and capacities, they act moreover as a board of police for the county and in this character have no forensic jurisdiction; as in laying the county levy, recommending sheriffs, coroners, militia officers and justices of the peace, in which they act merely as ministerial persons; and though they act in their several capacities on the same day, the character in which they act is determined by the nature of the case. * * * When a deed is offered to be proved, the court quoad hoc sits as a court of registry only. It is to examine the witnesses as to the execution of the deed, or receive the acknowledgment, if presented and affirmed to be acknowledged by the maker of it, as a matter of right and duty." *Doolittle v. County Court*, 28 W. Va. 177.

The county court is a corporation created by statute. *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452.

b. Powers and Duties.

See ante, "Definition and Status," VI, B, 1, a.

(1) Generally.

The county court is a corporation created by statute, and can only do

such things as are authorized by law, and in the mode prescribed. *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452.

Under the provisions of the West Virginia constitution (art. 8, § 24) county courts are authorized to exercise such other powers and perform such other duties not of a judicial nature, as may be prescribed by law. *Arkle v. Commissioners*, 41 W. Va. 471, 23 S. E. 804.

The county courts of this state, as they existed on the 12th day of October, 1880, notwithstanding the adoption of the amendment of article 8 of the constitution, continued in existence with the limited jurisdiction prescribed by § 24 of said amendment, until the 1st day of January, 1881, after which day the said county courts were no longer composed of a "president and two justices of the peace," but of the three commissioners mentioned in § 22 of said amendment. That until the said 1st day of January, 1881, the said county courts could rightfully exercise the limited jurisdiction, prescribed by said § 24 of said amendment, at the regular terms of said courts, in accordance with the laws then in force. *Fowler v. Thompson*, 22 W. Va. 106.

The limited jurisdiction remaining vested in said courts, after the adoption of said amendment on the 12th day of October, 1880, included "all matters of probate, the appointment and qualification of personal representatives, guardians, curators and committees, and the settlement of their accounts, and all matters relating to apprentices; also the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies; to grant licenses, for the sale of intoxicating liquors, in certain cases, and in all cases of contest, to judge of the election, qualification and return of their

own members, and of all county and district officers." *Fowler v. Thompson*, 22 W. Va. 107. See the title COURTS.

In making agreements for repairs of public buildings of the county, etc., on behalf of the county, the county court does not act in its judicial capacity but simply as a board of police in its ministerial capacity. It acts as a board of directors on behalf of the county in its corporate capacity, and has as such board the same authority to bind the county as a board of any other corporation, acting within its legal powers, would have to bind such corporation. *Despard v. Pleasants Co.*, 23 W. Va. 318.

(2) Control over Fiscal Affairs.

The county courts have jurisdiction and control over the fiscal affairs of the county and of its district as a part of it, and because the district has no local officers or government, the county court performs all of its functions. *Neale v. County Court*, 43 W. Va. 90, 27 S. E. 373. See post, "Internal and Fiscal Affairs," VI, B, 2, b, (9).

(3) Powers and Duties Relating to Public Property.

(a) Erecting and Providing for Public Buildings.

aa. Generally.

"By § 13, ch. 37, Rev. Code, W. Va., 1792, it was enacted, that 'from that time forth hereafter the court of every corporation and county within this commonwealth shall cause to be erected and kept in repair within each respective county and corporation at the charge of such county or corporation a good and convenient courthouse and jail for the use of their county or corporation, and for no other use whatever.' This provision was re-enacted without change in § 16, ch. 71, Rev. Code, W. Va., 1819. The same provision in substance was re-enacted in § 1, ch. 50, W. Va. Code, 1849: 'There shall be provided by the court of every

county, and by the council of each town, wherein there is a corporation court, a courthouse, clerk's office and jail, the cost thereof and of the land on which they may be, and keeping the same in good order shall be chargeable to the county or corporation, and may be levied for by such court or council. But no county court shall make any order for the purchase or condemnation of such land, or the erection of a courthouse unless a majority of the acting justices of such county be present at the time or unless the acting justices of such county shall have been summoned to attend at that time to consider the subject, under an order made at a previous term.' The same provision was carried into the edition of the Code published in 1860." *Bank v. County*, 28 W. Va. 280.

"Section 14, ch. 39, W. Va. Code, commands the county court to provide at the county seat, suitable courthouse, jail, and offices for clerks, and the clerks are to keep the records and papers in such offices, as provided by § 9." *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 10.

"By the Virginia Code of 1819, which was in force when the county of Alleghany was formed, and when it acquired the courthouse lot or square of three-fourths of an acre, it was made the duty of every county court to cause to be erected and kept in repair (or where the same had been erected to maintain and keep in repair), a courthouse, county jail, whipping post, pillory and stocks; and, where land had not been already provided and appropriated for that purpose, the court was authorized to purchase two acres of land upon which to erect said public buildings for the use of their county, 'and for no other use whatsoever.' 1 Rev. Code, ch. 71, cl. or § 16, p. 250." *Alleghany Co. v. Parrish*, 93 Va. 617, 25 S. E. 882.

"The Virginia Code of 1849, which was in force when the orders of the county court upon which the appellee

relies were made, required that 'there shall be provided by the court of every county, and by the council of each town wherein there is a corporation court, a courthouse, clerk's office and jail, the cost whereof and of the land on which they may be, and of keeping the same in good order, shall be chargeable to the county or corporation, and may be levied for by such court or council. The fee simple of the land shall be in the county or corporation, and the court thereof may purchase so much land, as, with what it may before have had, will make two acres whereof what may be necessary shall be occupied with the courthouse, clerk's office and jail, and the residue planted with trees and kept as a place for the people of the county to meet and confer together.' Code of 1849, ch. 50, § 1, p. 255. By this provision of the Code the county courts were not only not expressly, nor impliedly authorized to make contracts by which other buildings than those specially named could be erected upon the courthouse lot or square, but it expressly provided the use to which the residue of the lot, not occupied by the courthouse, clerk's office, and jail, should be put. It required that so much thereof as might be necessary 'shall be occupied with the courthouse, clerk's office, and jail, and the residue planted with trees and kept as a place for the people of the county to meet and confer together.' The lot in so far as it was not occupied by the courthouse, clerk's office, and jail, was required to be planted with trees, and kept as a place for the people to meet and confer. Not a portion of the residue was to be so used, but the whole of it. The uses to which the court was required to put the lot exhausted all the purposes for which it could be lawfully used." *Alleghany Co. v. Parrish*, 93 Va. 619, 25 S. E. 882.

bb. Raising Funds.

See post, "Accounting—Allowance of Claims," VI, B, 1, b, (7).

aaa. By Taxation.

"From this examination of these provisions of the Codes of 1792, 1819, 1849 and 1860, it is apparent, that, while the general assembly of Virginia imposed upon the county courts of the several counties the duty 'from time to time forever thereafter' to cause to be erected and kept in repair within each respective county a courthouse, clerk's office and jail, and also to provide for the payment of all other amounts chargeable upon the county, it clothed them with ample authority to raise the money necessary for that purpose by vesting in them an almost unlimited power of raising money by taxation levied upon every tithable of the county in a manner best calculated to arouse public attention as well as to the amount demanded as to the persons receiving the same and the uses, to which it was to be applied." *Bank v. Lewis Co.*, 28 W. Va. 282. See generally, the title TAXATION.

bbb. By Loans—Liability of Agent.

In 1854 the county court of Lewis County by an order entered of record, having determined to build a new courthouse and clerk's office, the cost of which was to be paid in four equal annual installments, contracted for the erection thereof on the terms aforesaid. In December, 1854, said court appointed J. B. its agent to borrow the money necessary to meet the engagements of the county with its contractors and pledged the county for the payment thereof. J. B. borrowed from the Exchange Bank of Virginia \$4,075.04 for that purpose, for which he made to the bank four negotiable notes, whereby he promised to pay the same to the bank one hundred and twenty days after their respective dates, and signed the same, "J. B., agent for Lewis county." In an action brought by the bank against Lewis county to recover the amount of this loan, held, the said notes were the notes of J. B. and not

the notes of Lewis county. *Bank v. Lewis Co.*, 28 W. Va. 273.

"The possibility that such reckless expenditure may be made is a cogent reason why the power of borrowing money had been withheld from the county courts. The power already granted of raising money by taxation was ample for the purpose of erecting and keeping in good repair at the expense of the county a courthouse and clerk's office, and if the particular mode of raising money for these purposes prescribed by the statute be departed from for the purpose of building a courthouse, by what means could the county court be restrained from borrowing money to keep the same in good repair or for the purpose of paying other lawful county charges? The policy of the law of Virginia was to keep the counties out of debt, to compel them 'to pay as they go,' and to charge the county revenues of each year with its own burdens." *Bank v. Lewis Co.*, 28 W. Va. 283.

The county courts of Virginia in 1855 and 1857 had no power or authority to borrow money for the erection of courthouses or other public buildings for the use of their several counties. *Bank v. Lewis Co.*, 28 W. Va. 273.

No action against Lewis county to enforce the collection of the money so borrowed can be maintained. *Bank v. Lewis Co.*, 28 W. Va. 273.

Ratification.—The borrowing of said money and the making of said negotiable notes, so far as Lewis county was concerned, were acts *ultra vires*, and incapable of ratification. *Bank v. Lewis Co.*, 28 W. Va. 273.

cc. What Funds May Be Appropriated.

A county court has the right to appropriate the funds on hand and those to be raised by the levy of the present fiscal year for the purpose of erecting necessary county buildings including a courthouse, and to enter into contracts with this end in view without thereby creating an indebtedness in violation

of § 8, art. 10, of the West Virginia constitution. *Hanley v. County Court*, 50 W. Va. 439, 40 S. E. 389. But it can not bind the levies of future years. *Hanley v. County Court*, 50 W. Va. 442, 40 S. E. 389.

A county court can not bind the levies of future years under §§ 25, 26, ch. 194, acts, 1872-73, to pay for improvements made on roads and bridges, without first submitting all questions in relation thereto to a vote of the people, as required by § 8, art. 10, of the constitution. *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 373.

An assignee of such indebtedness has no greater rights to enforce payment thereof than his assignor. *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 373.

dd. Failure to Provide Jail—Duty of Sheriff.

The fact that the county court has not provided a jail in which a debtor taken in execution may be confined, does not authorize the sheriff who has taken a debtor on an execution, to permit him to go at large. If no jail is provided by the county court, it is the sheriff's duty to provide one, and to keep the debtor whom he has taken in execution, in custody. *Stone v. Wilson*, 10 Gratt. 529. See the title SHERIFFS AND CONSTABLES.

ee. Authority over Land Acquired for Public Buildings.

See ante, "Limitation of Authority," VI, A, 4.

County courts had no authority, either under the Virginia Code of 1819 (1 Rev. Code, ch. 71, § 16), or the Code of 1849 (ch. 50, § 1), to authorize or permit the use of lands acquired for a courthouse, jail, and other public buildings, for any other purpose than those mentioned in the Codes. The power of acquisition was for a special purpose, and the use was confined to the purpose for which authority to acquire was given, and subject to the restrictions imposed; and it is imma-

terial whether the land was acquired by gift, or purchase, if held under the general law. The uses to which the court was required to put the land exhausted the purposes for which it could be used. It had no authority to authorize the erection of a law office on the land upon the payment of a ground rent. *Alleghany Co. v. Parrish*, 93 Va. 615, 25 S. E. 882. See *Franklin Co. v. Gills*, 96 Va. 332, 31 S. E. 507.

(b) Mandamus to Compel Action.

Building New Courthouse.—A mandamus will not go to compel a county court to build a new courthouse, when its construction would impose a debt on the county beyond the means that can be raised by taxation, within the legal limit of taxation on the assessed valuation of property. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959. See the title MANDAMUS.

Nor will it be compelled by mandamus to build a new courthouse pending a proceeding to remove the county seat. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

Repair of Old Courthouse.—Citizens or taxpayers of a county may, merely by reason of their interest as such, maintain mandamus, in a proper case, to compel a county court to repair an old courthouse. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

(c) Power to Postpone Building of New Courthouse.

A county court has the authority to determine whether the building of a new courthouse should be postponed until a vote can be had for the relocation of the county seat and such determination is final and not reviewable by injunction or otherwise, unless such vote has been ordered and is pending, when by proper proceeding the wrongful action of the court will be controlled. *Hanley v. County Court*, 50 W. Va. 439, 40 S. E. 389.

(d) Leasing County Property.

The judge of a county court has no

authority to authorize or assent to a lease of county property acquired for county purposes to any person for private use, or for any purposes other than those provided by law. The judge of the county court is a mere agent of the county in respect to county property, whose duties and powers are prescribed by law, and all contracts made by him in respect to said property not authorized by statute are void. *Franklin Co. v. Gills*, 96 Va. 330, 31 S. E. 507; *Franklin Co. v. Saunders*, 96 Va. 335, 31 S. E. 1007.

(e) Changing Location of Public Buildings.

"Under our statutes the county court may at its pleasure change the location of the courthouse, jail or other public buildings at the county seat to any point, that they may think proper, at any time, so that the same be at the county seat, purchasing or providing at their pleasure new and other buildings whenever they may think proper, provided only such buildings be located at the county seat; that is, the town chosen as the county seat. (Acts of 1885, ch. 24.)" *Doolittle v. County Court*, 28 W. Va. 183.

(f) Altering Contract—Effect of Acceptance.

The county court, having made a contract with the plaintiff for certain repairs to the public buildings of the county, by an agreement in writing signed by it, and the plaintiff accepted said repairs and directed said agreement to be entered on the order book of the court; after it had been so entered but before the minutes of the court had been signed, the court by interlining the agreement on the order book made a material change therein without the knowledge of the plaintiff. Held, the said court in making said agreement did not act judicially but simply as a board of police for the county in its ministerial capacity and its obligations as such board and its powers as a county court in its judicial capacity

were as separate and distinct as if the two bodies had been composed of different instead of the same members, and it had no power as a court to alter the agreement entered into by it as such board, and the interlineation made therein on its order book was a nullity and it was proper to show that fact by parol evidence. *Despard v. Pleasants Co.*, 23 W. Va. 318.

The acceptance of said repairs by the county court was conclusive as to the character and completion of the repairs unless the county should show that the same had been obtained by the imposition or fraud of the plaintiff or made by the mistake of the county court. No offer having been made to show such imposition, fraud or mistake, it was not error to reject parol evidence offered by the county to show that the repairs had not been made and completed according to the contract between the plaintiff and the county. *Despard v. Pleasants Co.*, 23 W. Va. 318.

(g) Rights in Public Square.

See ante, "The Public Square," V, B.

The county court of the county, being desirous of erecting a jail, having as early as November, 1813, agreed with a party fronting on such public square that in consideration of the conveyance of a lot for such new jail to be erected upon, no public buildings shall be erected on such public square in front of said party's house, can not, after said public square has for so many years been dedicated to the public and accepted as such, sell the same to private parties for the erection of private buildings, and the party owning property as aforesaid fronting on such public square may restrain the erection of private buildings thereon by injunction. *Sturmer v. County Court*, 42 W. Va. 724, 26 S. E. 532.

(h) Ferries.

See the title FERRIES. See post, "Leasing Ferries," VI, B, 2, b, (3), (d).

Authority to Establish.—A ferry established since ch. 44 of the West Virginia Code was amended by the act of the legislature passed March 25, 1882, does not carry the exclusive privilege of transporting persons and things across the river within a half mile of the same. Under such act, the county court has the authority to establish a ferry within a half mile of another ferry over any of the streams of this state, and without in any manner infringing upon the franchises of such existing ferry, or rendering the proprietor of the new ferry liable for damages on account thereof. *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146.

Jurisdiction to Provide for Ferries.—Virginia Code, 1873, ch. 64, confers on the county courts jurisdiction to establish ferries. When in particular case such jurisdiction is acquired, the failure of the court in the progress of the case to comply with the statute in details, may be error reviewable on appeal, but is no ground to attack the judgment collaterally. *Wimbish v. Breeden*, 77 Va. 324. See the title FERRIES.

Leasing Ferry—Injunction.—Where a person is enjoined from operating an illegal ferry at a certain point on a river, and the county court afterwards establishes a ferry at such point, and licenses such person to maintain and operate it, such injunction is properly dissolved. *Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146. See the title FERRIES.

(4) Binding Future Levies.

See ante, "What Funds May Be Appropriated," VI, B, 1, b, (3), (a), cc.

(5) Contracts of Purchase.

(a) Purchasing Salt.

Generally.—"The authority under which the contract now sought to be enforced were made, is an act of the legislature assembled at Richmond, passed May 9th, 1862, entitled 'An act to authorize the county courts to purchase and distribute salt amongst the

people and provide payment for the same;' and is in the following words: Section 1. Be it enacted by the general assembly, that the courts of the several counties of this commonwealth, when a majority of the acting justices of the county is present, or when the justices have been summoned to attend to act upon the matter, are hereby authorized and empowered to order the purchase for the use of the people of said counties respectively, such quantities of salt as the said courts may deem necessary, and to provide for the payment of the same by county levies, or by loans negotiated upon the bond of said counties, to be redeemed by county levies or otherwise. Section 2. The said courts shall have power and authority to distribute the salt thus purchased amongst, or dispose of the same, to, the people of their respective counties, in such quantities, upon such terms, and under such regulations as the said counties may prescribe. Section 3. For the purpose of carrying out the provisions of this act, the said court may appoint or employ agents or commissioners, and take from them bonds with approved security, payable to their respective counties, in such penalties as such courts may prescribe, with condition for the faithful performance of their duties as such agents or commissioners. The bonds so taken shall be filed in the clerk's office of the court in which they are taken, and may be put in suits from time to time, by the said court in behalf of the said counties, or by any person injured by the breach of the said conditions." *Dinwiddie Co. v. Stuart*, 28 Gratt. 536; *Chesterfield v. Hall*, 80 Va. 323.

Constitutionality of Contract.—Under the statute authorizing counties and corporations to purchase salt to be sold to their people, the county court of Dinwiddie in 1862, makes a contract with S. for the purchase of a certain quantity of salt, which is delivered

to S. This is a valid contract, binding on the county of Dinwiddie as at present organized, and its payment is not prohibited either by the constitution of the state or of the United States. *Dinwiddie Co. v. Stuart*, 28 Gratt. 526.

A contract made under the act of May 9, 1862, to furnish salt to a county, does not come within the prohibition of the constitution (art. 10, § 10), which declares, "no county, city or corporation, shall levy or collect any tax for the payment of any debt contracted for the purpose of aiding any rebellion against this state or the United States," and must be enforced. *Pulaski Co. v. Stuart*, 28 Gratt. 872, following *Dinwiddie Co. v. Stuart*, 28 Gratt. 526; *Stuart v. Greenbrier*, 16 W. Va. 93.

Statute of Limitations.—This contract being a parol contract, and suit not having been brought on it till 1875, it was barred by the statute of limitations; and to the plea of the statute of limitations the plaintiff could not reply, that he could not truly make the affidavit prescribed by § 27, ch. 106, of the Code of West Virginia, as no plaintiff can make such replication, when he sues any corporation. *Stuart v. Greenbrier*, 16 W. Va. 93.

Executing Bond.—A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were summoned, or that a majority were present, when a bond was executed for salt purchased, or the bond will be held to be null and void. *Dinwiddie Co. v. Stuart*, 28 Gratt. 526; *Chesterfield v. Hall*, 80 Va. 321.

(b) Purchasing Hogs for Use of Poor Farm.

Two members of the county court of Kanawha county, made by law a corporation, on the streets of Charleston, and as individuals, gave the following order; "Charleston, W. Va.

Nov. 12, 1894. Mr. Geo. A. Goshorn —Dear Sir: You will please deliver to Kanawha county poor farm, by river, as soon as there is water in the river for large boats to run so you can deliver same, 60 hogs, for use of poor farm, at 7 cents per pound. J. D. Shrewsbury, C. S. Young, Pres. Kana. Co. Ct." In pursuance thereof the 27 hogs in controversy were delivered at the poor farm, received by the superintendent, and appropriated to the use of the poor. Held, that such transaction, unless ratified by the county court, had no binding force on said corporation. For the members of such corporation can not individually give their consent or enter into a contract, in such manner as to oblige the corporate body. It was not ratified by the superintendent of the poor farm, as he did not appear to have the authority, express or implied, to have made the original contract, or to know anything about the transaction. It was not ratified by the corporate body, but, when presented for allowance and payment, it was disallowed and rejected. *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452.

The county court, not being able, without its fault, to return the same hogs, was liable to pay what they were reasonably worth; viz., the fair market value at the time and place of delivery, with such incidental sums added as were necessary to make the sellers whole. *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452.

(6) Levying Poor Rates.

"The county courts have been, from time immemorial, authorized by law to levy poor rates for support of the poor of their own county; and to lay county levies in order to defray the expenses of building courthouses, clerks' offices, jails and bridges, and of opening roads and keeping them in repair. These are levies for local county purposes, ascertained by usage and practice to be so." *Goddin v.*

Crump, 8 Leigh 143. See the title **TAXATION**.

(7) Accounting—Allowance of Claims.

See post, "Accounting and Allowance of Claims," VII, B. 2.

(8) Contractors Charged with Notice of Court's Authority.

A contractor or laborer dealing with the county court is charged with notice of the constitutional limitation of its powers, and if he performs labor or does work for it under an unauthorized contract of payment out of the levies of future years, and not out of the funds on hand or the levy for the current fiscal year, he can not recover for the same in an action of assumpsit, or compel the county court by mandamus to lay a levy for payment thereof, even though the county court has issued certificates, orders, or evidences of debt therefor. *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 373. See ante, "Third Persons Charged with Notice," VI, A, 4, b.

(9) Powers of Taxation.

See the title **TAXATION**.

(10) Duties Relating to Roads, etc.

See the title **STREETS AND HIGHWAYS**.

(11) Removal of County Seat.

See ante, "Authority of Supervisors and County Court," IV, A, 3.

c. Removal—Constitutionality of Act.

Chapter 48, acts, 1897, allowing proceedings for removal of commissioners of the county court by proceedings in the circuit court, is constitutional. *McDonald v. Guthrie*, 43 W. Va. 595, 27 S. E. 844. See ante, "Removal—Constitutionality of Act," VI, A, 5.

2. Board of Supervisors.

a. Creation and Purpose.

"The board of supervisors, like every other quasi corporate body, being the mere creature of the statute, it has only such powers as are expressly conferred upon it, or necessarily implied in furtherance of the object of its creation. These boards are created for the

purpose of managing the ordinary county affairs appertaining to all the counties of the state alike." *Roper v. McWhorter*, 77 Va. 223.

b. Powers and Duties.

(1) In General.

"The office of supervisor was unknown to the constitution and laws of Virginia until the adoption of the present constitution, which went into effect during the last year. It results from the system of county organization, taken, substantially, from the constitution of some of the northern and northwestern states, and engrafted upon our constitution. The provision of the constitution which relates to the subject is the second section of the seventh article, which, so far as it is material to be stated, is as follows: 'Each county of the state shall be divided into so many compactly located townships as may be necessary, not less than three,' etc. 'The supervisors of each township shall constitute the board of supervisors for that county; and shall assemble at the courthouse thereof on the first Monday in December in each year, and proceed to audit the accounts of said county, examine the books of the assessors, regulate and equalize the valuation of property, fix the county levies for the ensuing year, apportion the same among the various townships, and perform such other duties as shall be prescribed by law.' Acts of Assembly, 1869-'70, p. 624. In the act approved July 11, 1870, entitled 'An act prescribing the duties and compensation of certain township officers,' Id. p. 269, ch. 188, are the following, among other provisions: 'The board of supervisors of each county in this state shall have power at the meeting on the first Monday in December in each year: First. To audit the accounts of the county; to settle with the county treasurer his accounts for the year, in the manner prescribed by law; to settle with the sheriff his accounts upon the collec-

tion of fines or other monies accruing and belonging to the county; to receive, audit and approve the report and accounts of the superintendent of the poor; and, generally to settle with any other officer who may have an account with the county, and take such steps as may be necessary to secure a full and satisfactory exhibit and settlement of the affairs of the county. Second. To examine the books of the assessors and regulate and equalize the valuation of property. Third. To fix the county levies for the ensuing year, upon the information afforded by the above settlements, and to apportion the same among the various townships of the county. The said board of supervisors of each county of the state shall have power, at said meeting in December, or at any other legal meeting: First. To make such orders concerning the corporate property of the county as they may deem expedient. Second. To examine, settle and allow all accounts chargeable against such county, and when so settled they may issue county warrants therefor, as provided by law. But the board of supervisors of any county shall not issue in any one year a greater amount of county warrants than the amount of the county tax levied in such county for such year; and no interest shall ever be paid by any county on any county order. Third. To build and keep in repair county buildings. Fourth. To cause the county buildings to be insured in the name of the board of supervisors of said county and their successors in office for the benefit of the county, if they shall deem it expedient; and in case there are no public buildings, to provide suitable rooms for county purposes. Fifth. To direct the raising of such sums of money as may be necessary to defray the county charges and expenses, and all necessary charges incident to or arising from the execution of their lawful authority, if the same has not been provided for at the December meeting, and is necessary under the circumstances. Sixth.

To represent the county, and to have the care of the county property, and the management of the business and concerns of the county in all cases where no other provision shall be made. Seventh. To perform all other acts and duties which may be authorized and required by law, not embraced in this act." *Supervisors v. Gorrell*, 20 Gratt. 501. See also, *Norfolk, etc., R. Co. v. Supervisors*, 87 Va. 526, 12 S. E. 1009, and dissenting opinion in *Anable v. Com.*, 24 Gratt. 584.

"It will thus be perceived that, under our new internal organization of the state, the most important powers and duties, in regard to the police and property of the counties, are devolved on the boards of supervisors thereof respectively. The first section of the act referred to makes them a quasi corporation, with capacity to sue and to be sued. The seventh section declares that they may have a seal, that they shall sit with open doors, and that all persons conducting themselves in an orderly manner may attend their meetings. By subsequent sections, the attorney for the commonwealth is required to represent the county before the board of supervisors who are clothed with important judicial functions, and from whose decisions only a limited right of appeal is allowed. The twentieth section provides for their compensation and traveling expenses; and the twenty-first section requires them to give bonds conditioned for the faithful discharge of their duties; and for any violation of the condition thereof makes them and their sureties liable thereon for damages to any party injured thereby, and subjects them to a penalty for refusing or neglecting, without just cause, to perform any of their official duties. The supervisors are to be elected annually by their respective townships." *Supervisors v. Gorrell*, 20 Gratt. 503.

The board of supervisors being the mere creature of the statute, has only such powers as are expressly conferred

upon it. *Roper v. McWhorter*, 77 Va. 214.

(3) Nature of Powers—Not Judicial.

"A board of supervisors in Virginia has no judicial powers of any sort. This was decided in *Board of Supervisors v. Catlett*, 86 Va. 158, and there are many like decisions by courts of other states." *Supervisors v. Randolph*, 89 Va. 622, 16 S. E. 722; *Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999.

(3) Relating to Public Property.

(a) Providing for Public Buildings.

aa. Generally.

The law makes it the duty of the board of supervisors of every county to provide a courthouse, clerk's office, and jail. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380.

"By the act of April, 1879 (which was in force in 1885, when the order of the board of supervisors was made giving the appellee the right to make an addition to his office), it was provided that the board of supervisors of each county should have power 'to sell or exchange the corporate property of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings, and to provide a suitable farm as a place of general reception for the poor of the county, and to make such orders concerning such corporate property as now exists or as hereafter may be acquired as they may deem expedient; provided that no sale of such corporate property shall be made except by public auction,' after notice given, and subject to the approval and ratification of the county court. Acts, 1878-79, ch. 58, § 7, p. 300." *County of Alleghany v. Parrish*, 93 Va. 620, 25 S. E. 882.

The board of supervisors of a county in its corporate capacity has full power to provide public buildings for the county, and having power to contract for such buildings it may make any changes in the contract which it deems

proper. In the absence of any charge of fraud or collusion on the part of the board of supervisors, a taxpayer can not come into a court of equity merely to settle an account between a claimant and the board, growing out of a contract which the board had full power to make. The board has a full, adequate, and complete remedy for the enforcement of its contracts, and the rights of all persons having contracts with, or claims against the county, are amply protected by the provisions of §§ 836, 837, 838, Va. Code, 1887. *Manly Mfg. Co. v. Broadus*, 94 Va. 547, 27 S. E. 438.

bb. Acquiring Land for Erection of Public Buildings.

aaa. Rule Stated.

"The board of supervisors of the county of Culpeper had power, therefore, to acquire title to the land selected by them for the location of the public buildings of the county in the mode prescribed by the provisions aforesaid." *Supervisors v. Gorrell*, 20 Gratt. 509.

bbb. By Purchase.

The board of supervisors of a county have authority to provide land for building a courthouse, clerk's office and jail by purchase. *Supervisors v. Gorrell*, 20 Gratt. 484.

"The law makes it the duty of the board of supervisors of every county to provide a courthouse, clerk's office, and jail; and to that end authorizes the board to purchase such real estate as may be necessary for the erection of all necessary county buildings, which, with what the county has, will make two acres, and so much thereof as may be necessary shall be occupied with the courthouse, clerk's office, and jail. Va. Code, §§ 834, 925. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 381. See also, *Boykin v. Smith*, 3 Munf. 102.

ccc. By Condemnation.

See generally, the title EMINENT DOMAIN.

When an agreement can not be made

with a person entitled to land, which is needed by a county for the erection thereon of its necessary public buildings, provision is made by § 1074 of the Virginia Code for the application to the court of the county or corporation in which such land, or the greater part thereof, lies for the appointment of commissioners to ascertain a just compensation for such land. This statute has been construed by this court to authorize the application by the board of supervisors of a county to the proper tribunal for the condemnation of land which it may have selected for the location of the courthouse, clerk's office, and jail of the county. *Supervisors v. Gorrell*, 20 Gratt. 484; *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 381.

The board of supervisors of a county may, on application to the proper tribunal, have land condemned which has been selected by them for the location of the courthouse, clerk's office and jail of the county. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380.

Under Virginia Code, 1887, §§ 834, 925, making it the duty of the board of supervisors of every county to provide a courthouse, clerk's office and jail, and authorizing it to purchase such real estate as may be necessary for the erection of all necessary county buildings, a county whose courthouse and clerk's office are located within the limits of an incorporated city is entitled to have land in the city, condemned for the enlargement of its clerk's office. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380.

Discretion of Board Can Not Be Questioned in Condemnation Proceeding.—It is for the board of supervisors to determine what land they will procure for the public buildings of their county; and, whether their discretion is wisely or unwisely exercised in the selection, can not be inquired into in the proceeding instituted to condemn the land. *Supervisors v. Gorrell*, 20 Gratt. 484.

Who Is Tenant of Freehold.—The tenant of the freehold referred to in the act authorizing the condemnation of land for public purposes, Va. Code, 1860, p. 324, § 7, is the tenant in possession appearing as a visible owner. *Supervisors v. Gorrell*, 20 Gratt. 484.

Parties.—The board of supervisors proceeding to have certain land condemned for the purpose of building thereon a courthouse, clerk's office and jail, and the persons whose land is proposed to be condemned, not objecting to the report of the commissioners, other citizens of the county have no right to make themselves parties in the proceeding, and object to the confirmation of the report. *Supervisors v. Gorrell*, 20 Gratt. 484.

In such a case the circuit court of the county has no jurisdiction, on the application of these citizens, to award a writ of error and supersedeas to the judgment of the county court refusing to admit such citizens as parties, and confirming the report of the commissioners. *Supervisors v. Gorrell*, 20 Gratt. 484.

ddd. Land Must Be within Limits of County.

Under W. Va. Code, § 3176, requiring the clerk's office of the court of every county to be kept at the courthouse, and under § 3120, providing that no place of session for a county court shall be without the limits of the county of which it is the court, the selection, by the board of supervisors of a county, of land for the erection of a clerk's office, is confined to lands within the limits of the county. *Supervisors v. Cox*, 98 W. Va. 270, 36 S. E. 380.

cc. Providing Clerk's Office—Injunction.

The board of supervisors of a county order that one of the jury rooms attached to the courthouse shall be prepared to be used as a part of the clerk's office of the county court, and this order is approved by the county court. The judge of the circuit court

thereupon makes a rule upon the board of supervisors to show cause why they shall not be restrained from making the changes in the room. This court will not restrain him by prohibition from proceeding under the rule; but the board should make their defense in the circuit court; and any error of the judge in that proceeding may be corrected by writ of error to this court. *Bedford Co. v. Wingfield*, 27 Gratt. 329.

dd. Mandamus to Compel Action.

The board of supervisors of a county in its corporate capacity has full power to provide public buildings for the county, and if it fails to do so, may be compelled by the circuit court of the county by mandamus to perform its duty. *Manly Mfg. Co. v. Broaddus*, 94 Va. 547, 27 S. E. 438. See the title MANDAMUS.

(b) Authority to Give Lien on Public Buildings.

The board of supervisors can not give a lien on a public building of the county, nor does the contractor, nor those who furnish materials, nor the artisans employed in its construction, acquire a lien of any kind on it. Those who contract with the board, do so solely upon the faith and credit of the county, and not with the expectation of securing their compensation by a lien. *Manly Mfg. Co. v. Broaddus*, 94 Va. 547, 27 S. E. 438.

(c) Power to Sell Lands on Which Public Buildings Placed.

The board of supervisors of a county have authority to sell the lands belonging to the county, on which the courthouse and other public buildings once stood. *Supervisors v. Gorrell*, 20 Gratt. 484.

(d) Leasing Ferries.

See the title FERRIES.

In September, 1881, the board of supervisors of Norfolk county and the council of the city of Portsmouth leased to R., for twelve years, the Norfolk county ferries at \$13,000 per annum.

Held, neither under the general nor statutory laws of this state did the said board and council, or either of them, possess the authority to lease the said ferries. *Roper v. McWhorter*, 77 Va. 214. See ante, "Ferries," VI, B, 1, b, (3), (h).

The *jus disponendi* is not incident to the ownership of property as a public trust. *Roper v. McWhorter*, 77 Va. 214.

Even had the power existed in the board and council to execute this lease, yet the circumstances attending its execution justified its annulment. *Roper v. McWhorter*, 77 Va. 214.

(e) Possession and Control of County Property.

General Rule.—The right to the possession of county property is in the board of supervisors of the county. If the actual possession be in another, the board may acquire possession as other suitors do. The board, as such, should be a party to all proceedings by or against it. *Manly Mfg. Co. v. Broaddus*, 94 Va. 547, 27 S. E. 438.

Effect of Statute.—The act of assembly placing the corporate property of counties under the control and management of the board of supervisors of the counties (acts, 1878-'9, ch. 58, § 7) did not change the uses to which the public property might be put, but is to be construed in connection with the prior law designating such uses, and the designation of these uses is not discretionary, but mandatory. *Alleghany Co. v. Parrish*, 93 Va. 615, 25 S. E. 882.

(4) Removal of County Seat.

See ante, "Authority of Supervisors and County Courts," IV, A, 3.

(5) Allowance of Claims.

See post, "Accounting and Allowance of Claims," VII, B, 2.

(6) Restraining Wrongful Diversion of Public Funds—Jurisdiction.

Equity has jurisdiction of a suit brought by one or more citizens and taxpayers, suing in behalf of them-

selves and others similarly situated to restrain the illegal diversion of public funds by a board of supervisors of a county, and to compel the restitution of such funds which have been illegally diverted and lodged in the hands of persons not entitled thereto, and who had notice of the wrongful diversion, where the boards themselves will not act, or take the necessary steps to compel the restitution. This jurisdiction of equity, which has long existed, has not been taken away by provisions of § 836 of the Code, as amended. Courts of equity, having once acquired jurisdiction, never lose it because jurisdiction of the same matter is given to courts of law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words. *Johnson v. Black*, 103 Va. 477, 49 S. E. 633.

(7) Powers and Duties in Regard to Bridges.

See the title BRIDGES.

(8) Powers and Duties Relating to Taxation.

See the title TAXATION.

The provision of the constitution relied on as conferring this power is found in § 2, art. 7, of that instrument. That section, after providing that each county shall be divided into townships, in each of which there shall be annually elected one supervisor and certain other officers therein named, declares: "The supervisors of each township shall constitute the board of supervisors for that county, and shall assemble at the courthouse thereof on the first Monday of December in each year, and proceed to audit the accounts of said county, examine the books of the assessors, and regulate and equalize the valuation of property, fix the county levies for the ensuing year, apportion the same among the several townships, and perform such other duties as shall be prescribed by law." *Virginia, etc., R. Co. v. Washington Co.*, 30 Gratt. 471.

The board of supervisors of a county have no power under the general stat-

utes of this commonwealth to certify amended and supplemental delinquent tax returns by the treasurer. Acts, 1874-75, p. 347, et seq., and acts 1877-78, p. 183, et seq. *Supervisors v. McGruder*, 84 Va. 828, 6 S. E. 232.

(9) Internal and Fiscal Affairs.

"The constitution of the state of West Virginia took effect after the passage of the act of 1862. The fourth section of the seventh article of the constitution provides that, 'the board of supervisors of each county, a majority of whom shall be a quorum, shall under such general regulations as may be prescribed by law, have the superintendence of the internal affairs and fiscal concerns of their county,' etc." *Conley v. Calhoun Co.*, 2 W. Va. 420. See ante, "Control over Fiscal Affairs," VI, B, 1, b, (2).

c. Criminal Responsibility of Secretary.

A. was the secretary of the board of supervisors of the county of H. and there was to his credit on the books of the treasurer for claims held by him against the county, \$1,649. Blank warrants, signed by the chairman of the board, were left with him, and he filled up and sold warrants to a considerably larger amount than the sum due to him. Warrants to near the amount due are registered, and among these one for \$350, sold to W.; but there were other warrants sold before the one sold to W., and if they had been registered before W.'s, the fund would have been exhausted, and would have left nothing to be applied to W.'s warrant. Upon indictment of A. for larceny of check given by W. for payment of the warrants, held, the warrants are to be paid in the order in which they are registered, and there being sufficient to pay W.'s warrant, as well as all the warrants registered before it, A. can not be convicted of the larceny charged. *Anable v. Com.*, 24 Gratt. 563.

W., having brought his warrant to N., an agent of A., and having given a check payable to the order of N.,

and the indictment charging the larceny of the check of W. endorsed by N., and the proof being that N. endorsed his name after receiving the check; quære, if this is a variance. *Anable v. Com.*, 24 Gratt. 563.

d. Compensation.

"The only compensation provided by law for a supervisor is fixed by § 848 of the Virginia Code of 1887, which, as amended, is now found in Virginia Code (1904), § 848. It is there provided that each supervisor shall receive 'three dollars per diem for the time he shall actually attend, and five cents for each mile traveled in going to or returning from the place of meeting; but no per diem allowance should be made for any time occupied in travelling where mileage is allowed therefor; provided that but one mileage shall be allowed for any one term of meeting of such board; and no supervisor shall be allowed to draw pay for more than ten days' attendance in any one year.'" *Johnson v. Black*, 103 Va. 488, 49 S. E. 633.

No extra charge can be made by them for attendance on committees, or for other supposed beneficial services. If the compensation is inadequate, they can resign. To take more than is allowed by law is a fraud in law upon the rights of the taxpayers of the county, and restitution may be compelled. *Johnson v. Black*, 103 Va. 478, 49 S. E. 633.

3. Auditor.

a. Drawing Warrant on Treasurer—Presumption of Payment.

Where the auditor drew a warrant in favor of one of the county commissioners, the court will presume payment by the treasurer, unless the warrant be produced, or he otherwise discharges himself of the receipt. *Com. v. Garth*, 3 Call 6.

b. Appointment of Collector.

Under § 34 of ch. 60, acts, 1878-79, the auditor may appoint a collector to collect such delinquent taxes for a com-

pensation, previously agreed on, and approved by the executive, of twenty per centum of the amount collected and paid into the treasury. *Allen v. Com.*, 83 Va. 94, 1 S. E. 607.

c. Liability for Excessive Compensation to Treasurer.

Where certain railroad tax tickets are placed by the auditor of public accounts in the hands of a county treasurer, who collects and pays the taxes into the state treasury, and whose compensation prescribed by statute (acts 1878-79, ch. 60, § 30, p. 328), for this service, is only two and one-half per centum, but the auditor pays him twenty per centum; the auditor is liable to an action for the excess. *Allen v. Com.*, 83 Va. 94, 1 S. E. 607.

4. Surveyor.

a. Road Surveyor.

(1) Appointment.

"By the fourth section of the act to reduce into one the several acts concerning public roads and for establishing public landings, passed February 2, 1819 (2 Rev. Va. Code, ch. 236, p. 234), the several county courts are directed to divide the roads into precincts, 'and appoint a surveyor over every precinct, whose duty it shall be to superintend the road in his precinct, and see that the same be cleared, and kept in good repair.'" *Com. v. Piper*, 9 Leigh 658.

A county court is required by the constitution of West Virginia to appoint a surveyor of roads for each precinct in the county. *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654.

(2) Duties and Liabilities.

See post, "Defective Roads," VIII, D, 3.

Generally.—"All that the road surveyor, under our statute, is required to do, is that 'he shall superintend the county roads and bridges, cause the same to be put in good order and repair, of the proper width, well drained, and to be cleared, and kept clear, of rocks, falling timber, landslides, car-

casses of dead animals, and other obstructions, and remove all dead timber standing within thirty feet thereof.' W. Va. Code, 1887, ch. 43, § 7." *Smith v. County Court*, 33 W. Va. 713, 11 S. E. 4.

Though the assignment of tithables to work on a public road has been made, not by the county court itself, but by one of the justices designated for that purpose by the court, and has not been returned to the court or ratified by it, yet if the tithables so assigned do not refuse to work on the road, the surveyor is indictable for failing to keep the same in repair. *Com. v. Piper*, 9 Leigh 657.

In *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654, the court said: "Among the other duties of surveyor of roads was this that 'he shall superintend the county roads and bridges, cause the same to be put in good order and repair, of the proper width, well drained, and to be cleared and kept clear of rocks, falling timber, landslides, and other obstructions.' On March 25, 1882, this law was amended, and made to read as it now does: 'He shall superintend the county roads and bridges, cause the same to be put in good condition and repair, of the proper width, well drained, and to be cleared and kept clear of rocks, falling timber, landslides, carcasses of dead animals, and other obstructions, and to remove all dead timber standing within thirty feet thereof.'"

Changing Roads.—Under the twenty-first section of the road law, ch. 194, acts of 1872-73, a surveyor may change a road, with the consent of the owner of the land, in which such change is made, in the manner therein provided; but he has no authority to discontinue any portion of a road, without opening another in lieu of the portion discontinued, even though there be another public road already existing, which might be used instead of the portion of the road discontinued. *Key-stone Bridge Co. v. Summers*, 13 W.

Va. 476. See the title **STREETS AND HIGHWAYS**.

b. County Surveyor.

(1) Duties.

(a) To Furnish Surveys.

It is part of the official duty of the surveyor of a county to furnish, in reasonable time, when demanded, copies of all surveys, not specially excepted in the land law. *Preston v. Bowen*, 6 Munf. 271.

Liability for Refusal to Furnish.—A special action on the case lies against the surveyor of a county for fraudulently refusing to furnish copies of surveys, when lawfully demanded, and thereby enabling a third person to locate the lands, therein described, before the plaintiff. *Preston v. Bowen*, 6 Munf. 271.

Pleading.—Where the declaration charges that the defendant, contrary to his official duty, refused to furnish copies of certain surveys, when demanded by the plaintiff; if the defendant be excused, by any provision in the land law, from furnishing the copies so demanded, he ought to plead it specially. *Preston v. Bowen*, 6 Munf. 271.

In an action against the surveyor of a county, for refusing to furnish copies of certain surveys of land which the plaintiff wished to enter as waste and unappropriated, the court on the plaintiff's motion, instructed the jury, "that the surveys in question having been made in May, 1774, the land was liable to be entered as vacant in December, 1809, unless they were returned to the land office; but that the plaintiff was not bound to show that they were not returned to the land office in due time;" and this instruction was not considered erroneous by the court of appeals. *Preston v. Bowen*, 6 Munf. 271.

(b) To Furnish Land Warrants, etc.

A declaration alleges that J., a former surveyor of Grayson county, in consideration of a certain sum named, paid him by the plaintiff, had promised to

furnish a land warrant and to enter and survey for plaintiff a certain piece of vacant land in Grayson county, with a view to enable plaintiff to obtain a grant for the same; that J. wholly failed to make the entry; and that defendant, having become the successor of J. in the office of surveyor of Grayson county, in consideration of the promises of J., and of the payment to him by the plaintiff, and being required by plaintiff to enter said piece of land for plaintiff, agreed that he would furnish the necessary warrant for the purpose, and would enter the same in the plaintiff's name in his office, and in due time would survey the same in order that plaintiff might obtain a grant; and that plaintiff agreed to pay the defendant his fees for the said survey whenever performed. It is then alleged that defendant failed to furnish a land warrant and enter said land for and in the name of the plaintiff, but had in fact entered and surveyed it for another person, to whom a patent had issued thereon from the commonwealth. Upon demurrer, held, that considering this as a count in assumpsit upon a special contract between the plaintiff and defendant, it alleges no sufficient consideration moving from plaintiff to defendant, to ground and support the promise and undertaking imputed to him. *Hale v. Crow*, 9 Gratt. 263.

If it is to be considered a count in case to recover damages against the defendant for misbehavior or neglect of duty in his office of surveyor of Grayson county, then it does not set out any act, or the omission of any duty, on the part of the defendant as surveyor, under such circumstances as would render him liable in damages to the plaintiff in this action. *Hale v. Crow*, 9 Gratt. 263.

(2) Surveys as Evidence.

"At the trial, upon the plea of not guilty, the plaintiff offered in evidence genuine copies of four entries made by John Preston, jr., December 23d, 1809 (which are set forth in haec

verba), with the view of showing, by that and other evidence, that the defendant and John Preston, jr., his confederate, had deprived the plaintiff of the opportunity of locating the same lands comprised in the surveys, mentioned in his declaration, copies of which he also offered in evidence (in haec verba); whereupon, the defendant objected to the admission of the evidence, on the ground that the description of John Preston, jr., surveys and entries, in the declaration, was so general and vague that no such evidence ought to be received. The court overruled the objection and admitted the evidence." *Preston v. Bowen*, 6 Munf. 273.

5. Superintendent of the Poor.

Power of Appointment.—Under act of March 15, 1904 (Va. Code, 1904, § 95), circuit courts have no power to appoint superintendents of the poor until 1907, except to fill vacancies, and there is no vacancy in the office of a superintendent still in office who was appointed prior to January 1, 1904, and whose term was to continue until that date and thereafter until his successor was appointed and had qualified. *Chadduck v. Burke*, 103 Va. 694, 49 S. E. 976.

Under acts 1902-93-94, p. 742, authorizing the county judge to appoint a superintendent of the poor upon the recommendation of the board of supervisors, and providing that he may reject their recommendation, and, unless the board recommends another suitable person within thirty days, the judge shall fill the office by his own appointment, the judge has no power, immediately upon rejecting an application and before the expiration of thirty days to make an appointment of his own. Courts have no power to appoint to office except as provided by statute, and this must be strictly pursued. *Chadduck v. Burke*, 103 Va. 694, 49 S. E. 976.

Vacancies — Appointment of Successor.—The office of superintendent of

the poor of each county was extended by the constitution until January 1, 1904, and until the successor of the incumbent was appointed and had qualified, and hence there could be no vacancy in that office by failure to appoint a successor of the incumbent at the expiration of his fixed term, as the time elapsing after January 1, 1904, is as much a part of the term of the incumbent as that elapsing before that date. The vacancy referred to in § 106 of the act of December 18, 1904 (Acts, 1902-93-94, p. 742), is a vacancy occurring during the term of an office, by death, resignation, removal and the like, and not a failure to appoint a successor to an incumbent who is to hold until his successor is appointed and has qualified. In the latter case, there can be no vacancy. *Johnson v. Mann*, 77 Va. 265, disapproved in *Chadduck v. Burke*, 103 Va. 694, 49 S. E. 976.

6. Overseers of the Poor.

a. Status and Duties.

"By the act of May, 1780, ch. 22, 10 Hen. Stat. at large, pp. 288, 289, the overseers of the poor were commanded to be elected, and were declared to be a body politic and corporate, to sue and be sued, and were invested with the powers and duties of former churchwardens and vestries. This character they still retain. Next, if we advert to the law as to churchwardens, we find that they are a quasi corporation with power to sue and be sued. 1 Blacks. Comm. 394, and that succeeding churchwardens may bring an action of account against their predecessors at common law, 1 Blac. Abr. Churchwardens, E. p. 604." *Chapline v. Overseers of Poor*, 7 Leigh 231.

Submission to Arbitration. — The overseers of the poor may submit a claim against a predecessor in office, for money officially received by him, and unaccounted for, to arbitration. *Chapline v. Overseers of Poor*, 7 Leigh 231. See generally, the title **ARBITRATION AND AWARD**, vol. 1, p. 687.

b. Right to Sue.

The overseers of the poor may maintain an action against a predecessor in office for moneys officially received by him and unaccounted for. *Chapline v. Overseers of Poor*, 7 Leigh 231.

The overseers of the poor are a corporate body who can maintain a suit. *Chapline v. Overseers of Poor*, 7 Leigh 231.

On a motion against a predecessor in office by the overseers of the poor for moneys officially received by him and unaccounted for, if pending such a motion, the plaintiff's own term of office expires, their motion does not abate, but they may proceed in the prosecution of it, being themselves accountable to their successors for the money they shall recover. *Chapline v. Overseers of Poor*, 7 Leigh 231.

7. Treasurer.

a. Election.

County treasurers are elected by popular vote. *Johnson v. Mann*, 77 Va. 277.

b. Qualification.

Matter of Record—Conclusiveness of Record. — "The qualification of the treasurer, including the execution of his bond, is, by virtue of § 812 of the Virginia Code of 1887, made matter of record in the county courts, and that this record and memorial of the judge imports 'such uncontrollable credit and verity as that they admit of no avowment, plea, or proof to the contrary;' and in support of this proposition cites a number of cases, among them *Vaughn v. Com.*, 17 Gratt. 386, and *Calwell v. Com.*, Id. 391." *Stuart v. Com.*, 91 Va. 154, 21 S. E. 246.

The qualification of a county treasurer, including the execution of his bond, is made a matter of record in the county court, and imports such absolute verity that in an action on said bond the plea of non est factum can not be pleaded by the obligors. Where the record appears to be regular and complete, it can only be assailed, if

at all, on the ground of fraud, which must be distinctly charged and clearly proved. *Vaughn v. Com.*, 17 Gratt. 386; *Calwell v. Com.*, 17 Gratt. 391, approved in *Stuart v. Com.*, 91 Va. 152, 21 S. E. 246.

Failure to Qualify—Vacancy.—"In case a county treasurer should fail to qualify and give bond, all must admit that his office would, for that cause, become vacant, and that the outgoing treasurer could hold over only until the county court should appoint, and that such appointee would only hold until the next regular county election, which would necessarily occur before the next regular election at which county treasurers generally would be elected." *Johnson v. Mann*, 77 Va. 277.

c. Powers and Duties.

(1) Generally.

In *Anable v. Com.*, 24 Gratt. 587, Judge Moncure in his dissenting opinion says: "Ch. 179, §§ 4-33, relate to the county treasurer, but only a few of these sections need be noticed here. Section 8. The treasurer shall reside in the county of which he is treasurer, and shall keep his office at the county seat, and shall receive all moneys payable into the treasury thereof, and disburse the same on orders of the county or circuit court, or warrants drawn by the board of supervisors for the county; but it shall be competent for the judge of the county court, by order entered of record, to certify that in his opinion some other point in said county would be more convenient to a majority of the citizens of said county; and upon the entry of such order the treasurer for such county shall remove his office to the place named in said order, etc. Section 9. He shall keep a just account of all moneys received and disbursed by him for the county, and return at intervals of two months, until his settlement with the board at the end of the year, sworn statements of his receipts to the clerk of the court, to be preserved by him for the

inspection of any person having an interest therein. He shall keep the books, papers and money pertaining to his office at all times ready for the inspection of the county judge or board of supervisors; and shall, when required, exhibit his account and the book containing a list of the warrants and orders drawn upon the county treasurer provided for in the following section. Section 10. He shall provide and keep a well-bound book, in which he shall make an entry of all warrants or orders legally drawn upon him by the county or circuit court, or the board of supervisors for the county, and presented for payment, stating correctly the date, amount, number, in whose favor drawn, and the date the same was presented; and all warrants or orders so presented shall be paid in the order presented, out of the fund drawn upon. Section 11. No county treasurer shall refuse the payment of any warrant or order legally drawn upon him and presented for payment for the reason that warrants or orders of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon sufficient to pay such prior warrants or orders, and also such warrants or orders so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants or orders previously presented, and in the order presented; however, that nothing herein contained shall prevent the treasurer from receiving warrants of the county in payment of the county levy."

(2) Warrants Drawn on Treasury.

(a) Presumption of Payment.

Where the auditor drew a warrant in favor of one of the county commissioners, the court will presume payment by the treasurer, unless the warrant be produced, or he otherwise discharges himself of the receipt. *Com. v. Garth*, 3 Call 6.

(b) Effect of Warrant—Equitable Assignment.

Where warrants of a county were issued, drawn on funds in the hands of the county treasurer, and duly registered as required by law, the registration was notice to the treasurer of the existence of the warrants; and they constituted an equitable assignment of so much of the funds in the hands of the treasurer as was necessary to meet their payment, and the treasurer and his sureties, having notice of the assignment by reason of the registration of the warrants, became liable therefor to the holders of the warrants. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913.

Rights as between Holder and County.—It can make no difference to the treasurer and his sureties whether he pays this fund to the holder of these warrants or to the county, and, as between the county and the holders of these warrants, clearly the holders should be paid, rather than the fund should revert to the county. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 914.

(c) Registry of Warrants—Order of Payment.

All warrants or orders on the county treasury are to be registered according to the date of their presentation, and to be paid in the order presented. *Anable v. Com.*, 24 Gratt. 570. See *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913.

(d) Sheriff Ex Officio Treasurer.

When the county court has provided a fund in the hands of the sheriff, ex officio the county treasurer, for the payment of claims against the county, and has caused to be issued and delivered to the creditor an order for his claim in form or effect as provided in § 37, ch. 39, W. Va. Code, and the sheriff, without fault on the part of the court, fails or refuses to pay the order, the creditor's remedy is against the sheriff. Section 39, ch. 39, W. Va.

Code, 1887. *Ratliffe v. County Court*, 36 W. Va. 202, 14 S. E. 1004.

(3) Constitutionality of Act Relating to Return of Delinquent Taxes.

Constitution of Virginia, art. 5, § 15, ordains that "no law shall embrace more than one object which shall be expressed in its title." Act of November 27th, 1884, entitled "an act to allow further time for the treasurer of Henrico county to make returns of delinquent taxes," provides that "the late treasurer of Henrico county be allowed until the 1st day of February, 1885, to make his supplementary returns of delinquent taxes for the years 1879, 1880, 1881, 1882 and 1883," and is repugnant to the said section of the constitution in that the title thereof is not only misleading, but embraces an object wholly variant from the object expressed in the body of the act. *Supervisors v. McGruder*, 84 Va. 828, 6 S. E. 232.

(4) Outgoing Treasurer—Settling Accounts.

Prior to the passage of the act of April 2, 1873, an outgoing county treasurer was not required or authorized to turn over to his successor in office any portion of the public revenue. He was to account directly to the auditor of public accounts as an outgoing sheriff. *Smith v. Com.*, 25 Gratt. 780.

There is nothing in the statute (Va. Code, 1860, ch. 52, § 18), requiring sheriff to settle with the county court his account of the levies, and in the event of his failure so to do, after notice to him and his sureties, requiring the said court to proceed to settle the account, which deprives the said court of the aid of a commissioner in making the settlement. And it is not necessary that it shall appear in the record, for whose benefit the levy was made, but after a judgment has been entered in favor of the county under said action, no other judgment can be entered in favor of individuals. Under Va. Code, 1873, ch. 53, §§ 30 and 31, similar

provisions apply to county treasurers. *McFalls v. Essex Co.*, 79 Va. 137.

To What Cases Act of April 2, 1873, Applicable.—The act of April 2, 1873, Sess. Acts, 1872-'73, ch. 373, § 6, p. 372, whatever may be its operation upon cases arising subsequent to its passage, is only prospective in its operation, and does not apply to the case of a treasurer who went out of office on the first of January. *Smith v. Com.*, 25 Gratt. 780.

d. Bond and Sureties.

(1) Liability of Sureties.

See generally, the title SURETYSHIP.

Bonds Executed by Power of Attorney—Parol Evidence.—Where powers of attorney, to execute bond in grantors' names as sureties for a person as county treasurer, are in no way ambiguous, parol evidence is not admissible to limit the power to the bond required of such person elected by vote, and to exclude the bond required of him, when, having failed to qualify in time after his election, he is appointed by the county judge to fill the vacancy, and the sureties will be held liable under said power of attorney. *Redd v. Com.*, 85 Va. 648, 8 S. E. 490.

S. gave G. power of attorney to execute in his name, as surety, any bond to the amount of \$25,000, which I, the treasurer of H. county, might be required to give for the faithful discharge of his duties as treasurer. A bond of \$40,000 penalty was required; and G. to this bond, under said power of attorney, affixed the signature and seal of S. as surety. To an action on said bond, S. plead non est factum. Held, that the bond sued on is not the bond of S. *Stovall v. Com.*, 84 Va. 246, 4 S. E. 379. See post, "Power of Attorney to Sign Bond," VI, B, 7, d, (3).

Failure of Treasurer to Make Prompt Settlements.—S. was county treasurer for three terms, beginning in 1875, 1879 and 1883. He resigned in 1885, owing the state a balance for taxes collected

in that year. In 1878 there was a balance due which remained due from year to year, the collection for each year being used to pay the balance for the preceding year. C. was surety on his official bond. Held, C. is liable for the balance due at the end of the treasurer's term. The failure to require the treasurer to make prompt settlements did not discharge C. *Crawn v. Com.*, 84 Va. 282, 4 S. E. 721.

(2) Discharge of Sureties.

(a) Change of Sureties after Approval.

Where the record shows that the court has designated and approved certain persons as sureties on the official bond of a county treasurer, no alteration can be made by leaving off a name, or substituting another therefor. The bond must conform to the judgment of approval. *Blanton v. Com.*, 91 Va. 1, 20 S. E. 884.

Therefore, in a motion against a county treasurer and his sureties on his official bond as such treasurer, the defendants plead nul tiel record, and issue is joined on this plea. The plaintiff vouches the order of approval of the county court showing the names of eight persons accepted as sureties, and offers in evidence a bond containing the names of the principal and of the eight sureties, but signed by only seven. Held, there was a material variance between the record of the bond accepted by the county court and the bond in suit, and the sureties are discharged. *Blanton v. Com.*, 91 Va. 1, 20 S. E. 884.

(b) Extending Time for Settlement.

The failure to require the county treasurer to make prompt settlement at the end of the year does not discharge the surety from liability. *Crawn v. Com.*, 84 Va. 282, 4 S. E. 749.

The surety of a public collector or treasurer is not discharged from liability for his principal on his official bond by an act of assembly passed subsequent to the execution of the bond, without the surety's assent, ex-

tending the time within which, by the law in force at the date of the bond, the officer was required to settle his accounts and make payment of the public money in his hands. *Smith v. Com.*, 25 Gratt. 780. See also, *Com. v. Holmes*, 25 Gratt. 771.

(3) Power of Attorney to Sign Bond.

See ante, "Liability of Sureties," VI, B, 7, d, (1).

How Construed—Consent to Alteration.—A power of attorney to sign a bond as surety for a public officer is to be strictly construed. The attorney can do nothing except what he is expressly authorized by the instrument to do, and when he has once exercised the power he can not thereafter consent to material alterations in the bond. *Stuart v. Com.*, 91 Va. 152, 21 S. E. 246.

Power of Judge to Act.—The judge of a county court can not act as attorney in fact of an obligor to sign his name to a treasurer's bond which is to be given before and approved by said court, and the fact that, at the time the power of attorney was given, the obligor knew that the attorney was such judge, is immaterial. *Stuart v. Com.*, 91 Va. 152, 21 S. E. 246.

(4) Approval by Court.

County courts are charged with the duty of superintending the execution of official bonds of county treasurers, and their approval is necessary to complete the execution and delivery of such bonds, and to make them obligatory; but this approval must appear of record. *Blanton v. Com.*, 91 Va. 1, 20 S. E. 884.

(5) Effect of Indemnity Bond to Sureties.

A deed made by a county treasurer to indemnify and save harmless the sureties on his official bond enures to the benefit of creditors of such treasurer existing at the time the deed was made, and for whose debts the sureties were bound. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913.

(6) Actions against Treasurer and Sureties.

(a) Failure to Submit Bond to Commissioner—Parties.

On a notice to and motion against the treasurer of a county and his sureties for a time for his failing to submit his bond to the commissioner of accounts within the time prescribed by the act of 1878-79, ch. 60, § 4; held, the motion will not be dismissed for the joining the sureties in it. *Wimbish v. Com.*, 75 Va. 839.

Effect of Ignorance of Law.—In such a case the fact that the treasurer was not informed of the passage of the act until after the time prescribed by the act for submitting his bond to the commissioner of accounts, will not relieve him from the penalty provided by the statute for such failure. The law presumes every man to know the law. *Wimbish v. Com.*, 75 Va. 839.

Dismissal of Sureties.—The proceeding being in the nature of a criminal prosecution, the motion may be dismissed as to the sureties, and judgment rendered against the treasurer. *Wimbish v. Com.*, 75 Va. 839.

(b) Statute of Limitations.

Where a county treasurer was in default, and given a trust deed conveying property to secure his sureties against loss by reason of any default, and holders of certain county warrants had instituted suits at law to recover judgment against the treasurer and his sureties under Va. Code, 1887, § 863, such action was not barred by Va. Code, 1887, § 2920, providing for limitation of three years "upon any other contracts" than those specially provided for in said section, but were barred as to the sureties on the treasurer's bond only in ten years from the date they became due and payable. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913.

The right of the holder of a county warrant drawn on funds in the hands of a county treasurer, and duly regis-

tered, to assert his claim against a fund created by the treasurer for the indemnity of his sureties is never barred as to the treasurer, and as to the sureties is not barred until ten years from the time the right of action thereon accrues. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913.

"It would be unjust and inequitable to hold that the county of Scott could sit quietly by and allow its treasurer to make default in the payment of the claims of appellants out of funds in his hands applicable to their payment, and issued by the county of Scott for a valuable consideration, and then reap the benefit of his default by his pleading the statute of limitations against these claims." *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 914.

(c) Plea of Non Est Factum—Fraud.

In *Blanton v. Com.*, 91 Va. 2, 20 S. E. 884, on a motion against a treasurer and his sureties, it was held, to be a quære as to whether the plea of non est factum can be pleaded to an action on an official bond taken and approved by a court of record, where no fraud is alleged.

(d) Right of Surety to Set Off.

B. had judgment against R. for a large sum. Afterwards R., as surety on B.'s official bond as county treasurer, was compelled to pay a larger sum. Previously B. had assigned all his property, except his claim against R. to S. as trustee, and S., claiming the judgment by some "parol trust," directed it to be marked for his benefit as such trustee. Held, R. is entitled in equity to set off the amount paid by him as B.'s surety, against the judgment in the hands of S. who, at most, could only take it subject to all equities against B. *Gordon v. Rixey*, 86 Va. 853, 11 S. E. 562.

e. Compensation.

"The compensation fixed by law for county treasurers for collecting the state revenue is two and one-half per centum per annum for all sums over

\$15,000. Acts of Assembly prescribing the compensation of county officers, April 1, 1879, § 30 (Acts, 1878-79, p. 328)." *Allen v. Com.*, 83 Va. 96, 1 S. E. 607.

But in cases where the treasurers have not been able to collect any taxes coming in their hands, the law provides that, where the lists are made out of these, examined by the county court, and approved, that the treasurer shall receive credit for them, and shall not afterwards collect them. A certified copy of these are to be placed by the auditor in the hands of the sheriff, sergeant, constable, or collector for collection, and his compensation shall not exceed twenty per centum. Acts 1878-79, pp. 327, 328, 329, §§ 29, 34, 35. *Allen v. Com.*, 83 Va. 96, 1 S. E. 608.

f. Deputies.

(1) Liability of Deputy and Sureties.

Where a treasurer permitted deputy to turn over tax tickets to S. for collection, declaring, however, he would look only to deputy and his sureties, and subsequently S., on motion of treasurer, qualified as deputy, but gave no bond, and treasurer receipted to him for any money paid by him; held, the deputy and his sureties are responsible for any default of S. in the collection of taxes, being his agent. *Stultz v. Ingles*, 84 Va. 844, 6 S. E. 147.

The penalties imposed on deputy treasurers by § 854 of the Virginia Code for failure to collect or pay over taxes are not to be extended by implication. The party seeking to recover such penalties must bring himself strictly within the terms of the section. It is the duty of the jury to ascertain the amount and date of the default, and to render verdict for this sum with the penalty added. Judgment should be rendered for the amount of the verdict with interest at six per cent. per annum, as the penalty does not extend beyond the verdict. If there is doubt as to whether

the jury imposed the penalty, this doubt can not be resolved by the affidavits of the jurors, but the verdict will be presumed to be correct. *Street v. Broadus*, 96 Va. 823, 32 S. E. 466.

(2) Actions by Treasurer against Deputy—Notice.

Generally—Jurisdiction.—Under the provisions of §§ 910, 912, Va. Code, 1887, a county treasurer may proceed, by motion, upon ten days' notice, in the county court, against his deputy and his sureties, for the failure of the deputy to pay over the proceeds of or to account for tax tickets placed in his hands for collection. *Hall v. Ratliffe*, 93 Va. 327, 24 S. E. 1011.

Va. Code, 1887, § 910, provides that if the deputy of any officer commit any default or misconduct in office for which his principal is liable, such principal, on motion, may obtain a judgment against the deputy and his sureties "for the full amount for which such principal * * * may be so liable." Section 912 provides that such a motion may be made in the county court. In other instances the jurisdiction of the county court is limited to \$100. Held, that such court had jurisdiction of such a motion by a county treasurer for judgment for \$1,800 on the bond of his deputy, though it only covered embezzlements and larcenies, and though the deputy might have been liable for other delinquencies so that there might be one measure of recovery against the deputy, and another against the sureties. *Fidelity, etc., Co. v. Beale*, 102 Va. 295, 46 S. E. 307.

Pleadings.—Upon a proceeding by motion by a treasurer against his deputy and the sureties on his bond, formal pleadings are not required. Any proper defense may be made as well without as with pleas. *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

8. Collector.

See the title TAXATION.

Compensation—Giving Bond.—Where treasurers have not been able

to collect any taxes coming in their hands, a list being made out of these, a certified copy of which being placed by the auditor into the hands of a collector for collection, the compensation allowed such collector shall not exceed twenty per centum, but the amount of such compensation is to be agreed on before the services performed, and must be approved by the governor; and such collector is required, before he acts, to give bond approved by the auditor. Acts, 1878-79, pp. 327, 328, §§ 29, 34, 35. *Allen v. Com.*, 83 Va. 96, 1 S. E. 608.

Suit against Collector.—A judgment in the name of the commonwealth for W., treasurer of C. county, founded on a notice in the name of the commonwealth proceedings by W., late treasurer of C., against F., the collector of the township, M., and his sureties upon his official bond, is a judgment in favor of the commonwealth. *Com. v. Ford*, 29 Gratt. 683.

On such a judgment the commonwealth at the relation of T., auditor of accounts, may maintain a suit against F. and his sureties. *Com. v. Ford*, 29 Gratt. 683.

The judgment having been recovered in C. county, the suit may be brought in that county. Except in cases where it is otherwise specially provided, the commonwealth may prosecute her suit in any of the courts in which other parties may prosecute suits of like character. And this case is not embraced in the statute. Va. Code, 1873, ch. 166. *Com. v. Ford*, 29 Gratt. 683.

9. Commissioners of Revenue.

See the title REVENUE LAWS.

10. Clerk.

See ante, "Giving Notice—Duties of Clerk," IV, B, 2, d.

See the title CLERKS OF COURT, vol. 2, p. 834.

Compensation to County Clerks.—

Under Va. Code, § 666, as amended by acts, 1899-1900, p. 855, relating to the sale of land for delinquent taxes, and

prescribing compensation for certain enumerated duties by the county clerk, and requiring him to perform other incidental duties for which no compensation is provided, the clerk is entitled to such compensation for these incidental duties as is allowed by Code, ch. 172, fixing the fees of officers; and on application for the sale of delinquent lands the applicant must tender not only the fees under Code, § 666, but the compensation provided by ch. 172. *Stone v. Caldwell*, 99 Va. 492, 39 S. E. 121.

11. Justice of Peace.

See the title JUSTICE OF THE PEACE.

12. Notary Public.

See the title NOTARY PUBLIC.

13. Prosecuting Attorney.

See the title COMMONWEALTH'S ATTORNEY, ante, p. 30.

14. Educational Boards and Officers.

See the title SCHOOLS.

VII. Capacities and Powers of Counties.

For capacities and powers of county officers, see ante, "County Officers," VI.

A. POWER TO CONTRACT DEBTS.

Extent of Power—What Constitutes County Indebtedness.—Section 8, art. 10, of the constitution, adopted on the 22d day of August, 1872, by the people of West Virginia, is as follows: "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall, hereafter be allowed to become indebted in any manner, or for any purpose, to an amount including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness, nor without, at the same time, providing

for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof within and not exceeding, thirty-four years; provided, that no debt shall be contracted under this section unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." This section of the constitution is not addressed alone to the legislature, but is addressed to the several counties, cities, etc., and all other departments and persons in the state, and took effect and became binding and operative, so far as it is prohibitory and restrictive in its provisions, upon counties, cities, etc., on, and from the 22d day of August, 1872. *List v. Wheeling*, 7 W. Va. 502. See the title MUNICIPAL STATE AND COUNTY SECURITIES.

"In this state multiplying instances of acts authorizing cities, counties, and townships to subscribe large sums in aid of railroads warned our people of the danger of burdensome indebtedness in that quarter, the framers of the constitution of 1872 not only repeated the bar against state debt found in constitution of 1863, but provided in § 8, art. 10, that 'no county, city, school district or municipal corporation * * * shall hereafter be allowed to become indebted, in any manner or for any purpose, to an amount * * * exceeding five per cent. on the value of taxable property therein.' Plainly, this speaks a denial of the capacity of counties, school districts, and municipal corporations to incur debt beyond a certain limit." *Neale v. County Court*, 43 W. Va. 90, 27 S. E. 371.

"In the case of *List v. City of Wheeling*, 7 W. Va. 501, Judge Haymond, in construing § 8, art. 10, of the constitution, holds that 'it was not intended to and does not in any wise interfere with or prevent the levying, collecting, and expenditure of taxes annually by

authority of law by the proper legal authorities of the counties, * * * and to do and cause to be done whatever is necessary for that purpose, including the making and causing to be made contracts touching the disbursement of the taxes levied and collected annually and the like, and all this without a vote being taken.' This construction has been since approved in the cases of *Brannon v. County Court*, 33 W. Va. 789, 11 S. E. 34, and *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279. In the latter case it was held that the 'term "indebtedness" includes every kind of indebtedness, no matter in what manner created, or voluntarily brought about.' The constitution plainly forbids the contraction of any debt for any purpose 'unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same.'" *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 374.

A magisterial district can not, by subscription to works of internal improvement, become indebted up to 5 per cent. of its taxable property, and, in addition, the county, up to 5 per cent. of its whole taxable property; but such district subscription, for the purposes of the limitation upon county indebtedness fixed by § 8, art. 10, of the constitution, is to be regarded as county indebtedness, and included with other county indebtedness in determining whether the total county indebtedness will exceed that limitation. *Neale v. County Court*, 43 W. Va. 90, 27 S. E. 370.

Levying Tax for Payment.—"The constitution, in art. 10, § 8, allows a county, school district, or municipal corporation to become indebted to a certain extent, but provides that it shall not do so 'without, at the same time, providing for the collection of a direct annual tax sufficient to pay annually the interest on such debt and

the principal thereof, within and not exceeding thirty-four years; provided, that no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same.' The first provision quoted is said to require the creation of a sinking fund for the discharge of the debt created by the subscription within a period correspondent with the pay day of the bonds. Assuming such to be its construction, the legislature has enacted in § 59, ch. 54, Code, 1891, that at the time the annual levy of any such county, city, town, or village is laid, there shall be a tax levied to pay the annual interest of the bonds, and to create a sinking fund to pay the principal when due. This is the only statute law to execute the clause of the constitution in hand. It was within the power of the legislature to make regulation herein." *Neale v. County Court*, 43 W. Va. 90, 27 S. E. 376. See generally, the title TAXATION.

What Funds May Be Expended.—

"The county court may expend the current revenues and accrued funds, and make contracts looking to that end, as that which the court may have the means of paying, either in the treasury or by the current fiscal levy, is not the contraction of debt within the meaning of the constitution, but is merely the appropriation and application of the annual income of the county to the legitimate purposes for which it was accumulated and levied. But where the county authorities attempt to or do bind, without a proper vote of the people, the levies of future years in any manner or for any purpose whatsoever, either by contract, express or implied, their action in so doing is a usurpation of power and an infringement of the constitution, and such contract is null and void, and is not a good consideration for any future order on the funds of any future year, and all

orders issued on such consideration alone are invalid." *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 374.

B. FINANCIAL AFFAIRS OF COUNTY.

1. Borrowing Money.

"The uniform legislation of the state from the earliest day, in relation to chartered municipal corporations and quasi corporations, such as counties, show that whenever the legislature intended that these corporations should be authorized to borrow money for any purpose, the power was expressly granted." *Bonsack v. Roanoke Co.*, 75 Va. 589.

2. Accounting and Allowance of Claims.

a. Proceedings for Allowance of Claims.

Generally—County Courts.—"By § 7, ch. 134, W. Va. Rev. Code, 1792 it was enacted that 'The justices of the several counties within this commonwealth, shall and they are hereby authorized at their courts respectively to be held in the months of June or July annually, or as soon after as may be, if no court be held in either of those months, to proceed to make up in their minutes an accurate account of all expenses incurred by the said court under authority of any law chargeable on the county and remaining unpaid, stating therein the sums due, for what and to whom due, and all credits owing to said county. When the balance due from the county is thus ascertained by deducting the sums due to the county from those owing by the county, the said justices shall proceed to levy and assess on the tithable persons in their respective counties the amount of that balance in equal portion. The sums due the county, and the sum to be assessed on the tithables being added together shall then be appropriated by the court, so as to show the right of each county creditor, and the amount of his demand.' This provision was carried into § 6, ch. 191, Rev. Code,

1819, with a proviso, that to authorize such a levy, a majority of all the justices of the county must be present at the time, or unless the court shall have signified its intention to lay such levy by entering the same upon its records at least one month previous with directions to the sheriff to summon the justices to attend the next term for that purpose. This section was carried into the Code of 1849, § 3, ch. 53. By the first section of ch. 53, it is declared that 'so much of every county as is without the limits of a town that provides for its own poor, and keeps its streets in order, shall be levied upon by the court of such county to raise the money with which the county is chargeable.' While by the Codes of 1792 and 1819 this levy is charged in equal amounts, as a poll tax upon all male persons over the age of sixteen years and on all female slaves in the county above that age, § 4, ch. 53, of the Code of 1849 authorized the county court with the consent of a majority of all the justices of the county to lay the said levy on all free male persons over the age of sixteen years and on all slaves and other property assessed with state taxes, within the county and without the limits of a town, which provides for its own poor and keeps its streets in order, in which case the order for the levy shall be for a certain sum on each free male person over the age of sixteen years on all other subjects for a certain per cent. upon the amount of taxes thereon. By § 9, ch. 134, Rev. Code, 1792, and by § 8, ch. 191, Rev. Code, 1891, it is provided, that every sum, the payment whereof shall have been directed out of the levy, shall be paid by the sheriff or collector within six months after the date of such order to the person, to whom such payment is directed; and in default of such payment the party entitled to the money may recover judgment in the court of such county for the same against the sheriff or collector and his sureties upon ten days'

notice. By § 15, ch. 53, Code of 1849, any such party not so paid was authorized in like manner to recover the same by motion in the county or circuit court of such county for the amount due with interest, from the time the same ought to have been paid --and damages in addition thereto not exceeding fifteen per cent. as the court might deem proper." *Bank v. Lewis Co.*, 28 W. Va. 280. See *Stuart v. Hamilton*, 2 Hen. & M. 52.

Statute Mandatory.—"By the very terms of the Codes of 1792, 1819, and 1849, the county courts are required to make annually an accurate account of every item of indebtedness against them, which is payable within the year, and to levy an amount sufficient to pay the same. Second. In a statute when the public interest is concerned, and the public or third persons have a claim de jure that the power should be exercised, the word 'may' means 'must' or 'shall.' (*Newbury Turnpike Co. v. Miller*, 5 Johns. Ch. R. 113; *Bean v. Simmons*, 9 Gratt. 389.) From these considerations it is apparent the county court has no discretion on this subject and must levy to pay all the charges on the county, which may be payable within the year." *Bank v. Lewis Co.*, 28 W. Va. 291.

"Section 834 of the Code of Virginia provides that 'the board of supervisors of each county shall have power, at their meeting in July, or any other legal meeting,' to examine, settle, and allow all accounts chargeable against such county, and when so settled, issue warrants therefor." *Botetourt Co. v. Burger*, 86 Va. 532, 10 S. E. 264. See *Johnson v. Black*, 103 Va. 485, 49 S. E. 633.

b. Necessity of Presenting Claim.

"Section 844, following, provides that 'no action shall be maintained by any person against a county, upon any claim or demand, until such person shall have first presented his claim to the board of supervisors of such county

for allowance." *Botetourt Co. v. Burger*, 86 Va. 533, 10 S. E. 264.

c. Raising Funds.

(1) By Taxation.

"The county court can not make an allowance, to be paid by taxes on the people, without statutory authority." *Yates v. Taylor Co.*, 47 W. Va. 376, 35 S. E. 29.

A suit as to right of board of supervisors to levy a tax to pay a claim, concerns a franchise, and this court hath jurisdiction. Code, 1887, § 3455. *Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999.

Mandamus.—"Mandamus does not lie to compel a board of supervisors to levy a tax for the payment of a claim which it has no authority to pay, even though the claim may have passed into judgment. In such a case there is no estoppel by the judgment, and a fortiori there is none where the claim is of a class, payment of which, is prohibited by law. The writ lies to compel that to be done which it is the defendant's duty to do without it, but it confers no new authority. Hence the party proceeded against, must have the power to perform the act, otherwise the writ will be denied." *Supervisors v. Catlett*, 86 Va. 162, 9 S. E. 999. See generally, the title MANDAMUS.

The mere fact that a county levy is made to pay, among other demands, unpaid orders on the county treasury issued under orders made in former years, will not render the levy void, as against § 8, art. 10, of the constitution. It must appear that such orders are for indebtedness prohibited by the constitution. *Armstrong v. County Court*, 41 W. Va. 602, 24 S. E. 993.

(2) By Laws—Allowance to Soldiers and Sailors.

Under an act of the legislature passed October 31, 1863, it was the duty of the county and corporation courts to make an allowance in money or supplies to soldiers and sailors and their families, of such liberal amount and in

such proportions, as should be deemed just and sufficient; and it was declared that the allowance should be charged on the county, city or town, and that "provision should be made for its payment in the manner prescribed by law for sums legally chargeable on counties, cities and towns." The manner prescribed by existing laws was by county levy. The county court of R. county, in December, 1863, appointed R. G. H. county agent and treasurer of a fund to be created by loans obtained on county bonds, for the purpose of furnishing supplies as contemplated by the said act. The agent borrowed \$10,000 from B. and K., and executed to them five bonds of \$2,000 each, sealed with the seal of the county, and dated February 21, 1865. Held: That the act neither in express terms, nor by necessary implication, empowered the county to borrow money and issue bonds for its payment, and consequently the bonds are void. *Bonsack v. Roanoke County*, 75 Va. 585.

While such a power might perhaps be conferred by implication, yet in view of its dangerous nature, its great liability to abuse and the constant habit of the legislature to grant it in terms when intended, the implication, to be justified, should be very clear, if not irresistible. *Bonsack v. Roanoke County*, 75 Va. 585.

The supplies were to be procured by purchase, and, if need be, by impressment, through agents appointed for the purpose, and the debts thus contracted were to be paid in the manner and by the means indicated. The express designation of a particular mode of raising the means, exclude every other, though the borrowing of money might be deemed by some a more appropriate mode than a levy in the ordinary way. *Bonsack v. Roanoke County*, 75 Va. 585.

The authorized allowance of "money" within the discretion of the courts, instead of "supplies," must be understood as limited to money on hand at

the passage of the act, and such as might be raised by subsequent levies. *Bonsack v. Roanoke County*, 75 Va. 586.

Pleading.—The plaintiff joined issue on a plea or non est factum, "in this, that a majority of the acting justices of the county were not present and had not been summoned, etc.," but the act did not render it necessary that a majority should be present. Held, if the issue were immaterial and not cured by the statute of jeofails, the usual course would be to award a repleader—that is, to reverse the judgment, set aside the pleadings, and remand the cause with directions that parties plead de novo, for the purpose of obtaining a better issue. *Bonsack v. Roanoke County*, 75 Va. 586.

(3) Statutory Method Exclusive.

The power conferred upon the county courts of the several counties of Virginia by the provisions of ch. 53 of the Code of 1849 to provide for the payment of all sums lawfully chargeable on the counties, which ought to be paid within the year, out of the county levies, which they were required to make annually, prohibited them from raising the money necessary for that purpose in any other way. *Bank v. Lewis Co.*, 28 W. Va. 273. See *Bonsack v. Roanoke County*, 75 Va. 586.

d. Negotiable Paper.

The county court of Lewis county had no authority to execute negotiable notes for any debt due by the county. *Bank v. Lewis Co.*, 28 W. Va. 273.

e. What Amount Recoverable.

The proper recovery by the county creditor is the principal of his debt, with interest from the end of the six months, to the date of the judgment, and ten per cent. damages upon the amount of such principal and interest, and interest upon the whole from the date of the judgment till paid. *Ballard v. Thomas*, 19 Gratt. 14.

f. Improper Allowance.

See ante, "By Taxation," VII, B, 2, c, (1).

Remedy.—A plain and adequate remedy is provided by § 836 of the Virginia Code, 1887, for relief against the improper allowance by the board of supervisors of a county, of a claim which for any reasons ought not to be allowed. And a bill in equity will not be entertained to enjoin the payment of any such claim. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483.

Attorney Fees.—A judgment of the circuit court of Taylor county, sustaining an allowance to one of its attorneys, appointed by said court to defend a person charged with felony, to be paid out of the county treasury, is void. A recovery of such a claim against the county is not authorized by the common law, and no statute authorizes its payment by the count. *Yates v. Taylor Co.*, 47 W. Va. 378, 35 S. E. 25.

Donations.—The judgment of a court ordering or confirming a donation made out of the county treasury without lawful authority is void, and will be prohibited. *Yates v. Taylor Co.*, 47 W. Va. 376, 35 S. E. 25.

Injunction.—An injunction will not be allowed, to restrain the execution of an order of a county court making numerous allowances to different county creditors, merely because some of those allowances are not proper charges on the county. An order laying a county levy will not be enjoined merely because of such illegal allowances. Payment of those allowances should be enjoined. *Armstrong v. County Court*, 41 W. Va. 602, 24 S. E. 993.

To enjoin a county levy on the claim that it goes to pay indebtedness incurred in violation of § 8, art 10, of the constitution, it must affirmatively appear that such indebtedness is in violation of the constitution. He who asserts it must show it. It will not be presumed to be so. *Armstrong v. County Court*, 41 W. Va. 602, 24 S. E. 993.

The right of taxpayers to resort to equity to restrain municipal corporations and their officers, and quasi corporate bodies and their officers from transcending their lawful powers or violating their lawful duties in any way injuriously affecting the taxpayers, such as making unauthorized appropriations of the corporate funds or an illegal disposition of the corporate property, is well established. *Roper v. McWhorter*, 77 Va. 214.

g. Remedy of Creditors.**(1) Upon Failure of Sheriff to Collect County Levy.**

A creditor of a county can not make a motion against the sheriff for failing to collect the county levy, or any part thereof, but only for the sum appropriated by the court, in laying the levy to pay the sum due him, and this he can do after six months from the time when it is laid, whether the sheriff has collected the money or not. The remedy by motion for the sum so appropriated lies only in favor of the county creditors and not in favor of those who as trustees have contracted, or may contract, on behalf of the county with any individual. It seems that it ought to be shown that the plaintiff was a creditor at the time of the levy, the court not being authorized to levy money in advance upon the people. *Stuart v. Hamilton*, 2 Hen. & M. 48. See generally, the titles SHERIFFS AND CONSTABLES; TAXATION.

(2) Against County Funds—Statutory Remedy.

The county court of a county can not be compelled by a bill in chancery to issue an order against the county funds for any debt or claim, just or unjust, against the county. The statutory law furnishes the remedy in all such cases, and it must be strictly pursued. *Hall v. Scites*, 38 W. Va. 691, 18 S. E. 895.

h. Plaintiff Must Show That He Is Creditor.

It seems, that it ought to be shown that the plaintiff was a creditor at the

time of the levy, the court not being authorized to levy money in advance upon the people. *Stuart v. Hamilton*, 2 Hen. & M. 48.

i. Statute of Limitation.

See post, "Statute of Limitations," IX, H.

j. Refusal to Allow Claim—Appeal.

Where board of supervisors "refused" to act upon a claim presented under Va. Code, 1887, § 844, claimant may sue the county under § 843. *Prince George Co. v. Atlantic, etc., R. Co.*, 87 Va. 283, 12 S. E. 667.

Conclusiveness of Decision.—"Section 843 of the Code provides that 'the determination of the board of supervisors of any county, disallowing any claim, in whole or in part, shall be final and conclusive, and a perpetual bar to any action in any court founded on such claim, unless an appeal be taken from the decision and determination of such board, etc.'" *Botetourt Co. v. Burger*, 86 Va. 532, 10 S. E. 264.

Appeal.—"Section 838 of the Code of Virginia provides that when a claim of any person against any county is disallowed, in whole or in part, by the board of supervisors, the person may appeal to the county court, etc." *Prince George Co. v. Atlantic, etc., R. Co.*, 87 Va. 285, 12 S. E. 667.

Time of Appeal.—"Section 838 of the Virginia Code provides: 'When a claim of any person against the county is disallowed in whole or in part by the board of supervisors, if such person be present, he may appeal from the decision of the board to the county court of said county within thirty days of the date of said decision; if not present, he shall have notice served on him, and appeal within thirty days from the date of said decision; provided, that in no case shall the appeal be taken after the lapse of six months from the date of said decision.'" *Botetourt Co. v. Burger*, 86 Va. 532, 10 S. E. 264. See also, *Johnson v. Black*, 103 Va. 485, 49 S. E. 633.

To What Court Appeal Lies.—An appeal from a decision of the board of supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county. *Dinwiddie Co. v. Stuart*, 28 Gratt. 526.

VIII. Expenses and Liabilities.

See ante, "Capacities and Powers of Counties," VII.

A. MAINTAINING SLAVES IN CUSTODY OF SHERIFF.

The expense of keeping and maintaining negroes committed by order of a county court to the custody of the sheriff, can not in any case be a lawful charge upon the county. *Rixey v. Justices*, 3 Leigh 811.

In this case the court said: "We can not conceive a case in which the county can be made liable for the keeping of slaves, or persons claimed as slaves, committed to the custody of the sheriff. The only cases of such commitments that occur to us, are, when they are committed for criminal offenses, or as runaways, or under execution for debt, or by their owners in certain cases, or when they are in the predicament above mentioned of pauper's suing for freedom." *Rixey v. Justices*, 3 Leigh 811.

B. COMPENSATION TO OFFICERS.

See ante, "County Officers," VI.

"Section 7, ch. 161, Code, providing for costs in criminal cases, is in these words: 'A sheriff or other officer for travelling out of his county to execute process in a case of felony and doing any act in the service thereof for which no other compensation is provided, shall receive therefor out of the treasury such compensation as the court from which the process issued may certify to be reasonable. When in such case an officer renders any service for which no specific compensation is provided, the court in which the case may

be may allow therefor what it deems reasonable and such allowance shall be paid out of the treasury.' This section applies to felony cases only." *Yates v. Taylor Co.*, 47 W. Va. 376, 35 S. E. 28.

C. LIABILITY ON CONTRACTS.

See post, "Actions," IX.

The legislature has given a remedy in cases growing out of contracts with counties. *Fry v. Albemarle Co.*, 86 Va. 197, 9 S. E. 1004.

D. LIABILITY FOR TORTS.

1. In General.

A county court is not responsible in damages, at the suit of an individual, for injuries sustained by him in consequence of the neglect of the county court, or any of its officers or agents, to perform any duty enjoined by law, unless such action against it was, expressly or by necessary implication, given by statute. *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654; *Fry v. Albemarle Co.*, 86 Va. 197, 9 S. E. 1004.

2. Burning of Barn by Road Hands.

The plaintiff permitted a force of hands engaged in working the county roads to occupy his barn, and while there they negligently caused it to burn. Held, that the county was not responsible for the loss. *Field v. Albemarle Co.*, 2 Va. Dec. 67, following *Fry v. Albemarle Co.*, 86 Va. 195, 9 S. E. 1004.

3. Defective Roads.

See the title STREETS AND HIGHWAYS.

Generally.—By statute law which has always been enforced in this state, it is provided that, "Any person who sustains an injury to his person or property by reason of a public road or bridge in a county being out of repair may recover all damages sustained by him by reason of such injury, in an action on the case, in any court of competent jurisdiction, against the county court." *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654.

If a dead tree, standing within five feet of a public road, falls upon a person travelling along such road, the county court can not be sued by such person because of the injuries he sustained by the falling of such tree upon him. *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654. In this case, the court said: "If the plaintiff in error is right in supposing that substantially this duty was imposed on the surveyor of roads by the Code of 1868, ch. 43, § 7, p. 267, still the willful and knowing neglect of his duty by the surveyor of the road in not cutting down this tree would, as we have seen, not render the county court of Preston liable to be sued for damages which were sustained by the plaintiff, W. H. Watkins, by this dead tree falling upon him, as a consequence of such willful neglect of duty by the surveyor of the road appointed by this county court; as the statute law of this state never has provided, expressly or by necessary implication, that a county court should be responsible, at the suit of an individual, for the neglect of such duty to have such trees cut down, even if it was on March 22, 1882, a duty imposed on them." *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 657.

The plaintiff and a lady friend were driving a single horse, in a spring wagon, along the road leading from the city of Charleston to the town of Malden, in Kanawha county. At a point in said road where it was from 12 to 18 feet wide, two calves yoked together came suddenly from the pawpaw bushes, and frightened the horse, which the plaintiff had owned for two years, and regarded as gentle; and he commenced backing, and continued so to do until he backed the wagon and its occupants and himself over the steep river bank, whereby the plaintiff was seriously and permanently injured. In a suit brought by said plaintiff against the county court in Kanawha county to recover damages for the injuries sustained, it was proven by plaintiff

that she could have managed the horse but for the narrowness of the road; that she had traveled the same road two or three times a week for the previous two years without accident; and by another witness that the road was in good condition, smooth, and cindered, and that he had traveled said road 200 times a year for 16 years, driving all kinds of horses and teams, and had never met with an accident; that the road at that point was wide enough for two teams to pass, and on one side of the road was a steep mountain which slipped into the road in wet times, and on the other side the river bank. Held, that under the circumstances of this case, the defendant was not liable for said injury. *Smith v. County Court*, 33 W. Va. 713, 11 S. E. 1.

Defect Too Remote.—"In the case of *Phillips v. County Court*, 31 W. Va. 478, 7 S. E. 427, this court held, that where the defect or obstruction in the road is merely a remote cause of the injury, and the want of care or negligence of the plaintiff is the direct or proximate cause of the injury, the plaintiff can not recover. In the case of *Fawcett v. Railway Co.*, 24 W. Va. 755, this court held, that 'the cause of an injury, in contemplation of law, is that which immediately produces it, as its natural consequence; and, therefore, if a party be guilty of a default or act of negligence which would naturally produce an injury to another, but, before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible for the injury.' *Smith v. County Court*, 33 W. Va. 713, 11 S. E. 4.

Where an injury is the combined result of a horse becoming suddenly frightened, and shying away from a pile of rock beside the roadway, and the failure of the county court to provide a suitable guard rail along the approach to a bridge, the county is liable for the damages sustained by

reason thereof. *Rohrbough v. County Court*, 39 W. Va. 472, 20 S. E. 565.

But if sufficient time elapses between the fright of the horse and the accident to permit the driver, being a man of ordinary prudence, to make a proper effort to regain control of the frightened animal, even though he should fail, the county would not be liable for its negligence, as the injury must be attributed to the viciousness of the horse, rather than to the defect in the highway. *Rohrbough v. County Court*, 39 W. Va. 472, 20 S. E. 565.

Necessity of Presenting Claim.—An action in case for damages for injury to persons or property against a county court under § 53, ch. 43, W. Va. Code, which provides: "Any person who sustains an injury to his person or property by reason of a public road or bridge in the county * * * being out of repair, may recover all damages sustained by him by reason of such injury in an action on the case in any court of competent jurisdiction against a county court," may be maintained without first presenting a claim or demand therefor to a county court under § 41, ch. 39, Code. *Chancey v. County Court*, 51 W. Va. 252, 41 S. E. 156. But see post, "Necessity of Presenting Demand," IX, D.

E. LIABILITY BETWEEN COUNTIES—MANDAMUS.

A run divides G. and M. counties and a swamp lies in M. adjacent to the run. County court of M., under § 30, ch. 181, acts, 1874-75, notified county court of G. of the necessity of a bridge over the run, and of a causeway over the swamp. Latter concurred as to the necessity, and appointed commissioners to confer with commissioners appointed by former. The commissioners, also, concurred as to the necessity, but those of G. thought the causeway should be made at the sole expense of M., and so reported, and their report was confirmed. Then the county court of G. refused to appoint commissioners

to unite with those of M. letting the causeway to contract. Thereupon, county court of M. applied to the circuit court of G. for a mandamus. County court of G. demurred. Held, that section provides only for a bridge or a causeway between two counties, and not for a bridge between the counties and a causeway wholly in one county, though adjacent and necessary to the bridge. *County Court v. County Court*, 79 Va. 15.

G. county was under no obligation to aid in making the causeway, and in such a case a mandamus should be denied. *County Court v. County Court*, 79 Va. 15.

IX. Actions.

A. GENERALLY—SUITS ON CONTRACTS.

"The county is a political subdivision of the state, and can only be sued when and in the manner prescribed by law. The sovereign can be sued only by its own consent, and a state granting the right to its citizens to bring suit against it can be sued only in the mode prescribed. The same principles apply to a county, which is a part of the state, which is, as we have said, a political subdivision of the state, suable only in the mode prescribed in the law granting the right to sue." *Botetourt Co. v. Burger*, 86 Va. 533, 10 S. E. 264; *Prince George Co. v. Atlantic, etc., R. Co.*, 87 Va. 286, 12 S. E. 667.

Counties, being political divisions of the state, can not be sued except in cases where by statute such suits are allowed, as in cases growing out of contracts with them, but not for injuries resulting from the negligence of their officers or servants. *Field v. Albemarle Co.*, 2 Va. Dec. 67, following *Fry v. Albemarle Co.*, 86 Va. 195, 9 S. E. 1004. See ante, "Burning of Barn by Road Hands," VIII, D, 2.

B. DECLARATION — ALLEGATION.

Where a county court made a contract for making a road, and building

a bridge according to certain specifications, and added, "to the satisfaction of the court," it means that it must be done according to the specifications, and that would be to the satisfaction of the court. In such case, in a suit by the contractors for damages for breach of the contract, the declaration need not allege that the work was done "to the satisfaction of the court." *Kinsley v. Monongalia County*, 31 W. Va. 464, 7 S. E. 445.

In assumpsit by the contractor against a county for the price contracted to be paid for building a jail, it is not necessary to set out the dimensions or a description of the building in the declaration. *Carroll County v. Collier*, 22 Gratt. 302.

In such a case, the contract set out in the count fixes a time within which the jail is to be completed, but there is no averment that it was completed within the time. The count is defective. *Carroll County v. Collier*, 22 Gratt. 302.

In a suit on a penal bond, in which the county and a district are both interested, the declaration should show whether the suit is for an injury or loss suffered by the county or by the district, and in what such loss or injury consists; and, if it fails to do so, it will be held to be bad on demurrer. *State v. Sistersville, etc., Turnpike Co.*, 49 S. E. 454.

In the prosecution of a claim against a county, allegation that payment thereof has been refused is a condition precedent to a suit upon any claim against the county founded on contract. *Yates v. Taylor Co.*, 47 W. Va. 376, 35 S. E. 24.

If such a suit be brought against the county court of any county for the recovery of any such claim or demand, the declaration must substantially aver, that the same had been so presented to and disallowed in whole or in part by such court, or that such itemized account or statement thereof had been so filed with the clerk of such court, and

that said court had so neglected or refused to act thereon and unless such averments substantially appear upon the face of the declaration, it will for that cause be demurrable. In such a suit against the county court of Wayne county it was held, upon demurrer, that the declaration contained substantially these averments. *Chapman v. County Court*, 27 W. Va. 496.

C. VARIANCE.

The declaration states that the county court appointed three commissioners, naming them, to let out the building of the jail; in an order of the county court offered in evidence by the plaintiff, only two of them are named. This is no material variance, and the order may be admitted as evidence. *Carroll County v. Collier*, 22 Gratt. 302.

D. NECESSITY OF PRESENTING DEMAND.

No suit can be maintained against the county court of any county for the recovery of any sum of money due from such county founded on contract except an order on the county treasury, until such claim or demand has been presented to and disallowed in whole or part by such county court, or until an itemized account or statement thereof has been filed with the clerk of such court and the court had neglected or refused to act thereon to the close of the second session of such court, next after it was so filed with such clerk, or to the close of the first session thereof, next after it was so presented to such court. *Chapman v. County Court*, 27 W. Va. 496; *Yates v. Taylor Co.*, 47 W. Va. 376, 35 S. E. 24.

But see *Chancey v. County Court*, 51 W. Va. 252, 41 S. E. 156, where it was held, that an action in case for damages for injury to persons or property against the county court under § 53, ch. 43, W. Va. Code, may be maintained without first presenting a claim or demand therefor to the county court under § 41, ch. 39, Code. See *Botetourt Co. v. Burger*, 86 Va. 533, 10 S. E. 263.

E. IN WHOSE NAME SUIT BROUGHT.

The county court is the legal representative of the various magisterial districts of the county, which can only sue and be sued in its name, as they have no legal existence for the purposes of suit. *State v. Sistersville, etc., Turnpike Co.*, 49 S. E. 454.

"I doubt whether a county, as such, can sue in this state, since, under the statute and constitution, the county court is its perfect representative, performing its functions, and that court is by statute a corporation; but, as this is not a suit dependent on legal title, the petition, though filed in the name of the county, not the county court, will be held as substantially good in that respect." *Summers v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 307.

But in *Fry v. Albemarle Co.*, 86 Va. 197, 9 S. E. 1004, the court said: "The thirteenth section of chapter 45 of the Code of 1873, provides that: 'Counties may sue in their own names for forfeitures, fines, or penalties given by law to such counties, or upon contracts made with them, and may be sued in their own names, in the circuit court of such county.'"

And the court also said in *Prince George Co. v. Atlantic, etc., R. Co.*, 87 Va. 285, 12 S. E. 667: "Section 802 of the Code of Virginia provides that counties may be sued in their own name, under the provisions of § 843, supra—that is, by appeal under § 838, supra—when the claim duly presented to the board of supervisors had been rejected in whole or in part by the said board; and such disallowance shall be final, and a perpetual bar to any such claim, unless an appeal be taken, or the board consent to the institution of an action against the said county. 'Provided, however, that when the board of supervisors shall refuse or neglect to act upon any claim duly presented to them, this section shall not be so construed as to prevent the institution of an action by such claimant.'"

F. WHEN ASSUMPSIT DOES NOT LIE.

An action of assumpsit will not lie against a county court, upon an order issued by a county court upon the sheriff of a county, in favor of the owner of such order. *Ratliff v. Wayne Co.*, 33 W. Va. 94, 10 S. E. 28.

G. SET-OFF.

One sued by the county can not set off a claim which has not been presented to the board of supervisors and allowed by them, or by the county court upon an appeal. *Botetourt Co. v. Burger*, 86 Va. 530, 10 S. E. 264.

H. STATUTE OF LIMITATIONS.

The act of limitations runs against counties and other subdivisions of the state, in suits brought by them to recover debts, in the same manner and to the same extent as against natural persons. Supervisors of counties are constructive or implied trustees, and the statute of limitations applies to actions brought against them by counties to compel a restitution of funds diverted. *Johnson v. Black*, 103 Va. 478, 49 S. E. 633.

"The right expressed in the maxim 'nullum tempus occurrit regi,' is an attribute of sovereignty and can not be invoked by counties or other subdivisions of the state. As to such subdivisions of the state, the statute runs in the same manner and to the same extent as against natural persons." *Johnson v. Black*, 103 Va. 492, 49 S. E. 633.

Laches can not be imputed to taxpayers for ignorance of the fact that members of a board of supervisors have been misappropriating the public funds. They have the right to assume the contrary, and although the books of the supervisors are open to inspection, no duty of inspection rests upon the taxpayers. Laches will not be imputed to one who is innocently ignorant of his rights. *Johnson v. Black*, 103 Va. 477, 49 S. E. 633.

Where a party presents his claim

against a county to the board of supervisors, within the time limited by the statute, and they decline to take it up, and adjourn, and no entry is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim. *Dinwiddie County v. Stuart*, 28 Gratt. 526.

Claim of agent appointed by county court in 1863, for an agreed compensation, was presented and allowed in 1871, but not paid, and in 1873 was disallowed. In 1887, a mandamus was applied for to compel its payment. Held, the claim was barred by the lapse of five years between its accrual and the filing of the application. *Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999.

I. PROCESS AGAINST ANOTHER COUNTY.

In the case reported it was held, that a county court ought not to be compelled by a superior court to issue process to another county to compel the appearance of a person summoned as a garnishee under an attachment against an absconding debtor. *Jackson v. Justices*, 1 Va. Cas. 314.

J. EVIDENCE—ESTOPPEL.

Report of Commissioners.—Where an action is brought for breach of contract made by commissioners of a county court with the plaintiff, a report made by these commissioners to the county court, that the contractor had failed to comply with his contract, is improper evidence. *Kinsley v. Monongalia County*, 31 W. Va. 464, 7 S. E. 445.

Order of Court.—In an action of assumpsit by a contractor against a county for the price contracted to be paid for building a jail, the defendant pleads that the building was not completed in time, and that the material used and the work was defective, so that it is unfit for use as a jail. The plaintiff takes issue on this plea, and upon the trial the defendant offers a witness to sustain the defense. The plaintiff objects to the evidence, and of-

fers in evidence an order of the court, showing that the court had appointed commissioners to examine the building, and upon their report, that it had been done according to contract, had received it. Held, that the plaintiff having taken issue upon the plea, the order could not operate as an estoppel when offered in evidence, even if it would have been such if set up by replication to the plea, or if the trial had been upon the general issue. The order was not an

estoppel, it not being the judgment, and the report of the commissioner not being an award. *Carroll County v. Collier*, 22 Gratt. 302.

X. County Bonds.

See the title MUNICIPAL, STATE AND COUNTY SECURITIES.

XI. County Aid.

See the title MUNICIPAL AID.

Counts.

See the titles ACTIONS, vol. 1, p. 122; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; PLEADING.

County Boards.

See the title COUNTIES, ante, p. 636.

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See the titles COUNTIES, ante, p. 636; COURTS.

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See the title COUNTIES, ante, p. 636.

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See the title MUNICIPAL, STATE AND COUNTY SECURITIES.

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See the title COUNTIES, ante, p. 636.

Coupling Cars.

See the title MASTER AND SERVANT.

COUPON BONDS.—See the titles BROKERS, vol. 2, p. 628; FINES AND COSTS IN CRIMINAL CASES; INTEREST; MUNICIPAL, STATE AND COUNTY SECURITIES; PAYMENT; STATE; TAXATION.

In *Arents v. Com.*, 18 Gratt. 765, it is said: "Construing the third section in connection with, and with reference to, the second, it authorized bonds which were to be guaranteed by the state to be issued in the form of **coupon bonds**; that is to say, payable to such person as might be the holder, and with coupons for interest transferable by delivery."

Courses and Distances.

See the title BOUNDARIES, vol. 2, p. 587.

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I. Definition and General Consideration.

Definitions.—A court is “a place wherein justice is judicially administered.” *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448, quoting 3 Black. Com. 23.

A court is “a body in the government, organized for the public administration of justice at the time and place prescribed by law.” *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448, quoting 4 Am. & Eng. Ency. Law 447.

“Courts, or tribunals in the nature of courts, are the only agencies of the law by which a cause can be heard and determined; they are the only depositaries of judicial power. Without them it lies dormant and inactive in the sovereignty of the state. Its active and potent existence is inseparable from that of a court. It is not only necessary to the existence of judicial power that can be exercised that it be vested in a court or other tribunal, but there can be no court vested with such power unless and until all the requirements of law, necessary to constitute such court, are complied with. The election and qualification of a judge or a justice of the peace does not constitute a court. The holding of a commission as judge by an individual does not authorize him to hear and determine causes until all other requirements of law, necessary to the transaction of judicial business are fulfilled. ‘To constitute a court, the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court.’ Works on Court and their Jur. 1.” *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448. And see post, “Time and place of Holding,” VII.

Judge Considered as the Court.—The word “court,” as is well known, is often used to describe a legal tribunal in an abstract sense, without a judge, and it is as often used to de-

scribe the tribunal with the judge. So we often speak of the judge while presiding in a tribunal as “the court.” *Griffin v. Cunningham*, 20 Gratt. 31.

In *Griffin v. Cunningham*, 20 Gratt. 31, it was held, that the last clause of § 2 of the schedule of the Virginia constitution that “The several courts, except as herein otherwise provided, shall continue with the like power and jurisdiction, both in law and equity, as if this constitution had not been adopted, and until the organization of the judicial department of this constitution,” was not intended to continue the judges in office, and the term “courts” was not used synonymously with judges.

A judge selected, under the provisions of chapter 112 of the Code, to try a certain case, and who does try such case, becomes the court with regard to such case, for all purposes, and may sign bills of exceptions therein within thirty days after the adjournment of the term at which the trial is had, in all respects, as though he were the regular judge of such court. *Carper v. Cook*, 39 W. Va. 346, 19 S. E. 379. See the title JUDGES.

II. Constitutional Provisions Vesting Judicial Power of State.

By art. 8, § 1, of the West Virginia constitution it is provided that “the judicial power of the state shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace.” *Fowler v. Thompson*, 22 W. Va. 106; *Brazie v. Commissioners*, 25 W. Va. 213.

By art. 6, § 87, of the Virginia constitution it is provided that “the judiciary department shall consist of a supreme court of appeals, circuit courts, city courts, and such other courts as are hereinafter authorized. The jurisdiction of these tribunals and the judges thereof, except so far as conferred by

this constitution, shall be regulated by law."

The last section of art. 6, of the constitution directs that there shall be a supreme court of appeals, district courts and circuit courts; and that the jurisdiction of these tribunals and the judges thereof, except so far as the same is conferred by the constitution, shall be regulated by law. *Com. v. Scott*, 10 Gratt. 749; *Holladay v. Auditor*, 77 Va. 425.

"Our state constitution declares the judicial power of Virginia shall be vested in certain tribunals of her own, whose jurisdiction is to be regulated by law." *McLaughlin v. Bank*, 7 Gratt. 68.

III. Classification According to Jurisdiction.

As to the classification of courts into courts of general and courts of limited jurisdiction and into courts of original and courts of appellate jurisdiction, see the title JURISDICTION.

IV. Establishment, Organization and Abolition.

A. CONSTITUTIONAL PROVISIONS.

As to the general provisions of the Virginia and West Virginia constitutions vesting the judicial power in certain specified courts and "such other courts as are hereinafter authorized," see ante, "Constitutional Provisions Vesting Judicial Power of State," II.

Establishment of Courts of Limited Jurisdiction.—Art. 8, § 19, W. Va. constitution, provides for the establishment by the legislature of "courts of limited jurisdiction within any county, incorporated city, town or village," etc. *Jelly v. Dils*, 27 W. Va. 267.

As to the provisions of the Virginia and West Virginia constitutions for additional courts for cities, see post, "Municipal Hustings and Corporation Courts," XVI, G.

B. PROVISIONS FOR ORGANIZATION IN NEW COUNTIES.

A provision for the organization and sitting of courts in new counties is properly connected with the subject of the formation of such counties, and may be included in "an act to authorize the formation of new counties and to change county boundaries." *Slack v. Jacobs*, 8 W. Va. 612. See the titles CONSTITUTIONAL LAW, ante, p. 140; STATUTES.

C. ABOLITION.

As to the abolition of county courts in Virginia, see post, "Abolition of County Courts in Virginia," XVI, F. 8.

As to the power of the legislature to abolish public offices generally, see the title PUBLIC OFFICERS.

V. Judges.

See the title JUDGES.

VI. Officers.

A. APPOINTMENT AND REMOVAL.

The officers of the supreme court of appeals, except the reporter, shall be appointed by the court, or in vacation by the judges thereof, with the power of removal; their duties and compensation shall be prescribed by law. *Const. W. Va.*, art. 8, § 8.

The officers of the supreme court of appeals shall be appointed by the court or by the judges in vacation. Their duties, compensation, and tenure of office shall be prescribed by law. *Const. Va.*, art. 6, § 92.

The circuit court has absolute control over its commissioners, with the power to appoint and remove at its discretion; and unless such discretion is plainly abused, to the prejudice of the parties to the litigation, the court can not interfere therewith. *Arbogast v. McGraw*, 47 W. Va. 263, 34 S. E. 736.

A special commissioner removed by the circuit court without notice or good cause shown, can not appeal from

the decree removing him. *Arbogast v. McGraw*, 47 W. Va. 263, 33 S. E. 736.

B. PARTICULAR OFFICERS.

Attorneys.—See the titles *ATTORNEY AND CLIENT*, vol. 2, p. 146; *COMMONWEALTH'S ATTORNEY*, ante, p. 30.

Clerks.—See the title *CLERKS OF COURT*, vol. 2, p. 834.

Interpreters.—See the title *INTERPRETERS*.

Reporters.—See the title *REPORTS AND REPORTERS*.

Sheriffs and Constables.—The court of appeals shall not be attended by any sheriff but each circuit court and county court shall be attended by the sheriff of the county in which it is held, who shall act as the officer thereof. Code W. Va., ch. 114, § 5.

The court of appeals shall not be attended by any sheriff; and a circuit or other court (except the circuit and chancery courts of the city of Richmond), held only for a corporation, shall be attended by the sergeant of such corporation, who shall act as its officer. In all other cases, the sheriff of the county in which any court is held, shall attend it, and act as its officer. Va. Code, 1904, § 3115. See generally, the title *SHERIFFS AND CONSTABLES*.

Stenographer.—See the title *STENOGRAPHERS*.

Tipstaff and Crier.—The supreme court of appeals, at each place of session, and such special court, may appoint a tipstaff and a crier, who shall perform such duties as the court may require, and shall receive out of the treasury such reasonable compensation as the court may allow, and be removable at its pleasure. Va. Code, 1904, § 3099.

VII. Time and Place of Holding.

A. HOW FIXED.

The constitution being silent as to the times and places of holding the

courts thereby established, legislation was necessary to carry its provisions on this subject into effect. *Com. v. Scott*, 10 Gratt. 749.

B. NECESSITY FOR HOLDING AT TIME AND PLACE FIXED BY LAW.

"The times and places at which the court shall sit are usually fixed by statute, and in order that a court may exercise its jurisdiction, these statutory provisions must be observed. The proceedings of a court at a time or place other than those that are prescribed by law, are *coram non judice*, and, therefore, void. It is not only void; it is not the act of a court at all." *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448, quoting *Works on Courts and their Juris.* 81. See the titles *JUDGMENTS AND DECREES*; *JURISDICTION*.

It is a fundamental principle that courts of general and original jurisdiction may exercise their functions only at such times and places as are fixed by law, and that the judge in vacation can enter no orders except such as are expressly authorized by statute, and he is restricted by its very terms. *Chase v. Miller*, 88 Va. 791, 14 S. E. Rep. 545.

"Our Code (§ 6, ch. 114) requires circuit and county courts to sit at the courthouse. Judicial proceedings at a place not appointed by law are null and void, because the court there sitting is not a court, but usurps jurisdiction, especially as our Code, ch. 39, § 6, requires the county court to sit at the courthouse. 1 *Black. Judgm.*, § 177. It seems to me that this also is a reason why a writ of prohibition should issue." *Hamilton v. Tucker County Court*, 38 W. Va. 71, 18 S. E. 8.

C. DUTY OF COUNTY AUTHORITIES TO PROVIDE COURTHOUSE, ETC.

See the title *COUNTIES*, ante p. 636.

D. STATUTORY PROVISIONS AS TO TIME AND PLACE.

1. Time.

As to the time of holding the various courts, see post, "Particular Courts," XVI.

2. Place.

In General.—Every circuit, county, or corporation court, for any county or corporation, shall be held at the courthouse of such county or corporation, except where some other place is prescribed by law, or lawfully appointed, Va. Code, 1904, § 3116; W. Va. Code, ch. 114, § 6. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380; *Com. v. Scott*, 10 Gratt. 749.

Circuit Court of Henrico County.—

The act of 1852 which provided that the circuit court of Henrico county should be held at the state courthouse in Richmond, does not violate art. 6, § 6, Const., providing that the circuit court shall be held by the judge of each circuit at least twice a year, the constitution being silent as to the place of holding such court. *Com. v. Scott*, 10 Gratt. 749.

"The constitution constitutes the city a distinct circuit, for which a judge is to be elected by the voters thereof, who is to reside in it during his continuance in office; and a circuit court is to be held at least twice a year by the judge of the circuit in the city. To this extent the city is withdrawn from the jurisdiction of the county in reference to judicial matters. But the constitution, in providing for a circuit court for the city, is silent as to the jurisdiction; that is to be regulated by law. Constituting the city into a separate circuit, with a court to exercise such jurisdiction as the law might confer on it, does not erect the city into a separate county. If these provisions stood alone, the city might, for all other purposes political and judicial, remain a part of the county. We are, therefore, of opinion that the city still remains within the territorial limits of the county, is comprised in it; and the

law prescribing the state courthouse in the city of Richmond as the place where the circuit court for the county of Henrico should sit, is not in violation of the seventh section of the sixth article of the constitution, directing that a circuit court shall be held at least twice a year by the judge of each circuit, in every county or corporation thereof wherein a circuit court is now or may hereafter be established." *Com. v. Scott*, 10 Gratt. 749.

E. CHANGE OF PLACE OR TIME.

1. Power to Change.

Statutory Provisions Authorizing Change by Governor.—Whenever, by reason of the destruction of any building in which the court of appeals or a special court of appeals is appointed to be held, or by reason of the place of sessions being possession of a public enemy, or infected with contagious disease, it shall seem to the governor necessary, he shall, by proclamation, appoint a place at which court shall be held, so long as such reason may continue, and when the circumstances require it, may postpone the time for holding the court. A copy of such proclamation shall be sent to the clerk and to each of the judges of such court, and published in some newspaper at the seat of government, and near the regular place of session of such court. Va. Code, 1904, ch. 151, § 3119.

Whenever, by reason of the destruction of any building in which courts are appointed to be held, or by reason of the place of sessions being in possession of, or threatened by, a public enemy, or infested with contagious disease, it shall seem to the governor necessary, he shall, by proclamation, appoint a place at which such courts shall be held, so long as such reason may continue, and, when the circumstances require it, may postpone the time for holding the courts. Code W. Va., ch. 114, § 7. *State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

A copy of such proclamation shall be sent to the clerk, and to each of the judges of any such supreme court of appeals and circuit courts, and the president of any such county court. Code, W. Va., ch. 114, § 9.

Change by Court or Judge.—Whenever, in the opinion of a circuit or corporation court, or the judge thereof, the courthouse or other place wherein it is required to hold its sessions, can not, or should not, from any cause, be occupied by it, or if the same shall be destroyed the court may hold its session at such places as may be appointed by its order, or by the warrant of the judge thereof in vacation, directed to its clerk, until the courthouse or its lawful place of session, can or should be thereafter occupied, or until another shall be built and fitted for its occupation, or until some other place be appointed by the court. Va. Code, 1904, ch. 151, § 3117.

A copy of every order of court or warrant of a judge under the preceding section, shall, if practicable, be posted by the clerk of the court at the door of his office, and at the courthouse door, and also at the place so appointed. Va. Code, 1904, ch. 151, § 3118.

When the courthouse of a county is not in a condition to be occupied, such courts shall hold their sessions at such places as may be appointed by order of the county court. A copy of such order or warrant shall be posted by the clerk of the county court at the front door of his office, at the courthouse door and at the place so appointed. Code, W. Va., ch. 114, § 6.

Where a courthouse is undergoing repairs and is not in a fit condition to be occupied, the circuit court may remove to another place, and continue its sessions there. *Caperton v. Bowyer*, 4 W. Va. 176.

Transfer of Case by Supreme Court.—Under Va. Code, 1904, § 3093, providing that by consent of the parties, or for reasons appearing to the court,

any case pending in said court may be transferred to another place of session, the supreme court of appeals has the right to transfer a case from one place of session to another. *Lillienfeld v. Com.*, 92 Va. 818, 23 S. E. 882.

2. Limitation as to Selection of Place.

No such place of sessions, for a circuit or corporation court, shall be without the limits of the county or corporation of which it is the court. And when such place is appointed because of the destruction of the building in which the court of appeals or special courts of appeals was held, the new place of sessions shall be within the same city or town with the old. Va. Code, 1904, ch. 151, § 3120; W. Va. Code, ch. 114, § 8. *Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380.

3. Effect of Change.

"Section 11, ch. 114, W. Va. Code, provides that 'when the place of holding any court, or the day for commencing any term is changed, * * * there shall be no discontinuance, but every notice, recognizance or process taken or returnable to the day on which the failure occurred, or to any day between that day and the next that the court may sit, or to the day and place as it was before such change, * * * shall be in the same condition and have the same effect, as if given, taken or returnable, or continued to the substituted time and place,' etc." *State v. Staley*, 45 W. Va. 792, 32 S. E. 198. See also, a similar provision in the Va. Code, 1904, ch. 151, § 3123. See the titles DISMISSAL, DISCONTINUANCE AND NONSUIT; SERVICE OF PROCESS.

4. Resumption of Sessions at Original Place.

When the place of holding the courts of any county has been changed to another building in the same town temporarily, under § 7, ch. 114, W. Va. Code, for the reason that the courthouse has been destroyed, no formal ceremony or notice is necessary to

authorize the holding of courts in the new courthouse provided upon the site of the old one, when the same is ready for occupancy and in possession of the county authorities. *State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

Whenever such new courthouse is ready for occupancy, the reason for holding the court at such other place appointed has ceased, and the courts are properly held in the new courthouse. *State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

VIII. Terms or Sessions.

A. DEFINITION AND CONSTRUCTION OF WORDS.

Where the word "term" is used in a statute with reference to courts, it should be construed to mean a regular term fixed by law, and not a special term fixed by the court, unless it is otherwise expressly provided, or clearly implied from the act. *Stultz v. Pratt*, 103 Va. 536, 49 S. E. 654.

"By § 3287 it is provided that every office judgment in a case where there is no order for an inquiry of damages, and every nonsuit, or dismissal entered in the clerk's office, shall, if not previously set aside, become final, if the case be in a circuit court, on the last day of the next term, or the 15th day thereof, whichever shall happen first. In § 3446 it is provided that where an injunction is dissolved, the bill shall stand dismissed of course with costs, unless sufficient cause be shown against such dismissal at the next term of the court after the dissolution. To hold that the word 'term' in §§ 3287 and 3446 includes special terms would result in great injustice and wrong. Litigants known when regular terms of court come. They are fixed by law. They prepare their cases and put in their defenses accordingly. They may not and generally do not actually know anything of the time when special terms may be appointed, yet if the construction insisted upon

were correct, office judgments and dismissals in the office would become final, and bills would stand dismissed if a special term intervened before the next regular term." *Stultz v. Pratt*, 103 Va. 536, 49 S. E. 654.

As to the construction of the word "term" as used in the statute providing for the discharge of a prisoner for failure to find an indictment, etc., against him, or to bring the trial within a certain number of terms, see the title CONSTITUTIONAL LAW.

The term session, when applied to courts, means the whole term; and in legal construction, the whole term is construed but as one day, and that day is always referred to the first day or commencement of the term. *Dew v. Judges*, 3 Hen. & M. 1.

"Judge Tucker said in *Dew v. Judges*, 3 Hen. & M. 27: 'The term "session," when applied to courts, means the whole term; and in legal construction the whole term is construed as but one day, and that day is always referred to the first day, or commencement, of the term.' I hardly think that because our statute contemplates adjournment from day to day, and provides that each day's proceedings shall be separately recorded and signed by the judge, it cuts up the term into separate days, and individuates each day from another, and changes the common-law rule. By reason of this rule that the whole term is one day, the common rule was that a judgment rendered on any day has relation to, and is a judgment of, its first day. *Tidd*, Prac. 547; 1 *Lomax*, Dig. 287; 1 *Black. Judgm.*, § 441; 2 *Freem.*, Judgm., § 369; *Farley v. Lea*, 32 Am. Dec. 680. This doctrine or rule had been always recognized in Virginia before we had a statute, but is now embodied in a statute, as regards the effect of the judgment as a lien. Code, ch. 139, § 5; *Mutual Assur. Soc. v. Stanard*, 4 *Munf.* 539; *Coutts v. Walker*, 2 *Leigh* 268; *Skipwith v. Cunningham*, 8 *Leigh*

272; *Withers v. Carter*, 4 Gratt. 418 (Baldwin, J.)" *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66. See the title JUDGMENTS AND DECREES.

B. SPECIAL TERMS.

As to special terms of courts, when, how, and by whom appointed, what causes may be heard thereat, etc., see post, "Particular Courts," XVI.

C. ADJOURNMENT.

See the title ADJOURNMENT, vol. 1, p. 179.

D. EXCLUSION OF SUNDAYS IN COMPUTING DAYS OF TERM.

In computing the days of a term of a court, Sunday being dies non juridicus is not counted as one of them. *Michie v. Michie*, 17 Gratt. 109; *Read v. Com.*, 22 Gratt. 924. See the title SUNDAYS AND HOLIDAYS.

IX. Jurisdiction.

See the title JURISDICTION.

X. Powers and Duties.

A. IN GENERAL.

Constitutional Provisions.—As has been stated, the constitutions both of Virginia and West Virginia vest the judicial powers of the state in the courts therein maintained or authorized to be established. See ante, "Constitutional Provisions Vesting Judicial Power of State," II.

Province of Court and Legislature Distinguished.—It is the province of courts to decide what the law is, and determine its application to particular facts in the decision of causes; the province of the legislature is to declare what the law shall be in the future. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635. See the title CONSTITUTIONAL LAW, ante, p. 140.

Power of Courts to Pass on Questions of Constitutionality.—"Wherever the question of constitutionality arises in the administration of rights, the

courts have power to pass on it." *Harmison v. Commissioners*, 45 W. Va. 179, 31 S. E. 394.

An unconstitutional act forming a delegate district or apportioning delegates for the house of delegates may be declared void by the courts, although the act is the exercise of political power, since in such case the question is judicial. *Harmison v. Commissioners*, 45 W. Va. 179, 31 S. E. 394. See the title CONSTITUTIONAL LAW, ante, p. 140.

B. POWER OF LEGISLATURE TO FIX.

1. In General.

Determination as to Judicial Powers of Courts and Judges Thereof.—The provision of the West Virginia constitution which declares that: "The judicial power of the state shall be vested in a supreme court of appeals, in circuit courts, and the judges thereof," etc. (§ 1, art. 8), plainly gives judicial power to the judges as well as the courts, and leaves it to the legislature to say, in all cases where there are no absolute prohibitions in the constitution, what portions of this judicial power shall be conferred upon the courts and what upon the judges thereof. *Brazie v. Commissioners*, 25 W. Va. 213.

Conference of Functions in Furtherance of Legislative Department.—Chapter 47 of the West Virginia Code, in relation to the incorporation of cities, towns and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, is constitutional and valid. *In re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398.

The circuit court, in the discharge of such functions, acts as a subordinate branch or tribunal of the legislative, and not of the judicial, department, and is not subject to the appellate jurisdic-

tion of the supreme court of appeals. In *re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398.

2. Limitations on Power of Legislature to Impose Duties.

A constitutional provision which, after prescribing the jurisdiction of a court in certain matters, further provides that such courts shall also have such other jurisdiction as is or may be prescribed by law, does not authorize the legislature to confer or impose on such court any of its functions which are strictly legislative, but only such as are in their nature judicial and administrative, and which, by the constitution, it is forbidden longer to exercise but is required to direct by general law, how and by whom they shall be discharged. In *re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398, citing *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *Wells v. Board of Education*, 20 W. Va. 157; *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97; *Mackin v. County Court*, 38 W. Va. 338, 18 S. E. 632; *Wheeling Bridge, etc., R. Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551.

The power to revoke or annul a statute or ordinance is equivalent to the power to repeal it; and in either case the power is legislative, and not judicial, in its character. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635.

Courts can not be empowered by the legislature to pass upon the constitutionality or validity of a legislative act or city ordinance as a general and abstract question; the question must be whether the act or ordinance furnishes the rule to govern the particular case before the court. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635.

Acts, W. Va., 1875, ch. 72, so far as it attempts to confer upon the circuit courts the power to "supersede, revoke, or annul" an ordinance of a city upon the petition of ten taxpayers residing in said city, is unconstitutional, for the reason that such power is leg-

islative, and therefore forbidden to be exercised by courts in this state. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635. See the title CONSTITUTIONAL LAW, ante, p. 140.

C. POWERS AND DUTIES IN PARTICULAR INSTANCES.

1. Control of Courthouse.

A judge of a circuit court has authority to control the courthouse in which he administers justice, to the extent, at least, of preventing any interference with the discharge of the public business, and of having necessary jury rooms and other conveniences for that purpose. *Supervisors v. Wingfield*, 27 Gratt. 329.

Where there is any such interference by the board of supervisors of a county, or any one else, the judge certainly has the right to inquire into it. If in doing so he violates the law or infringes upon the rights of others, his action may be corrected by a writ of error. But it is not a case in which prohibition will lie. *Supervisors v. Wingfield*, 27 Gratt. 329.

The board of supervisors of a county order that one of the jury room attached to the courthouse shall be prepared to be used as a part of the clerk's office of the county court, and this order is approved by the county court. The judge of the circuit court thereupon makes a rule upon the board of supervisors to show cause why they shall not be restrained from making the changes in the room. This court will not restrain him by prohibition from proceeding under the rule; but the board should make their defense in the circuit court; and any error of the judge in that proceeding may be corrected by writ of error to this court. *Supervisors v. Wingfield*, 27 Gratt. 329.

2. Management of Trial.

See generally, the titles CRIMINAL LAW; JUDGES; TRIAL.

Preservation of Order.—In the ad-

ministration of justice, the judge is charged with the preservation of order in his court, and to see to it that the due administration of justice is not obstructed by any person or persons whatsoever, and to this end he may rightfully summon to his aid, if necessary, the whole power of the commonwealth. *Belvin v. Richmond*, 85 Va. 574, 8 S. E. 378.

Power to Close Streets to Prevent Disturbance of Court and Jury.—Where the court, in its discretion, deems it essential to the proper administration of justice to close streets so as to prevent noises which disturb judge and jury in hearing witnesses and counsel, it has power to do so. *Belvin v. Richmond*, 85 Va. 574, 8 S. E. 378.

Control of Arguments of Counsel.—See the title ARGUMENTS OF COUNSEL, vol. 1, p. 714.

Examination of Witnesses.—All matters in regard to the examination of witnesses are peculiarly within the province of the trial court, subject, however, to review as in other cases. *Taylor v. Com.*, 77 Va. 692. See the title WITNESSES.

Adjournments.—See the title ADJOURNMENT, vol. 1, p. 179.

3. Power to Guard Execution of Process.

Every court has the power to watch over the execution of its process, and where it has been irregularly, or fraudulently executed, to quash it. *Hendricks v. Dundass*, 2 Wash. 50. See the title SERVICE OF PROCESS.

4. Inherent Power to Award Further Process to Bring in Parties.

A court has inherent power, in addition to powers specifically given by statute, to award further process to bring parties before it to answer its judgment. *United States, etc., Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342. See the title SUMMONS AND PROCESS.

5. Continuances.

As to the power of the court to grant

continuances, see the title CONTINUANCES, ante, p. 270.

6. Control of Proceedings during Preceding Vacation.

The court has control of all proceedings in the office, during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of such proceedings, or correct any mistake therein, and make such order concerning the same, as may be just. *Baylor v. Baltimore, etc., R. Co.*, 9 W. Va. 270.

As actions at law in the county courts are cognizable only at the quarterly terms, so motions to set aside any of the proceedings in the office in such actions are cognizable only at a quarterly term. And therefore the "preceding vacation" referred to in the Code, ch. 171, § 51, p. 715, means in its application to such cases, the interval between the quarterly terms of the court. *Insurance Co. v. Barley*, 16 Gratt. 363.

"The question depends upon the true construction of the Code, ch. 171, § 51, which declares that 'the court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings or correct any mistake therein and make such order concerning the same as may be just.' I think that, as actions at law brought in the county court are cognizable only at a quarterly term thereof, Code, ch. § 157, § 17, so motions to set aside or correct any of the proceedings in the office in such actions, are cognizable only at a quarterly term. The 'preceding vacation' referred to in the Code, ch. 171, § 51, means in its application to this case, the interval between the quarterly terms next after and next before the judgment was confessed. The motion was, therefore, properly made at the next quarterly, and not the next monthly term thereafter." *Insurance Co. v. Barley*, 16 Gratt. 363.

An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication, and reply; and if the plea filed at rules does not go to the plaintiff's whole demand, he may sign judgment for so much as is not covered by the plea. *Southall v. Exchange Bank of Va.*, 12 Gratt. 312.

"Though it was not competent for the clerk to correct the proceedings at rules, yet under the fifty-first section of chapter 172 of the Code, p. 653, the court, it is clear, had full authority so to do. By that section, control is expressly given to the court over all proceedings in the office during the previous vacation; and it may reinstate any cause discontinued during such vacation, set aside any of the proceedings, correct any mistake therein, and make such order concerning the same as may be just. There can be no doubt, then, that the court might properly, as it did, set aside all the proceedings at rules after the cause had been remanded at the previous term, and permit the plaintiff to do then, in court, what he could and should have done at the rules, to wit, file his replication and take judgment for the part not answered by the plea." *Southall v. Exchange Bank of Va.*, 12 Gratt. 312.

7. Correction or Amendment of Clerical Errors of Officers.

A court may at any time, without statute authority through its inherent power, allow merely clerical errors and omissions of its officers to be corrected or amended. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981. See the title AMENDMENTS, vol. 1, p. 316.

8. Control over Judgments.

As to the court's control over its judgments and records, see the title JUDGMENTS AND DECREES.

9. Power to Punish for Contempt.

As to the power of courts to punish

for contempt, see the title CONTEMPT, ante, p. 236.

10. Disbarment of Attorneys.

As to the powers of courts to disbar or suspend attorneys, see the title ATTORNEY AND CLIENT, vol. 2, p. 170.

11. Powers and Duties during Vacation.

See the title CHAMBERS AND VACATION, vol. 2, p. 771.

XI. Decisions.

A. DUTY TO RENDER ONLY IN CASE OF ACTUAL CONTROVERSY.

A court will express an opinion on questions of law when it becomes necessary to do so in determining controverted rights of persons or of property, but it can not decide moot questions or abstract propositions. *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176.

"It is the duty of courts to decide the rights of persons and of property when the parties interested can not adjust their controversy concerning such rights between themselves. Beyond this, there is no duty resting upon the court, nor any power or authority vested in them. It has long been settled law that, if one of the litigating parties, by purchase or otherwise, extinguish the claim of the opposite party, or if the parties, by collusion, endeavor to obtain from a court a decision upon a moot question, having no substantial right in actual controversy between them for determination, the court will refuse to take further cognizance of the matter and dismiss the proceeding, if pending, or decline to take jurisdiction if the status of the parties and object of the proceeding appear, when the aid of the court is invoked." *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176.

While a mandamus was pending in the supreme court to determine a petitioner's right to an office, the legis-

lature passed on this right. It was held, that the court would not decide an abstract question. *Flanagan v. Central Lunatic Asylum*, 79 Va. 554.

B. DUTY TO FOLLOW PRECEDENTS.

See the title *STARE DECISIS*.

C. PRACTICE WHERE COURT EQUALLY DIVIDED.

See the title *APPEAL AND ERROR*, vol. 1, p. 537.

D. REASONS FOR DECISIONS — PREPARATION OF SYLLABUS.

Constitutional Provision.—When a judgment or decree is reversed or affirmed by the supreme court of appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case. *Const. W. Va.*, art. 8, § 5. *Sweeney v. Baker*, 13 W. Va. 158; *Henry v. Davis*, 13 W. Va. 230; *Renick v. Ludington*, 15 W. Va. 323; *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

When a judgment or decree is reversed or affirmed by the supreme court of appeals the reasons therefor shall be stated in writing and preserved with the record of the case. *Const. Va.*, art. 6, § 90.

Provision Construed.—“When the constitution says that this court shall give its reasons for decisions, it can not surely mean that in case after case it shall discuss and rediscuss principles settled over and over again. The provision must receive a reasonable construction, like all other statute and constitutional provisions. It means that in cases of novelty, cases of first impression, cases involving the con-

struction of new statutes, cases involving law points not before well settled, the court shall file opinions giving such reasons. This court has, ever since the adoption of the constitution of 1872, pursued the course, in every case, of writing opinions, and many of them are but the iteration and reiteration of old and worn principles. In many of them only judgment or decree should have been rendered or pronounced without written opinions. The constitution intended nothing else.” *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

Syllabus Limited to Points of Law Decided.—The adjudications of facts by the supreme court are not required to be made points in the syllabus. *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

“The syllabus is never made up of findings of facts, but is limited to points of law determined. Sometimes the findings of facts are referred to for the purpose of explaining the point of law adjudicated, but only for such purpose. The opinion and not the syllabus shows the finding of facts necessary to the adjudication for the information of the circuit court and this court only makes the more important points of law a part of the syllabus for the general information of the legal profession and public, and not for the government of the circuit court in the further progress of the case. The opinion furnishes it the rule for its further action, if it be doubtful, and the syllabus does not clear away the doubt, he is justified in independent action; otherwise, it must be obeyed although the honorable judge may think the judge of this court who rendered the opinion has reached a conclusion at variance with his ‘lucid statement of the evidence and facts found.’” *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

XII. Rules.

See the title *RULES*.

XIII. Dockets.

A. COURT DOCKET OF CASES PENDING.

1. How Made and Called.

Court Provisions.—By § 3378 of the Virginia Code, 1904 (embodying the provisions of ch. 177, § 1, Code, 1849), it is provided that “before every term of a circuit court, and before every term of a corporation court designated for trial of civil cases in which juries are required, the clerk of each of said courts shall make out a docket of the following cases at law pending, to wit: First. Cases of the commonwealth. Second. Motions and actions in the order in which the notices of the motions were filed, or in which the proceedings at rules in the actions were terminated, docketing together as new cases those not on the docket at the previous term; and the clerk of the circuit court of the city of Richmond shall also put on the docket with said new cases, as soon as matured and in the order in which they are matured, all cases matured during the term of the said court. The clerk shall, under the control of the court, set the cases to certain days; and the docket shall be called, and the cases on it tried or disposed of for the term in that order, except that the court may, for good cause, take up any out of turn.” *Hanks v. Lyons*, 92 Va. 30, 22 S. E. 813.

“The provision as to making out the docket is substantially the same as that contained in the 1 Rev. Code, 1819, p. 507, § 76, varied so far as was necessary to provide for motions. The law then as now provided that the docket was to be made out before the term, and it followed that no cause could be put on the docket in which there was an office judgment, unless such office judgment had been obtained before the term; and where the office judgment was obtained on the same day the term commenced, the cause could not be put

upon the docket at that term. *White v. Archer*, 2 Va. Cas. 201; *Green v. Skipwith*, 1 Rand. 460.” *Hale v. Chamberlain*, 13 Gratt. 658.

By § 1, ch. 177, Va. Code, 1860, p. 730, the clerk of the circuit court was required to make out a docket of the causes ready for trial or hearing before the commencement of each term. *Higginbotham v. Haselden*, 3 W. Va. 266; *O'Brien v. Camden*, 3 W. Va. 20.

By ch. 131, § 1, W. Va. Code, 1899, it is provided that before every term of a circuit court, the clerk shall make out a docket of the following cases pending, to wit: First, cases of the state; and secondly, motions and actions, in the order in which the notices of the motions were filed, or in which the proceedings at rules in the actions were terminated, docketing together as new cases those not on the docket at the previous term. He shall, under the control of the court, set the cases to certain days; and the docket shall be called and the cases on it tried or disposed of for the term in that order, except that the court may for good cause take up any case out of turn.

By ch. 131, § 2, W. Va. Code, 1899, it is further provided that before every term of a circuit court the clerk shall make out a separate docket of chancery cases in which there are motions, and of other chancery cases which have been set for hearing as to any party, or which the court is to hear upon a plea, demurrer or exceptions to an answer, and during such term every cause on said docket shall be called and disposed of.

Necessity for Order of Court.—

When a summons in unlawful detainer is returnable to the first day of a term of the circuit court, or to the court generally, when that is equivalent to the first day of the term, it is not necessary that the court should make any order to docket the case. *Gas Co. v. Wheeling*, 7 W. Va. 22

"When a summons to institute an action, suit or other proceeding, is returnable to the first day of a term of a court, or to the term generally, when that is equivalent to the first day of the term, it is not necessary or proper that the court should make any order to docket the case. We have no doubt of this, without reference to authority. But the supreme court of this state, in the case of O'Brien and others against Camden sustains this opinion. 3 W. Va. 20." *Gas Co. v. Wheeling*, 7 W. Va. 22.

2. What Cases May Be Placed on Docket.

Necessity That Case Be Matured and Ready for Trial.—"By section 1 of chapter 177 of the Code, 1860, p. 730, the clerk is required to make out a docket of the causes ready for trial or hearing before the commencement of such term of the circuit court, and it follows that no case not matured and ready for trial before the commencement of a term can be put on the docket or tried at such term. *Hale v. Chamberlain*, etc., 13 Gratt. 658." *Higginbotham v. Haselden*, 3 W. Va. 266.

Where the time allowed for the defendant, proceeded against as a non-resident, did not expire until the day on which a term of court began, it was error to place the cause on the docket for trial. *Higginbotham v. Haselden*, 3 W. Va. 266.

Where a plea is set down for argument, the cause must be put on the court docket. *Hill v. Green*, 4 Hen. & M. 448.

Application to Motions as Well as Actions.—"The provision requiring the docket to be made out before the term applies as well to motions as to actions; the phraseology used is the same as to both; they are treated as cases pending, because they have been matured for their position on the trial docket before the term, by the service and filing of the notice in the time prescribed, where the proceeding is by

motion; by the confirmation of the conditional judgment at rules where the proceeding is by action at the common law. The object had in view was, as suggested by the revisors, to simplify and shorten pleadings and other proceedings; and this was to be effected by substituting the notice for the writ and pleading in the common-law action." *Hale v. Chamberlain*, 13 Gratt. 660.

In a proceeding under the Virginia Code, ch. 187, § 5, p. 640, to recover money due upon contract, by notice, the notice must be returned forty days before the commencement of the term, and put upon the docket of the court, or it can not be tried at that term. *Hale v. Chamberlain*, 13 Gratt. 658; *Furst v. Commercial Banks*, 101 Va. 208, 43 S. E. 728.

A notice of a motion for a judgment for money, under § 3211 of the Virginia Code, need not be given to the first day of the term of the court, but may be given to any day of the term, provided only the notice is served at least fifteen days before the day on which judgment is to be asked, and is filed in the clerk's office ten days before the term begins. *Hanks v. Lyons*, 92 Va. 30, 22 S. E. 813.

"The clerk, as is seen, is required to make out the docket before the term; and a notice like the one in question, in order that it may be heard at that term, must be in condition to be docketed before the term. In the case of *Hale v. Chamberlain*, supra [13 Gratt. 658], the notice was not only not returned before the term, but was not even served until after the term began. It could not, therefore, be put on the docket at that term, and the court necessarily held, that it could not be heard at that term. But in the case at bar the notice had been served and returned and filed by the clerk on March 7, 1894, which was more than ten days before the commencement of the term. It was, therefore, in a con-

dition to be docketed, before the term, and, when docketed, it was a case pending in the court for a hearing on the day to which the notice was given. The two cases are wholly unlike, and the principle of that decision can not govern this case." *Hanks v. Lyons*, 92 Va. 30, 22 S. E. 813.

3. Effect of Docketing upon Defendant's Right to Appear and Plead.

Where the cause is on the trial docket, whether properly or otherwise, the defendants may appear to it, in court, by attorney, and in person and plead in bar to the action, whether the writ in the cause has been properly executed or not. *Perry v. McHuffman*, 7 W. Va. 306.

4. Striking Cases from Docket for Failure to Prosecute.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

5. Reinstatement of Cause on Docket.

Cause on docket of circuit court at its last session before the war. All records of that court destroyed during the war except such as are in the attorney's hands. In 1881 the cause was not on docket, it not appearing that it had been legally removed. On motion it was reinstated. Held, no error. *Dismal Swamp Land Co. v. Macauley*, 85 Va. 16, 6 S. E. 697.

"We think the circuit court did not err in reviewing and reinstating the cause on the docket. It is admitted that the cause was on the docket at May term, 1861, the last term of the circuit court held in the city of Williamsburg before the war commenced, and that all the records of that court, except such as were, as was the case with this record, in the hands of attorneys, were destroyed. Upon the ascertainment of this fact, and in the absence of proof that it had been legally removed from the docket, the circuit court acted rightly in restoring the cause to the docket, and directing the proper accounts. It could not know in advance what would be the

evidence, and therefore acted rightly in giving the plaintiff an opportunity to show that he was not precluded from making out his case by his laches." *Dismal Swamp Land Co. v. Macauley*, 85 Va. 16, 6 S. E. 697.

B. RULE DOCKET.

By § 3237, Va. Code, 1904, it is provided that "there shall be a docket of the cases at rules, wherein the rules shall be entered; and the books in which rules and orders are entered, in chancery cases, shall be separate from those in which rules and orders are entered in other cases."

By the seventy-fourth section of the Virginia Revised Code of 1819, it is provided that "All rules to declare, etc., or for other proceedings, shall be given regularly from month to month, shall be entered in a book to be kept for that purpose, and shall expire on the succeeding rule day." *White v. Archer*, 2 Va. Cas. 201.

Where no rule docket is kept in the office, and no rules were held, and the cause had not been dismissed at rules, if the case be put upon the office judgment docket it should be remanded to rules for regular proceedings there to be had therein. *Alvis v. Johnson*, 1 Va. Dec. 381.

C. JUSTICE'S DOCKET.

See the title JUSTICES OF THE PEACE.

D. JUDGMENT DOCKET.

See the title JUDGMENTS AND DECREES.

E. EXECUTION DOCKET.

See the title EXECUTIONS.

XIV. Records.

See the title RECORDS.

XV. Reports.

See the title REPORTS AND REPORTERS.

XVI. Particular Courts.

A. GENERAL COURT.

The general court law enacted that

"the general court shall consist of (fifteen) judges, etc. A majority of the whole number of the said judges shall be necessary to constitute a general court for the transaction of business in the term time, except as herein is excepted. The said court shall be holden at the capitol in the city of Richmond. The said court shall be holden twice in every year, namely, on the fifteenth day of June, and fifteenth day of November. If a sufficient number of judges should not attend on the first day of any term, any one of the said judges may adjourn the court from day to day, for six days successively." *Mendum v. Com.*, 6 Rand. 704.

The general court continued to be the supreme criminal court until its abolishment by the constitution of 1851, when its appellate jurisdiction was given to the supreme court of appeals, which had no jurisdiction prior to that time. Va. Code, 1887, § 4052, as amended by acts, 1897-98, p. 622. But the court of appeals had jurisdiction in criminal cases adjourned from general court. See *Com. v. Caton*, 4 Call 5. See the titles CASES CERTIFIED OR RESERVED, vol. 2, p. 728; JURISDICTION.

B. SUPREME COURT OF APPEALS.

1. Origin and Nature.

Constitutional Provisions Vesting Judicial Power.—As to the provisions of the Virginia and West Virginia constitutions vesting the judicial power of those states in a supreme court of appeals and other courts, see ante, "Constitutional Provisions Vesting Judicial Power of State," II.

First Court a Legislative Court Only.

—The first court of appeals was a legislative court only, and it was not necessary that the judges should produce any commissions, or that the executive be present when they qualified; for the act constituting the court had not directed commissions to be issued, or the oaths to be taken in the pres-

ence of the executive; and the judges by construction of law knew each other to be judges of the courts to which they respectively belonged. First Case of the Judges, 4 Call 1.

2. How Constituted.

By art. 6, § 88, Va. constitution, it is provided that the supreme court of appeals shall consist of five judges, any three of whom may hold a court.

By the Virginia Code, 1904, § 3084, it is provided that the supreme court of appeals shall consist of five judges, any three of whom may hold a court. The said judges shall appoint one of their number president of the court, and also select by lot or otherwise one of their number, who shall reside at the seat of government. See also, § 3111a.

In the absence of the president, the eldest judge in commission present shall be the presiding judge; but if no one of the judges present be older in commission than the rest, then the judges present shall appoint any one of their number to preside. Va. Code, 1904, § 3085.

By art. 8, § 2, W. Va. constitution, it is provided that the supreme court of appeals shall consist of four judges, any three of whom shall be a quorum for the transaction of business. They shall be elected by the voters of the state and hold their office for the term of twelve years, unless sooner removed in the manner prescribed by this constitution, except that the judges in office when this article takes effect, shall remain therein until the expiration of their present term of office. *Buskirk v. Judge*, 7 W. Va. 91.

By ch. 113, § 1, W. Va. Code, it is provided that the supreme court of appeals shall consist of four judges, elected and qualified according to the constitution and laws, three of whom shall be a quorum.

As to the election of judges, see the title ELECTIONS; JUDGES.

By ch. 113, § 2, W. Va. Code, 1899,

it is provided that the judges of the supreme court of appeals shall designate one of their body to be the president of said court, and that in the absence of the president any other judge designated by the judges present shall act as president.

3. Terms and Sessions.

The supreme court of appeals shall hold its sessions at two or more places in the state, to be fixed by law. Const. Va., art. 6, § 93.

The supreme court of appeals shall hold a session annually, at Wytheville, in the county of Wythe, and at Staunton, in the county of Augusta, to commence at such time as the court may, from time to time, direct, and to continue at least sixty days, if the business be not sooner dispatched; and another in the city of Richmond, to commence at such time, and to be divided into such terms, as the court has directed, or may, from time to time direct, and to continue at least one hundred and sixty days, unless the business be sooner dispatched. Va. Code, 1904, § 3088.

There shall be at least two terms of the supreme court of appeals held annually at such times and places as may be prescribed by law. Const. W. Va., art. 8, § 9. *Buskirk v. Judge*, 7 W. Va. 91.

Three sessions of the supreme court of appeals shall be held every year; one in Charleston, in the county of Kanawha, commencing on the second Wednesday in January; one in Wheeling, in the county of Ohio, commencing on the first Wednesday in June, and one in Charlestown, in the county of Jefferson, commencing on the first Wednesday in September; and continue until the business is dispatched. W. Va. Code, ch. 113, § 3.

4. Transfer of Causes from One Place of Sessions to Another.

The supreme court of appeals has the right to transfer a case from one place of session to another by § 3093,

Va. Code, 1887, which provides that by consent of parties, or for reasons appearing to the court, any case pending in said court may be transferred to another place of session. *Lillienfeld v. Com.*, 92 Va. 818, 23 S. E. 882. See *Gilbert v. Washington, etc., R. Co.*, 33 Gratt. 586.

C. SPECIAL COURT OF APPEALS.

Constitutional and Statutory Provisions.—By art. 6, § 89, Va. constitution, it is provided that the general assembly may, from time to time, provide for a special court of appeals to try any cases on the docket of the supreme court of appeals in respect to which a majority of the judges are so situated as to make it improper for them to sit; and also to try any cases on said docket which can not be disposed of with convenient dispatch. The said special court shall be composed of not less than three or more than five of the judges of the circuit courts and city courts of record in cities of the first class, or of the judges of either of said courts, or of any of the judges of said courts together with one or more of the judges of the supreme court of appeals.

In accordance with this provision of the constitution § 3095, Va. Code, was enacted, to the effect, that, "If at any time there shall be on the docket of the supreme court of appeals a case in which a majority of the judges of the said court are so situated as to make it improper for them to sit on the hearing thereof, or if the court should be so situated in the rehearing of a case involving a constitutional question, according to the provisions of section eighty-eight of the constitution, that a full court can not be secured, on account of any one or more of the judges being unable, unwilling, or disqualified to sit, the fact shall be entered of record. The said court may thereupon have summoned from among the judges of the circuit courts, or judges of the city courts of record

of cities of the first class, as many as, with the judges of the supreme court of appeals not so situated, will make the number five, who shall together form and hold a special court of appeals to hear and determine any case in which a majority of the judges of the supreme court of appeals shall be so situated as to make it improper for them to sit, or to hear any case involving a constitutional question under section eighty-eight of the constitution, in which one or more of the judges of the said court shall be so disqualified, and upon which said question a majority of the court shall not agree. The said special court shall be held at Richmond, Wytheville, or Staunton, as the case may be."

Act Establishing Constitutional.—

The act of March 31, 1848, establishing a special court of appeals, constituted of judges of the circuit courts, is constitutional. *Sharpe v. Robertson*, 5 Gratt. 518.

The act of February 28, 1872, to provide a special court of appeals, which creates one consisting of three judges of the circuit courts, is constitutional, and the decisions of the courts are valid and binding on the parties in the cause. *Bolling v. Lerner*, 26 Gratt. 36.

The special court of appeals is not a supreme court of appeals, but belongs to the class of superior courts provided for in the constitution of Virginia. *Sharpe v. Robertson*, 5 Gratt. 518.

Proper Cases to Be Decided.—The proper cases to be decided by the special court of appeals are all cases on the docket of the court of appeals, not involving a constitutional question, and not decided in the lower court by one of the judges of the special court. It is the duty of the judges of the court of appeals to select the cases to be tried by the special court. *Bolling v. Lerner*, 26 Gratt. 36. See the title JURISDICTION.

D. DISTRICT AND SUPERIOR COURTS OF LAW.

Origin and History.—"The nature of the proceedings in the courts of common law always required that, in respect to them, justice, to use a current phrase of that time, 'should be brought more nearly to every man's door;' and district courts of law were therefore instituted at an early period, whose jurisdiction embraced several counties each; the courts being held at some central and convenient place for each district. * * * This arrangement was, in 1809, superseded by 'superior courts of law,' held by a single judge twice a year, in every county and corporation; and in 1831, that again was followed substantially by the present organization, which commits common-law and equity jurisdiction to the same judge, just as had been long practiced in the county and corporation courts, keeping the jurisdictions, however, as distinct as if they were administered by different judges; the 'order books,' that is, the books of the minutes of the proceedings being separate and distinct, and not the same, as in the case of the county and corporation courts. These courts were required to be held twice a year, in every county and corporation, and were denominated 'Circuit Superior Courts of Law and Chancery.' (Supp. Rev. Code, ch. 109, §§ 18, 1, pp. 142, 136.) In 1851, the name, but not the organization nor the jurisdiction of these courts, was changed, and they were styled 'Circuit Courts,' the designation which they have ever since borne." 4 Minor's Inst., p. 1, ch. 1, § ii, p. 271.

Transfer of Admiralty Jurisdiction to District Courts.—It was held, in *Scott v. Graves*, 4 Call 372, that the state district courts were obliged to execute the decrees of the court of appeals, reversing those of the old court of admiralty, after the dissolution of that court by the organization of the government of the United States, in cases in which the former court of ad-

miralty had jurisdiction by law, at the time of passing the "act establishing district courts, and for regulating the general court," and which was not taken away by the constitution of the United States. See the titles ADMIRALTY, vol. 1, p. 182; JURISDICTION.

Constitution, Time and Place of Holding Superior Courts.—By the first section of the circuit-court law of Virginia, it was provided: "That one judge of the general court shall hold a court in each year at the courthouse, etc., at the time, and in the manner herein-after directed." The second section of this act arranged all the counties into circuits, and appointed a day of holding courts for each. *Mendum v. Com.*, 6 Rand. 704.

Duration of Term of Superior Court.—By the third section of the circuit court law of Virginia, it was provided that "each of the aforesaid courts shall sit until the business thereof shall be dispatched, unless the judge holding the same be compelled to leave the court, in order to arrive in time at the next succeeding court of his circuit, or at the general court." *Mendum v. Com.*, 6 Rand. 704.

Judgment Rendered on Day General Court Held.—A judgment is rendered in the superior court of Chesterfield on the 15th of November, the day on which the general court is directed by law to be held at the capitol; the distance is judicially known to be not more than three hours moderate ride from one place to the other. It does not appear on the record but that the judgment might have been rendered in time to enable the judge to close that court, and attend at the capitol to his duties as one of the general court, on the same day. The superior court had jurisdiction to render the judgment on that day. *Mendum v. Com.*, 6 Rand. 704.

Transmission of Causes to Superior Court of Law.—Under the eighth and fifteenth sections of the act to organize

and establish a superior court of law in each county of Virginia, it was the duty of the clerk of the district court, in a case in which one of two defendants had confessed judgment, and the other had not, to send the papers to the superior court of that county, in which the defendant, as to whom the cause was still pending resided. *Payne v. Ladd*, 4 Munf. 483.

E. CIRCUIT COURTS.

1. Creation.

As to the provision of § 87, art. 6 of the Virginia constitution, vesting the jurisdictional powers of the state in circuit courts among others, see ante, "Constitutional Provisions Vesting Judicial Powers of State," II. Generally, as to the origin of the circuit courts as successors of district and supreme courts, see ante, "District and Superior Courts of Law," XVI, D.

2. Division of States into Judicial Circuits.

See Virginia constitution, art. 6, § 94; Va. Code, 1904, § 3057; West Virginia constitution, art. 8, §§ 10, 13; W. Va. Code, 1899, ch. 112, § 1. And see *Com. v. Scott*, 10 Gratt. 749.

3. Election of Judges.

It was formerly required by the Virginia constitution that for each circuit a judge should be elected by the voters thereof. *Com. v. Scott*, 10 Gratt. 749.

By the present constitution of Virginia, it is provided that for each circuit a judge shall be chosen by the joint vote of the two houses of the general assembly. Const. Va., art. 6, § 96.

The same provision is found in the constitution of West Virginia, Const. W. Va., art. 8, § 10.

Generally, as to the eligibility, election and qualification of judges, see the titles ELECTIONS; JUDGES.

4. Place of Holding Court.

Generally, as to the place of holding circuit courts, see ante, "Time and Place of Holding," VII.

5. Terms.**a. Number and Time of Holding.**

Constitutional and Statutory Provisions.—By the seventh section of article 6 of the former constitution of Virginia it was provided that a circuit court should be held at least twice a year by the judge of each circuit, in every county and corporation wherein a circuit court was then, or might thereafter, be established. *Com. v. Scott*, 10 Gratt. 749.

By § 12, art. 6, of this constitution "a circuit court shall be held at least twice a year by the judge of each circuit in every county and corporation thereof wherein a circuit court now is or may hereafter be established. But the judges may be required or authorized to hold the courts of their respective circuits alternately, and the judge of one circuit to hold court in any other circuit." *Smith v. Com.*, 75 Va. 904.

By art. 6, § 97, of the present constitution of Virginia it is provided that the number of terms of the circuit courts to be held for each county and city, shall be prescribed by law. But no separate circuit court shall be held for any city of the second class, until the city shall abolish its existing city court. The judge of one circuit may be required or authorized to hold court in any other circuit or city.

By W. Va. Const., art. 8, § 11, it is provided that a circuit court shall be held in every county of the state at least three times in each year, and provisions may be made by law for holding special terms of said court. A judge of any circuit may hold the court in another circuit. *Winans v. Winans*, 22 W. Va. 678.

By ch. 112, § 3, W. Va. Code, 1899, it is provided that there shall be at least three terms of the circuit court every year in each county, commencing at such times as may be prescribed by law. A judge of one circuit may, by arrangement with the judge of any other circuit, or when the office of

judge in any other circuit is vacant, hold court in any such circuit.

Time of Holding Circuit Court of Bland County.—By an act passed February 23d, 1867, acts of assembly, 1866-67, p. 668, ch. 234, § 2, it was declared that the circuit court of Bland county should be held on Wednesday after the third Monday in May and October. *Patten v. Hoge*, 22 Gratt. 443.

b. Provisions for Holding Where Judge Absent or Unable to Preside.

The legislature shall provide by law for holding regular and special terms of the circuit courts, where from any cause the judge shall fail to attend, or, if in attendance, can not properly preside. Const. W. Va., art. 8, § 15. *Winans v. Winans*, 22 W. Va. 678; *State v. Williams*, 14 W. Va. 851.

"Under authority of the constitution (art. 8, § 15), the legislature, by Code 1891, ch. 112, § 11, has provided for holding circuit courts 'when from any cause the judge shall fail to attend and hold the same, either at the commencement of the term, whether regular, adjourned or special; or if he be in attendance, and can not properly preside,' by the election of special judges. The special judge is a judge, under the constitution and statute, vested with circuit court powers, and just as much authorized to hold a circuit court as the regular judge, considerations which it seems to me, carry the conclusion that two courts in the same circuit can go on, under lawful judges, at the same time. The language of constitution and statute is broad. 'When from any cause the judge shall fail to attend;' the evident purpose being to save the term when the regular judge does not come. Each court has a separate existence. It is created for the county. So it have a judge, it is a lawful court; and that it may have, the law has provided. What has the circuit court of Tucker to do with the circuit court of Preston, or the reverse? Why can they

not both act at the same time? Public need and policy both say they can. I have no doubt of it." *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

Generally, as to special judges, their election, powers and duties, etc., see the title JUDGES.

c. Commencement and Duration of Term.

Need Not Be Held on First Day of Term.—Though a court be not held on the first day of a term, it may nevertheless be opened on any subsequent day, provided, in the case of a circuit or county court, the same be done before four o'clock in the afternoon of the third day. If, after a court is opened, it fail to sit on any day, it may nevertheless sit on any subsequent day of the term; provided, in the case of a circuit or county court there be not more than three consecutive days of such failure. W. Va. Code, ch. 114, § 10.

A term of the circuit court does not necessarily begin on the day fixed by law, but may open before four o'clock in the afternoon of the third day thereafter; and therefore it is not error in a circuit court to enter judgment and order execution, against prisoners, who have been convicted for murder in the county, on the second day after the term fixed for the beginning of a term in an adjoining county of the same circuit. *Boice v. State*, 1 W. Va. 328.

Presumption as to Commencement within Proper Time.—In the absence of proof to the contrary, it must be presumed that there was sufficient time after the entering of judgment, for the judge of a circuit to have reached the courthouse of an adjoining county, by the ordinary course of travel, before four o'clock p. m., of the third day after the period fixed by law for the term to commence. *Boice v. State*, 1 W. Va. 328.

If a party wishes to avail himself of matter rebutting such presumption,

he must make it appear upon the record by bill of exceptions or otherwise. *Boice v. State*, 1 W. Va. 328.

Limitation of Term.—The law has affixed no limit to the terms of the circuit superior courts, except that the judge holding the court shall adjourn in time to hold the next court in his circuit at the time appointed by law. And the judge may continue the session of his court until the latest period which will allow him time to get to the next court by 4 o'clock, p. m., of the third day of the term. *Hill v. Com.*, 2 Gratt. 594.

"The regular time prescribed by law for holding the circuit superior court of Nansemond, was on the 12th day of October. The next court of that circuit was that of Isle of Wight county, which by law was directed to be holden on Saturday, the 18th day of October. The verdict of the jury in this case was rendered on the 20th of October, and judgment of death was pronounced at 9 o'clock a. m. on the 21st. The distance from the courthouse of Nansemond to that of Isle of Wight, is 17 miles, and is three hours travel. In looking into the statements regulating the times for holding the respective courts of this commonwealth, we find that the county courts shall continue six days, unless the business is sooner determined. Here is an express statutory limitation of the duration of the terms of the county courts. But there is no such limitation in the circuit court law. By the statute, each of these courts 'shall sit until the business thereof shall be dispatched, unless the judge holding the same shall be compelled to leave the court in order to arrive in time at the next succeeding court of the circuit.' And the statute further provides, 'that if the judge shall not attend on the first day of the term of any of the said courts, such court shall stand adjourned from day to day, until a court shall be formed; if that shall happen

before 4 o'clock of the third day." *Hill v. Com.*, 2 Gratt. 594.

Prolongation of Session.—A term of a circuit court of one county can, if necessary, prolong its session beyond 4 o'clock p. m. of the third day of the time fixed for a term in another county. *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

"Our statute law fixes dates for the commencement of terms, but fixes no express length of those terms. The only limitation is one to be implied, it may be said, by the coming of the time fixed for another court; and, as each county has its time, the law intends to close one court when another begins. But it is only an implied termination. The judge is directed, it is true, to hold a court in the other county; but, if he continues in one county, the court of the other county is simply without a term—the term is simply lost in the second county." *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

"It has been the understanding of the legal profession, so far as I am able to say, for many years, that a circuit court term legally ends at a point of time from which there only remains time enough, by the usual course of travel, to enable the judge to reach the next court in his circuit, and open it not later than 4 o'clock in the afternoon of the third day. This is an impression founded on *Mendum's Case*, 6 Rand. (Va.) 704, *Hill's Case*, 2 Gratt. 595, and *Boice's Case*, 1 W. Va. 329. But in all of these cases the sentences alleged to be void because of the alleged expiration of the terms when they were rendered were sustained, because it appeared that a sufficient time remained after sentence for the judge to reach his next court by 4 o'clock after noon of its third day. In no one of them was the question decided. Is a judgment of a circuit court continuing to sit after it is too late for the judge to so reach and open his next court by 4 o'clock p. m. of its

third day, rendered after that point of time, void, as being *coram non judice*, or voidable for that reason?" *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

Courts of Different Counties May Sit at Same Time.—Circuit courts of different counties in the same circuit may sit at the same time. *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

d. Special Terms.

(1) When Proper and Manner of Appointing.

Constitutional and Statutory Provisions.—By the West Virginia constitution, art. 8, §§ 11 and 15, the legislature is authorized to provide for holding special terms of the circuit courts. *Winans v. Winans*, 22 W. Va. 678; *State v. Williams*, 14 W. Va. 851.

By the seventh section, ch. 15, of the West Virginia acts of 1872-73, organizing circuit courts, it is declared: "If any term of such court has ended without dispatching all its business, or if there be a failure to hold any term, the judge of the circuit court may, by a warrant directed to the clerk, appoint a special term thereof, and prescribe in such warrant whether a grand jury is to be summoned to attend such term." The act then prescribes the duty of the clerk and of the sheriff thereof. *State v. Williams*, 14 W. Va. 851.

These provisions are embodied in W. Va. Code, 1899, ch. 112, § 5. *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734.

By Va. Code, 1904, § 3060, it is provided that, "If any term of a circuit court is to end, or has ended, without the dispatch of all its business, or if there be a failure to hold any term, or it is expedient in the opinion of the judge of such court to hold a special term for the trial of any cause pending in such court, or of issues made up in any cause by consent of parties, or if the situation of a person confined in jail for trial in such circuit court makes it proper that his case should be disposed of before the next regular term

thereof, the judge of such circuit court, or, if he is dead, or is unable from any cause to hold his court, the judge of any other circuit court, or judge of a corporation or hustings court of a city of the first class, who has been designated by the governor to hold such terms, may, by order entered in such court, or by a warrant directed to the clerk, appoint a special term thereof and prescribe in such order or warrant whether any venire is to be summoned to attend the said term. The clerk shall inform the attorney for the commonwealth and the sheriff or sergeant of such appointment, post a copy of the warrant or order at the front door of the courthouse, and issue all proper process to such special term, and the sheriff or sergeant shall execute the process." *Stultz v. Pratt*, 103 Va. 536, 49 S. E. 654. *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482.

Presumption as to Regularity of Proceedings.—Where the judge's warrant appointing a special term was duly posted, in accordance with Code, § 3060, the presumption is that all of the provisions of that section were complied with, according to the rule in such cases, that all acts are presumed to have been rightly and regularly done. *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482. See also, *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734.

Provisions as to Duty of Clerk Directory Merely.—The provision that the clerk shall inform the attorney for the commonwealth, and the sheriff or sergeant of the appointment of a special term, is directory merely, and his failure so to do will not affect the validity of the proceedings at such special term. *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482.

A judge of the circuit court, in pursuance of § 5, ch. 112, of the Code, by a warrant directed to the clerk appoints a special term, which warrant the clerk enters in the order book of the court, but fails to post a copy of such warrant at the door of the courthouse.

Held, such omission does not in any wise affect the validity of the proceedings of such special term of the court. *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734.

"There was a motion to quash the warrant of the judge appointing the special term, because the record thereof made by the clerk in vacation does not show that the same was posted at the door of the courthouse, as required of the clerk by the statute. See Code, § 5, ch. 112. It is presumed that the clerk did his duty, according to the maxim; but, being no part of the warrant, but merely a part of the clerk's ministerial duty in regard to what he should do after receiving and recording the warrant, his failure to post a copy could not have the slightest effect on the validity of the warrant, or on the power to hold court under it, and, as the court had jurisdiction to hold the term, and dispose of defendant's case, there could be no ground of continuance for want of such jurisdiction" *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734.

(2) By Whom Held.

Section 11, ch. 15, W. Va. acts, 1872-73 prescribes that "Every such special term may be held by the judge of the circuit, or if he be dead or absent, by any other circuit judge who may be present." *State v. Williams*, 14 W. Va. 851.

By ch. 112, § 8, W. Va. Code, 1899, in addition to the above provision, it is provided that the special term may be held part of its session by one judge, and part by another.

By § 3062, Va. Code, 1904, every special term may be held by the judge of the circuit court, or, if he be dead or absent, or be so situated in respect to any cause pending in said court as in his opinion to make it improper for him to try it, by such other circuit or city judge as may be selected or designated in the manner prescribed by law. It shall be the duty of the

judge so selected or designated to hold such special term, and it may be held part of its session by one judge and part of it by another, and such special terms may be adjourned from time to time during intervals between the regular terms as to the judge may seem necessary for the dispatch of the business of the court. A judge selected or designated to hold a special term shall have all the powers and be authorized to discharge all the duties of the judge of said circuit court.

(3) What Cases May Be Tried at Special Term.

In General.—Section 3062 [Va. Code, 1904], declares what class of cases and controversies may be tried at such special terms: (1) Any civil case which could lawfully have been but was not tried at the last preceding term that was or should have been held; (2) any motion for a judgment, or other motion cognizable by such court, whether it was pending at the preceding term or not; (3) any criminal case which could be tried if it were a regular term; (4) and any cause or matter of controversy at law or in chancery then ready for hearing, or which may be made ready by consent of parties, may, with the consent of parties to such cause or controversy, be heard and determined, although it could not have been lawfully heard at the preceding term that was or should have been held. *Stultz v. Pratt*, 103 Va. 536, 49 S. E. 654; *Fowler v. Mosher*, 85 Va. 421, 7 S. E. 542.

"The Code, ch. 158, § 33, among other things, provides that 'at any special term any civil cause may be tried which could lawfully have been, but was not, tried at the last preceding term that was, or should have been, held; and any motion cognizable by such court may be heard and determined, whether it was pending at the preceding term or not,' etc. 'And any cause or matter of controversy in chancery then ready for hearing may be heard and determined, with the consent of the parties to such cause or con-

troversy, although it could not lawfully have been heard at the next preceding term that was, or should have been, held.'" *Patton v. Hoge*, 22 Gratt. 443. See also, *McDonald v. McDonald*, 3 W. Va. 676.

Section 11, ch. 15, W. Va. acts, 1872-73, declares that "At any such special term any civil case may be tried which could lawfully have been, but was not, tried at the last preceding term that was or should have been held; and any motion cognizable by such court may be heard and determined, whether it was pending at the preceding term or not, and any criminal cause may be tried at such special term as if it were a regular term, and although at the regular term next preceding the same may have been continued; and any cause or matter of controversy in chancery, then ready for hearing, may be heard and determined, although it could not lawfully have been heard at the next preceding term that was or should have been held." *State v. Williams*, 14 W. Va. 851.

By ch. 112, § 8, W. Va. Code, 1899, "Any cause, civil or criminal, and any motion or proceeding ready for trial or hearing, may be tried, heard and determined at any such special term, the same as if it were a regular term of such court."

Illustrations.—In a suit in equity, brought in February, 1869, against an absent and home defendant, the bill is taken for confessed at the May rules, and at the July term of the court the home defendant answers. At a special term of the court, held in December, 1869, a decree is made in the cause, the decree reciting that publication had been made as to the absent defendant. As the regular term of the court was on the Wednesday after the third Monday in October, the cause might have been heard then, and thereafter might be heard at the special term. Code, ch. 158, § 33. *Patton v. Hoge*, 22 Gratt. 443.

A notice upon a forfeited forthcom-

ing bond, given to a regular term of a court which the judge fails to attend, is sufficient to authorize an award of execution on the bond, at a special term held under § 17 of the circuit superior court law. *Wootten v. Bragg*, 1 Gratt. 1.

Where the report of a judicial sale was filed in the clerk's office before the regular March term, and should have been acted upon at that term, or the August term following, had either of those terms been held, consent was not necessary to authorize the court to dispose of it at a special term thereafter held, as § 3062, Va. Code, 1887, provides that any civil cause may be tried at a special term, which could have been lawfully tried at the last preceding term that was or should have been held. *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. Rep. 482.

Under 1 Va. Rev. Code, ch. 69, § 74, which gives the circuit court at intermediate terms, power to hear and decide all motions cognizable by them, whether the same were pending and could have been tried at the previous term or not, and § 6, act of March 15, 1838, which gives them power to order the sale of lands for delinquent taxes in vacation as well as in term, the circuit court has power to order the sale of land for taxes at an intermediate term. *Hitchcox v. Rawson*, 14 Gratt. 526.

Under § 3262, Va. Code, 1887, providing that any cause ready for hearing may, with consent of parties, be heard at a special term, the court can not at such term, without such consent, hear demurrer to bill or dissolve injunction. *Fowler v. Mosher*, 85 Va. 421, 7 S. E. Rep. 542.

"It is equally plain that the court had no right to try and determine the cause upon the demurrers. The statute (§ 3062, Va. Code) provides that, at a special term, 'any civil cause may be tried which could lawfully have been, but was not, tried at the last preceding term that was or should have been

held; * * * and any cause or matter of controversy, at law or in chancery, then ready for hearing, or which may be made ready by consent of parties, may, with the consent of the parties to such cause or controversy, be heard and determined, although it could not lawfully have been heard at the preceding term that was or should have been held.' By the terms of this statute the 'consent of parties' is required, as well in the case where the cause is ready as when it may be gotten ready; and as, therefore, there is an entire absence of consent in this case, although it might be, and indeed was, otherwise ready to be heard, so far as the demurrers were concerned, the court was without authority to enter the decree it did. It follows that the decree is erroneous, and must be reversed; the injunction must be reinstated; and the cause must be remanded, to be regularly proceeded in to final decree." *Fowler v. Mosher*, 85 Va. 421, 7 S. E. Rep. 542.

6. Powers and Duties.

Generally, as to the jurisdiction of circuit courts, see the title JURISDICTION.

Successor of County Court in Trial of Civil Suits.—On the second Tuesday in October, 1880, an amendment to the constitution of West Virginia was adopted by a vote of the people. Section 25, art. 8, in this amendment provides, that "all actions, suits and proceedings not embraced in the next preceding sections (which include the proceedings in this case) pending in a county court, when this article takes effect, together with the records and papers pertaining thereto shall be transmitted to and filed with the clerk of the circuit court of the county, to which office all process outstanding at the time this article goes into operation shall be returned; and the clerk shall have the same power and shall perform the same duties in relation to the said records, papers and proceedings, as were vested in and required of the

clerk of the county court on the day before this article took effect. All such actions, suits and proceedings so pending as aforesaid shall be docketed, proceeded in, tried, heard and determined in all respects by the circuit court, as if said suits and proceedings had originated in said court." *State v. Rawson*, 25 W. Va. 23.

Appointment of Commissioners to Settle County Lines.—The function of a circuit court, under W. Va. Code, 1891, ch. 39, § 18, in appointing commissioners to settle lines between counties, is ministerial, and legislative or administrative, and the court is without power to refuse such appointment on application of a county court of one of the counties. In case of its refusal, mandamus from this court is the remedy, not a writ of error. This court has no jurisdiction of such a writ of error. The action of a circuit court in such matters is not the exercise of chancery jurisdiction, and should not be entered in the chancery order book. *Summers County v. Monroe County*, 43 W. Va. 207, 27 S. E. 307. See the titles COUNTIES, ante, p. 636; MAN-DAMUS.

Duty to Obey Decrees of Court of Appeals.—Circuit courts are bound to obey the decrees of the court of appeals in all cases. Where, on appeal, the court of appeals prescribes the order in which properties must be sold when decree for sale is made, the circuit court, in its decree of sale, must conform to that prescription; otherwise its decree will be reversed for such non-conformance. *Strayer v. Long*, 83 Va. 715, 3 S. E. 372.

F. COUNTY COURTS.

1. Origin.

"The institution of the county court originates as early as 1623-24; and as it is the most ancient, so it has ever been one of the most important, of our institutions,—for a long time, in respect to the administration of justice, and always in matters of county police and economy. As early as 1645 they

had matured into courts of general jurisdiction in law and in equity, and the most important duties in matters of police and economy were confided to them. Prior to 1661-62 the judges of the county courts were styled 'commissioners of the monthly courts,' and afterwards 'commissioners of the county courts;' but by that act they were required to take the oath of a justice of the peace, and be called 'justices of the peace.' These tribunals now assumed a perfectly regular form, and their functions have ever since been so important that their institution was considered as a part of the constitution both of the colonial and state governments. No material change was introduced by the revolution in their jurisdiction, or in their general powers or duties, of any kind. Now, the members who compose it are no longer justices, but have come back to their old name of 'commissioners of the county courts,' which, though shorn of general judicial power, still have the superintendence and administration of the internal and fiscal affairs of their counties. See Code, 1819, p. 244, note; Const. W. Va., art. 8, § 24; Code, 1891, pp. 41, 42." *Haight v. Bell*, 41 W. Va. 19, 23 S. E. 666.

2. Establishment.

Constitutional Provisions.—County courts were among the courts provided for in art. 6, § 1, of the Virginia constitution of 1869. *Holladay v. Auditor*, 77 Va. 425.

By § 13, art. 6, of the Virginia constitution of 1869, it was provided that "In each county of this commonwealth there shall be a court called the county court, which shall be held monthly, by a judge learned in the law of the state, and to be known as the county court judge." *Smith v. Com.*, 75 Va. 904.

In the first constitution of West Virginia the county courts ceased to exist. And while it was in operation the writ of error also was unknown, the mode adopted by statute for reviewing cases being appeals of right. The mode of

taking appeals to the supreme court of W. Va. Code, ch. 135, p. 639. By the second constitution of this state county courts were again recognized as a part of its judiciary. See art. 8, Sess. Acts, 1872-73, p. 25. *Dryden v. Swinburn*, 15 W. Va. 234.

"The first section of the eighth article of the constitution of 1872, declared that the judicial power shall be vested in a supreme court of appeals, and in circuit courts, and the judges thereof; in county courts and in justices of the peace. The twenty-third section of said article declared, 'there shall be in each county of the state a county court, which shall be composed of a president and two justices. It shall hold six terms during the year, two of which shall be limited to matters connected with the police and fiscal affairs of the county, and the other four shall be held for the trial of causes, and for the transaction of all other business within the general jurisdiction of the court, except an assessment or levy upon the property of the county.'" *Fowler v. Thompson*, 22 W. Va. 106.

3. Formation of Districts for County Judges.

By § 13, art. 6, of the Virginia Constitution of 1869, it was provided that "counties containing less than eight thousand inhabitants shall be attached to adjoining counties for the formation of districts for county judges." *Smith v. Com.*, 75 Va. 904.

Detachment of County upon Increase of Population.—Where two counties had been joined and were under the jurisdiction of the same county court because they had less than 8,000 inhabitants, the legislature had the power to detach one county and take it out of that jurisdiction, when the census shows a sufficient number of inhabitants, and could establish its own county court. *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637.

4. How Constituted.

In Virginia by § 13, art. 6, of the constitution of 1869, it was provided

that the county court should be held by a judge learned in the law of the state, and to be known as the county court judge, and that such county court judges should be chosen in the same manner as judges of the circuit courts. *Smith v. Com.*, 75 Va. 904.

In West Virginia the county courts, prior to the first day of January, 1881, were composed of a president and two justices of the peace. After this date, by virtue of the amendment of art. 8, W. Va. constitution, they were composed of three commissioners. *Fowler v. Thompson*, 22 W. Va. 106.

Effect of Amendment of Article 8 of West Virginia Constitution.—The county courts of West Virginia, as they existed on the 12th day of October, 1880, notwithstanding the adoption of the amendment of article 8 of the constitution, continued in existence with the limited jurisdiction prescribed by the 24th section of said amendment, until the 1st day of January, 1881, after which day the said county courts were no longer composed of a "president and two justices of the peace," but of the three commissioners mentioned in the 22d section of said amendment. *Fowler v. Thompson*, 22 W. Va. 106.

"The only material changes made by said amendment in regard to the county courts then established, and existing under the constitution of 1872, are, that from and after the 1st day of January, 1881, the said courts shall no longer be composed of a president and two justices of the peace, but instead thereof, said county courts shall be composed of three commissioners, whose election is therein provided for, who shall continue in office six years, and who, while required to hold four instead of six regular terms in every year, they are divested of jurisdiction over all subjects, except those particularly specified in the twenty-fourth section of said amendment." *Fowler v. Thompson*, 22 W. Va. 106.

As to the power of the judge of another county to hold a county court

under certain circumstances, see the title JUDGES.

5. Terms.

a. Number and Time of Holding.

By art. 6, § 13, of the Virginia constitution of 1869, it was provided that the county court should be held monthly. *Smith v. Com.*, 75 Va. 904.

By ch. 157, § 2, of the Virginia Code of 1860, as amended by the act of April 2, 1870, it was provided that "There shall be held in each county of this commonwealth, monthly, a term of the county court, to be held at the times prescribed by law, and with the jurisdiction hereinafter provided." *Neal v. Com.*, 22 Gratt. 922.

Section 3045 of the Va. Code, 1887, provides that there shall be monthly terms of the county court; but §§ 3049 and 3122 of the Code contemplates that a regular term of a court may not be held at all, and § 3123 provides that when the court fails to sit on any day appointed for it, or to which it may have been adjourned, there shall be no discontinuance, and that all matters ready for the court to act upon, if it had been held, on any such day, shall be in the same condition, and have the same effect, as if continued to the next court in course. *Nicholas' Case*, 91 Va. 741.

By art. 8, § 23, of the West Virginia constitution of 1872, as it originally stood, it was provided that the county court "shall hold six terms during the year." *Fowler v. Thompson*, 22 W. Va. 106.

By art. 8, § 22, of the West Virginia constitution as amended, and ch. 39, § 6, W. Va. Code, 1899, it is provided that the county court shall hold four regular sessions in each year, and at such times as may be fixed upon and entered of record by the said court. *Fowler v. Thompson*, 22 W. Va. 106; *Mayer v. Adams*, 27 W. Va. 244.

b. Change of Commencement.

Under § 2, ch. 157, Va. Code, 1849, authorizing the county court to change

the day of the commencement of its terms, all the justices of the county having been first summoned, and a majority concurring, such change may be made without the summons having been served, all the justices being present at the time the change is proposed and having an opportunity to be heard. *Jackson v. Com.*, 13 Gratt. 795.

c. Designation of Terms for Trial of Civil Cases.

By the Virginia act of July 11th, 1870, the judges of the county courts are empowered to designate four or more terms for the trial of civil cases, in which juries are required. *Forrer v. Coffman*, 23 Gratt. 871.

d. Duration.

By § 3045, Va. Code, 1887, it was provided that a term of the county court may continue not exceeding fifteen days.

By Va. Code, ch. 157, § 15, it is provided, that "every such term of said courts (to wit, the county courts) may continue, if it be a monthly term, not exceeding six days, and if it be a quarterly term, not exceeding twelve days." By the act of April 27, 1867, acts of assembly, 1866-'67, ch. 118, § 3, p. 944, the 15th section of ch. 157 of the Code is amended and re-enacted, the amendment providing that "every such term of said courts may continue, not exceeding fifteen days, and may adjourn from day to day, or to any day within the fifteen days." *Read v. Com.*, 22 Gratt. 924.

e. Special Terms.

When and How Called.—By art. 8, § 22 of the West Virginia constitution provisions may be made by law for holding special sessions of the county court.

By ch. 39, § 6, W. Va. Code, 1899, it is provided that the county court may hold special sessions whenever the public interests may require it, to be called by the president, with the concurrence of at least one other of said commissioners; and the commissioner, if any,

not concurring therein, must have at least twenty-four hours notice of the time appointed for such special session. *Mayer v. Adams*, 27 W. Va. 244.

Notice.—A special session of a county court can be held legally only after a notice of the time of the session and notice of the purposes for which it is to be held have been posted by the clerk at the front door of the courthouse at least two days before the session. W. Va. Code, 1899, ch. 39, § 6. *Hamilton v. Tucker County Court*, 38 W. Va. 71, 18 S. E. 8; *Mayer v. Adams*, 27 W. Va. 244.

To give such special session jurisdiction in any matter, it must appear upon its record book that such notice was so posted, and also it must appear from such entry in said record book what were the particular purposes for which the special session is held, as stated and specified in such notice. *Hamilton v. Tucker County Court*, 38 W. Va. 71, 18 S. E. 8; *Mayer v. Adams*, 27 W. Va. 244.

If such entry as is above described is not entered in such record book of such special session, everything which may be done at the special session must be held to be an absolute nullity. *Hamilton v. Tucker County Court*, 38 W. Va. 71, 18 S. E. 8; *Mayer v. Adams*, 27 W. Va. 244.

A defective notice of the holding of a special term of the county court is not sufficient grounds on which to base an injunction. *Hanley v. County Court*, 50 W. Va. 439, 40 S. E. 389.

6. Status as Corporation.

As to the status of county courts in West Virginia as corporations, see the title COUNTIES, ante, p. 636.

7. Powers and Duties.

a. In General.

As to jurisdiction of county courts, see the title JURISDICTION.

As to powers and duties of county courts as county officers, see the title COUNTIES, ante, p. 636.

b. In Virginia.

Derived from Statutes.—The entire

authority of the county courts is derived from the enumerated powers conferred by the statutes giving them jurisdiction. *Jackson v. Maxwell*, 5 Rand. 636.

Powers as Dependent upon Term.

“It is well settled, both by the statute law and the decision of this court, that at a monthly term of the county court, no judgment against a debtor upon action at law for the recovery of money can be had, but such judgment can only be had at the quarterly term of such court. Va. Code, 1873, ch. 154, §§ 3, 12. See also, *Wynn v. Scott*, 7 Leigh 63; *Clafin v. Steenbock*, 18 Gratt. 842.” *Withers v. Fuller*, 30 Gratt. 547. See the title JURISDICTION.

c. In West Virginia.

In General.—By art. 8, § 6, of the West Virginia constitution of 1872 as it originally stood, it was provided “that two of the six terms of the county court shall be limited to matters connected with the police and fiscal affairs of the county; the other four shall be held for the trial of causes, and for the transaction of all other business within the general jurisdiction of the court, except an assessment or levy upon the property of the county.” *Fowler v. Thompson*, 22 W. Va. 106.

By art. 8 of the West Virginia constitution as amended, county courts are divested of jurisdiction over all subjects, except those particularly specified in the twenty-fourth section of such amendment. *Fowler v. Thompson*, 22 W. Va. 106.

“The county courts in this state and in Virginia were formerly courts of general jurisdiction. But the character of these courts in this state was essentially changed by the amendment of our constitution made in 1880. They are now inferior courts of limited jurisdiction. Their character and jurisdiction are prescribed in § 24, art. 8, of our constitution. (See Warth’s Code, p. 27.) Their jurisdiction now extends only to all matters of probate, the appointment and qualification of

personal representatives, guardians, committees, curators and the settlement of their accounts, and to all matters relating to apprentices, and to the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment of roads, ways, bridges, public landings, ferries, mills, with authority to levy and disburse the county levy and in all cases of contest to judge of the election, qualification and returns of their own members and of all county and district officers, subject to such regulations by appeal or otherwise, as may be prescribed by law." *Mayer v. Adams*, 27 W. Va. 244.

Under the provisions of the West Virginia constitution (art. 8, § 24), county courts are authorized to exercise such other powers and perform such other duties, not of a judicial nature, as may be prescribed by law; and § 7, ch. 7, W. Va. Code, so far as it authorizes the county court to hear the charges preferred against a justice of the peace, after having him summoned to answer such charges, and to remove him from office when a proper case is made, is judicial in its nature, and to that extent said section is unconstitutional. *Arkle v. Board*, 41 W. Va. 471, 23 S. E. 804.

What Are Judicial Acts.—An act done in the exercise of judicial power—an act performed by a court touching the rights of parties or property brought before it by voluntary appearance or by prior action of ministerial officers—is a judicial act. *Arkle v. Board*, 41 W. Va. 471, 23 S. E. 804.

When a judge or court of justice, in a suit between parties, ascertains facts, ascertains and applies thereto the law, decides the controversy, and renders judgment, judicial power has been exercised, and such exercise is a judicial act. *Arkle v. Board*, 41 W. Va. 471, 23 S. E. 804.

Transfer of Actions to Circuit Court.—Section 25 of amended article 8 of West Virginia is as follows: "All ac-

tions, suits and proceedings, not embraced in the preceding section, pending in the county court when this article takes effect, together with records and papers pertaining to such actions, suits and proceedings, as have already been disposed of by said court, shall be transmitted to and filed with the clerk of the circuit court of the county, to which office all process outstanding shall be returned; and said clerk shall have the same powers and perform the same duties, in relation to such records, papers, and proceedings, as were vested in and required of the clerk of the county court on the day before this article shall take effect." *Cobb v. Chesapeake, etc., R. Co.*, 35 W. Va. 65, 12 S. E. 1097.

The county court is the police court of the county, and to it the legislature may specially delegate the exercise of such power in specified cases. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666.

8. Abolition of County Courts in Virginia.

By the Virginia constitution of 1902 the county courts were abolished, but by § 7 of the schedule to the constitution (1 Va. Code, 1904, p. CCLXXIV), the then existing system of county and circuit courts was continued and the terms of the several judges thereof, with the powers and duties then possessed by them respectively were continued until the first day of February, 1904.

G. MUNICIPAL, HUSTINGS AND CORPORATION COURTS.

1. Municipal Courts.

a. In General.

Establishment.—By art. 8, § 19, of the West Virginia constitution, it is provided that "The legislature may establish courts of limited jurisdiction within any county, incorporated city, town or village, with the right of appeal to the circuit courts, subject to such limitations as may be prescribed by law; and all courts of limited jurisdiction heretofore established in any

county, incorporated city, town or village shall remain as present constituted until otherwise provided by law. The municipal court of Wheeling shall continue in existence until otherwise provided by law, and said court, and the judge thereof, shall exercise the powers and jurisdiction heretofore conferred upon them; and appeals in civil cases from said courts shall be directed to the supreme court of appeals.' This provision was inserted in our constitution in the amendment made in 1880. The original provision, for which it is a substitute, contained in the constitution of 1872 was as follows: 'The legislature may establish courts of limited jurisdiction within any incorporated town or city, subject to such appeal as now is or may hereafter be prescribed by law.' (Constitution of 1872, art. 8, § 22, acts, 1872-73, p. 29.) *Jelly v. Dils*, 27 W. Va. 267.

Terms.—The municipal court of Wheeling holds its term "in every month in which it is not, by law, provided that a circuit court for Ohio county shall commence." (Acts, 1869, ch. 88, § 2.) *Linsey v. McGannon*, 9 W. Va. 154.

Jurisdiction and Powers.—Generally, as to jurisdiction and powers of municipal courts, see the title JURISDICTION.

Chapter 28, W. Va. acts, 1869, p. 51, confers upon the municipal court of Wheeling within the city, in certain prescribed cases the same jurisdiction and powers at law and in equity, in civil suits and proceedings where the amount in controversy exceeds one hundred dollars, exclusive of interest and costs, or the possession or title of real or personal estate is concerned, as the circuit court of Ohio county now has, or may hereafter be vested with. *Linsey v. McGannon*, 9 W. Va. 154.

The municipal court of Huntington, created by act of the legislature passed March 4, 1879, is a court of limited

jurisdiction. *Rutter v. Sullivan*, 25 W. Va. 427.

b. Mayor's, Recorder's and Police Courts.

As to the various municipal courts, such as those of the mayor or recorder, police courts, etc., see the title MUNICIPAL CORPORATIONS.

2. Hustings or Corporation Courts.

a. Establishment.

The Virginia constitution of 1869, art. 6, § 14, provides that "for each city and town in the state, containing a population of five thousand, there shall be elected, on the joint vote of the two houses of the general assembly, one city judge, who shall hold a corporation or hustings court of said city or town as often, and as many days in each month, as may be prescribed by law, with similar jurisdiction, which may be given by law to the circuit courts of this state, and who shall hold his office for a term of six years," etc. *Holladay v. Auditor*, 77 Va. 425; *Chahoon v. Com.*, 21 Gratt. 822; *Craft v. Com.*, 24 Gratt. 602; *Cluverius v. Com.*, 81 Va. 787.

"The courts provided for by the fourteenth section of article 6 of the constitution, are continuations and succession of corporation courts then in existence, invested with the same jurisdiction and powers, subject to such modifications and changes as were made by the constitution, or might be made by any act thereafter passed." *Chahoon v. Com.*, 21 Gratt. 822.

As to the provisions of the present constitution and Code of Virginia as to the establishment of hustings and corporation courts, see Va. Const., art. 6, § 98; Va. Code, 1904, §§ 3050, 3068.

b. Terms.

Number and Time of Holding.—By art. 6, § 14, of the Virginia constitution of 1869, it was provided that the city judge should hold a corporation or hustings court, as often as might be prescribed by law. *Holladay v. Audi-*

tor, 77 Va. 425; *Chahoon v. Com.*, 21 Gratt. 822.

The act of April 7, 1870, acts of assembly, 1869-70, p. 44, § 10, provides, that "there shall be a term of the hustings court in the city of Richmond for each month in the year, commencing on the first Monday in the month, and continuing so long as the business before the court may require." *Chahoon v. Com.*, 21 Gratt. 822.

"Corporation courts, like county courts, had always been held once a month. The constitution expressly provides that county courts shall be held monthly, and there is no reason to believe that its framers intended that corporation courts might be held less frequently than they and county courts had always been held before, and than county courts were expressly required to be held thereafter. It was probably supposed that the police business of the cities and towns, or some of them, might require that their corporation courts should sit oftener than once a month, and, therefore, the legislature is authorized so to provide, if deemed proper. The words 'so many days in each month,' seem to indicate an intention that there should be at least one term in each month. No doubt it was contemplated that, generally if not in all cases, the law would provide thereafter as it had provided theretofore, for monthly sessions of those courts. Accordingly, the act of April 7, 1870, providing for courts for the city of Richmond, declares that there shall be a term of the hustings court of said city for each month in the year. Acts of assembly, 1869-70, p. 44, § 10. That act also declares that the said term shall commence on the first Monday in the month, and continue so long as the business before the court may require." *Chahoon v. Com.*, 21 Gratt. 822.

"By the twenty-sixth section of chapter 154 of the Code of 1873, it is provided, that 'there shall be a term of the said hustings court (of the city of

Richmond) for each month in the year, except the month of August, commencing on the first Monday in the month, and continuing so long as the business before the court may require.'" *Cluverius v. Com.*, 81 Va. 787.

Limitation of Term.—Under Va. acts, 1865-66, p. 230, § 5), the corporation courts there passed away also the limitation of the term to twenty days, and the terms of the substituted courts end only with the commencement of the succeeding term, unless sooner closed by order. *Moses v. Cromwell*, 78 Va. 671.

"Under act of the general assembly, approved January 20, 1866 (acts, 1865-66, p. 230, § 5), the corporation court of that city was limited to twenty days; but art. 6, § 14, and the act of assembly passed in pursuance thereof approved April 2, 1870, entitled 'An act to prescribe and define the jurisdiction of the county and corporation courts of the commonwealth, and the times and places of holding the same,' completely changed the organization and jurisdiction of the corporation courts of the state. Acts, 1869-70, p. 35. By this last-mentioned act, the corporation court of the city of Norfolk, as it was then constituted, was swept out of existence, and there was substituted in its place a new court, having 'within its limits the same jurisdiction as the circuit courts, and the same jurisdiction over offenses committed within its limits as the county courts,' which is required to hold its sessions for as many days in each month as may be prescribed by law. The schedule of the present constitution fixed the limit of the existence of all the courts; and by that limitation they expired as soon as 'the organization of the judicial department of this constitution' took place. With the old corporation court passed away also the limitation of the term to twenty days; and the new court that took its place, being untrammelled by any legislative restriction as to the duration of its terms, each of its terms

must be held to be only terminated by the commencement of the next succeeding monthly term, unless sooner closed by the order of the presiding judge. *Fox v. Com.*, 16 Gratt. 1; *Haynes v. Com.*, 31 Gratt. 96." *Moses v. Cromwell*, 78 Va. 671.

Continuance of Term into Succeeding Month.—Under Va. Code, 1873, ch. 154, §§ 26, 36, corporation courts have authority to continue a term from day to day into the next succeeding month, and to change accordingly the day for the commencement of the succeeding term. *Cluverius v. Com.*, 81 Va. 787.

Under §§ 26, 36, ch. 154, Va. Code, 1873, the corporation courts, which must be held monthly, may postpone the commencement of the next term, in order that a cause on trial may be proceeded with into the ensuing month. *Cluverius v. Com.*, 81 Va. 787.

"By the thirty-sixth section of this chapter it is provided, 'the judge of every such corporation court may, from time to time, change the day for the commencement of the terms thereof, or any of them,' etc. See also, Va. Code, 1873, ch. 155, § 18. The judge of the hustings court entered an order in this cause postponing the commencement of the June term of the court from the first Monday to the fourth Monday; and then continued the May term, by adjournment from day to day, after the first Monday in June, 'so long as the business before the court required.'" *Cluverius v. Com.*, 81 Va. 787.

Section 14, art. 6, of the Virginia constitution, which directs a corporation court to be held as often and as many days in each month as may be prescribed, does not require that the whole term shall be held in the same calendar month; and under the act of April 7, 1870, acts of 1869-70, p. 44, § 10, which fixes the terms of the corporation court of Richmond to commence on the first Monday, and continue so long as the business before the court may require, the court may continue

its session from the first Monday in one month until the first Monday in the next month. And a grand jury empaneled on the 2d day of May may find an indictment on the 4th of June, the term continuing until that day. *Chahoon v. Com.*, 21 Gratt. 822. See also, *Sands v. Com.*, 21 Gratt. 871.

"The words 'as many days in each month as may be prescribed by law,' in that section, do not refer to the calendar month in which a term was commenced, but to the judicial month, commencing from the day in one calendar month and continuing to the day in the next calendar month fixed by law for the commencement of the monthly term of the court." *Chahoon v. Com.*, 21 Gratt. 822, quoted in *Cluverius v. Com.*, 81 Va. 787.

c. Powers and Duties.

In General.—The judge of a corporation or hustings court is vested with similar jurisdiction which may be given by law to the circuit courts of Virginia. *Holladay v. Auditor*, 77 Va. 425. See the title JURISDICTION.

Hustings Judge a State Judge.—The judge of the hustings court of Richmond is a judge of a state court of equal dignity with the circuit courts of the state, and the city has no authority to control his actions. *Belvin v. Richmond*, 85 Va. 574, 8 S. E. 378.

Authority to Summon Jurors from without Corporate Limits.—A corporation court has authority to direct jurors to be summoned from without the limits of the corporation for the trial of a prisoner indicted in that court, when an impartial jury can not be obtained within the corporation. *Craft v. Com.*, 24 Gratt. 602. See the title JURY.

Acts of Clerk in Presence of Court—Effect.—The acts of the clerk of a corporation court done in the presence of the court and under its supervision, must be taken to be done by direction of the court, and it is the act of the court. *Mesmer v. Com.*, 26 Gratt. 976.

H. CHANCERY COURT OF RICHMOND.

Article 6, § 14, of the Virginia constitution of 1869, after providing for corporation or hustings courts, further provides that "in cities or towns containing thirty thousand inhabitants, there may be elected an additional judge to hold courts of probate and record, separate and apart from the corporation or hustings courts, and perform such other duties as shall be prescribed by law." *Holladay v. Auditor*, 77 Va. 425.

In pursuance of authority conferred by art. 6, § 14, of the Virginia constitution of 1869, the legislature, by act approved April 7, 1870, established the chancery court of the city of Richmond, and defined its jurisdiction. *Holladay v. Auditor*, 77 Va. 425.

In the sense of the acts approved April 7, 1870, May 18th, 1870, and April 1st, 1873, that court is a "city court." The last, providing that the judges of the city and corporation courts of this commonwealth shall be paid out of the treasury of their respective corporations, is constitutional, has not been repealed, and applies to the judge of the chancery court of the city of Richmond, no part of whose salary is payable out of the state treasury. *Holladay v. Auditor*, 77 Va. 425.

The nature and extent of the jurisdiction of those courts, is, of itself, no criterion whereby to determine their character as to whether they are

"state" or "city courts." The constitution itself determines that. *Holladay v. Auditor*, 77 Va. 425.

I. JUSTICES' COURTS.

See the title JUSTICE OF THE PEACE.

J. EXAMINING COURTS.

See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, ante, p. 1.

K. SPECIAL COURTS TO DETERMINE ELECTION CONTESTS.

See the title ELECTIONS.

L. COURTS OF LAND REGISTRATION.

By art. 6, § 100, of the Virginia constitution of 1902, it is provided that "the general assembly shall have power to establish such court or courts of land registration as it may deem proper for the administration of any law it may adopt for the purpose of the settlement, registration, transfer, or assurance of the titles to land in the state or any part thereof."

M. COURT OF CONCILIATION.

The decision of the court of conciliation, established by the military authority after the war, to adjust disputes during the suspension of the civil authority, is not obligatory upon a party who did not consent to its hearing the case. *Myers v. Whitfield*, 22 Gratt. 780.

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As to actions on covenants of title, see the title COVENANTS.

I. On What Contracts the Action Lies.**A. IN GENERAL.**

Covenant lies when a man covenants with another, by deed, to do something, and does it not. *Supervisors v. Leonard*, 16 W. Va. 491.

B. NECESSITY OF EXPRESS CONTRACT.

The general rule is, that the action of covenant is not confined to any particular words, but may be maintained upon any sealed instrument, where the words import an agreement. But where the words do not amount to an agreement, covenant will not lie. *Supervisors v. Leonard*, 16 W. Va. 486. See post, "Bonds or Mortgages with Collateral Condition," I, F.

C. NECESSITY FOR CONTRACT TO BE UNDER SEAL.

In General.—The action of covenant is the appropriate form of action only upon sealed contracts or specialties. If the contract sued on is not under seal, covenant will not lie. *Wolf v. Violet*, 78 Va. 57; *Horner v. Ebersole*, 83 Va. 765, 3 S. E. 438; *Supervisors v. Leonard*, 16 W. Va. 491; *State v. Harmon*, 15 W. Va. 124; *Minnick v. Williams*, 77 Va. 760.

The action of covenant, although in form for the recovery of damages can only be maintained upon a contract under seal. *State v. Harmon*, 15 W. Va. 124.

As to what constitutes a sealed instrument, see the title SEALS AND SEALED INSTRUMENTS.

Deed of Trust Securing Note.—It has been held, that a demurrer lies to action of covenant on a trust deed executed merely as collateral security for payment of promissory note. Such trust deed does not raise such note to the dignity of a specialty. *Wolf v. Violet*, 78 Va. 57. See the title **DEEDS OF TRUST**.

Unsealed Writing, Part of Prior Sealed Contract.—Where, upon terms not specified in a writing signed and sealed, parties agreed to exchange lands, and by a writing of same date signed but not sealed, and referring to the other, it is agreed that \$300 shall be the consideration for the exchange, the two writings constitute one agreement, and an action of covenant will lie for the recovery of the money. *Horne v. Ebersole*, 83 Va. 765, 3 S. E. 438.

D. BONDS PAYABLE IN SPECIFICS.

On an obligation to pay or deliver any other article than money, covenant is the proper remedy. Bonds, bank notes and other choses in action are not money, but stand in the same category with other articles in this respect. *Butcher v. Carlile*, 12 Gratt. 521; *Dungan v. Henderlite*, 21 Gratt. 153; *Minnick v. Williams*, 77 Va. 758.

"When the obligation is to pay money in a fixed quantity of some other article; as in so many bushels of wheat; or in wheat at a certain price per bushel; or in bonds, bank notes or other chose in action of a certain nominal amount, the authorities all seem to agree that the meaning and effect of the obligation is the same as if it had been in the simple form of an obligation to deliver the article, and that the covenant is the proper remedy." *Butcher v. Carlile*, 12 Gratt. 522; *Beirne v. Dunlap*, 8 Leigh 514; *Dungan v. Henderlite*, 21 Gratt. 153.

Thus where obligation was to pay "the sum of \$813.79, in notes of the United States Bank, or either of the Virginia banks," it was held, by the

unanimous opinion of the court, that the action of covenant was the proper remedy and that debt would not lie. *Beirne v. Dunlap*, 8 Leigh 514.

So where a person binds himself by bond to pay \$800 for the purchase money of land, "in the currency of Virginia and North Carolina money," this is a promise to pay the sum in the currency named, for the recovery of which covenant, not debt, is the proper remedy. *Dungan v. Henderlite*, 21 Gratt. 149. See the titles **BONDS**, vol. 2, p. 545; **DEBT, THE ACTION OF**.

E. BONDS FOR MONEY PAYABLE IN INSTALLMENTS.

Upon an obligation to pay a sum of money in twenty-five annual installments, the proper remedy is an action of covenant for the recovery of the installments as they fall due. The action of debt will not lie until the whole becomes due. *Peyton v. Harman*, 22 Gratt. 648. See the title **DEBT, THE ACTION OF**.

F. BONDS OR MORTGAGES WITH COLLATERAL CONDITION.

Bond for Title.—Where a bond for title was executed by a vendor of real estate and his surety, conditioned to be void upon the execution of a good title to the vendee, it was held, that upon a failure to make a good title, an action of covenant might be maintained upon the bond by the vendor against both the vendee and his surety. *Ward v. Johnston*, 1 Munf. 45.

In *Supervisors v. Leonard*, 16 W. Va. 488, *Moore, J.*, cites 3 *Robinson Prac.* 365, as saying that *Ward v. Johnston*, 1 Munf. 45, is "to say the least, of very questionable authority." See the title **BONDS**, vol. 2, p. 545.

Bond to Secure Performance of Public Contract.—Where a bond payable to the board of supervisors of the county, was entered into by several persons, conditioned upon the performance of a contract by a third person to build a bridge, the action of

covenant could not be maintained upon the condition of the bond, there being no act stipulated to be done in the condition, and it being merely a matter of defeasance. *Supervisors v. Leonard*, 16 W. Va. 471.

In such case the real and substantial contract on the part of the obligors in the bond is the agreement or obligation to pay the money upon the failure of the contractor to perform, for the recovery of which either debt or covenant may lie, but the action of debt is preferable. *Supervisors v. Leonard*, 16 W. Va. 471. See the title COUNTIES, ante, p. 636.

Mortgage with Collateral Condition.—The action does not lie upon a proviso in a mortgage deed that upon payment of a certain sum of money the deed shall be void, there being no express covenant for the payment of the money. *Drummond v. Richards*, 2 Munf. 337. See the title MORTGAGES.

G. COVENANTS OF TITLE.

It was doubted whether the action of covenant could be maintained on a mere real warranty. *Stout v. Jackson*, 2 Rand. 132.

But it is well settled that the modern covenant of warranty of title is a personal covenant, for the breach of which an action of covenant lies. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 901; *Tabb v. Binford*, 4 Leigh 132; *Dickinson v. Hoomes*, 8 Gratt. 353; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Rex v. Creel*, 22 W. Va. 373; *Riddle v. Core*, 21 W. Va. 530.

In a deed of bargain and sale of lands, the bargainor covenants as follows: "And the said T. doth hereby covenant, for himself and his heirs, to and with the said B. that he, the said T., will warrant and forever defend to the said B., his heirs and assigns, the title to the said parcels of land against all persons whatever." It was held, that this covenant was not a mere war-

ranty real, but was a personal covenant, upon which an action of covenant lay for the bargainee, on being evicted, against the administrator of the bargainor. *Tabb v. Binford*, 4 Leigh 132. See the title COVENANTS.

II. Parties.

A. PARTIES PLAINTIFF.

Parties Described in Covenant as Agents.—If persons contracting by a charter party, under seal, bind themselves each to the other, as on their own behalf, each may maintain an action for covenant broken, against the other in his individual capacity; notwithstanding they were described, in the introductory part of the instrument, and in their signatures, as agents for other persons. *Hartshorne v. Whittles*, 3 Munf. 357.

Executors and Administrators.—If one of two executors refer a matter in his own right, and the other in right of his testator, and the referees therein award one sum of money to himself, and another sum to him and his co-executor, the executor may sue upon the covenant of submission in his own name; and this does not constitute a variance. *Macon v. Crump*, 1 Call 575.

There was a joint covenant by four to pay to A \$300 a year for his life, to secure which annual payment, each was to execute his bond with surety, binding him to pay \$75 a year; but this was not done, nor was the annuity paid to A. After the death of A, one of the four joint obligors qualified as his administrator with the will annexed. It was held, that the administrator being one of the obligors could not sue the others at law, and that therefore a court of equity had jurisdiction to enforce the payment of the money. *Rodes v. Rodes*, 24 Gratt. 256. See the title EXECUTORS AND ADMINISTRATORS.

Person Entitled to Assignment of Agreement Sued on.—Where the agreement upon which an action of covenant is predicated appears to have been as-

signed to a third party by written assignment attached thereto, and said written assignment appears to have been canceled by lines having been drawn across the same, the agreement being in the possession of the plaintiff, it is error to dismiss his action for want of a formal reassignment of the agreement thereon before the institution of the suit. *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185. See the title ASSIGNMENTS, vol. 1, p. 745.

Action on Indenture of Apprenticeship Entered into by Overseers of Poor.

—An action of covenant in behalf of an apprentice, upon his indenture of apprenticeship, ought not to be brought in the name of the overseers of the poor, but in his own name. *Poindexter v. Wilton*, 3 Munf. 183.

But the action of covenant will not lie in the name of an apprentice on an indenture of apprenticeship entered into by the overseers of the poor without any previous order of the court for binding out the apprentice; such indenture is not a statutory deed, and, therefore, covenant can only be maintained on it in the name of the overseers who are parties to it. *Bullock v. Sebrell*, 6 Leigh 560.

"This action, therefore, was misconceived, since the indenture of apprenticeship was not entered into in pursuance of an order of the court having jurisdiction of the matter, which ought always to appear on the face of the indenture (see the form, *Hening's Justice* 68), and the covenant being a common-law deed, it could only be sued on in the name of the overseers of the poor who are parties to it." *Bullock v. Sebrell*, 6 Leigh 561. See the title APPRENTICES, vol. 1, p. 684.

Third Persons for Whose Benefit Contract Was Made.—As to action by persons for whose benefit a contract is made, but who are not parties to it, see the title CONTRACTS, ante, p. 307.

B. PARTIES DEFENDANT.

Executors.—Upon a covenant to warrant the title of a slave, in which a covenantor binds himself and his heirs, an action will lie against the executors though they are not named in the covenant. *Daniel v. Cooke*, 1 Wash. 306. So, also, an action for breach of a covenant respecting real estate will lie against executors though they be not expressly named in the covenant. *Harrison v. Sampson*, 2 Wash. 155. See the title EXECUTORS AND ADMINISTRATORS.

Action on Joint or Joint and Several Bonds.—In an action against the representatives of a deceased person, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations," (1 Rev. Code, 31) if it appear from the declaration that one of the joint covenantees survived, it is a radical defect and not cured by verdict. *Atwell v. Milton*, 4 Hen. & M. 253. See the title BONDS, vol. 2, p. 532.

A suit on a joint and several bond, must be brought either against all the obligors jointly, or one of them singly; and not against any immediate number; and if an error in this respect appear on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement. *Leftwich v. Berkeley*, 1 Hen. & M. 62.

III. Pleadings.

A. DECLARATION.

1. In General.

Setting Out Obligation Sued on.—In declaring on a covenant, it is sufficient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover. *Buster v. Wallace*, 4 Hen. & M. 82; *Newberry Land Co. v. Newberry*, 95 Va. 123, 27 S. E. 899; *Jones v. Thomas*, 21 Gratt. 104.

It is not necessary, in a declaration for covenant broken, to recite the whole of the agreement, but only to describe substantially the material parts as to

which breaches are alleged. *Backus v. Taylor*, 6 Munf. 488. See *Macon v. Crump*, 1 Call 575; *Buster v. Wallace*, 4 Hen. & M. 82. See the title PLEADING.

Averment of Happening of Condition upon Which Obligation Was to Become Payable.—When in an action of covenant, the declaration does not allege the happening of the event or condition upon which the obligation was to become due and payable, it is not error to sustain a demurrer thereto. *Harris v. Lewis*, 5 W. Va. 575.

2. Averment of Performance of Conditions Precedent.

In an action on a dependent covenant the plaintiff is in general obliged to aver in his declaration a complete performance of all that was to be done and performed on his part before he is entitled to demand performance from the other party. *Kern v. Zeigler*, 13 W. Va. 716; *Gas Co. v. Wheeling*, 8 W. Va. 369; *Schwarzback v. Protective Union*, 25 W. Va. 649; *Jones v. Singer Mfg. Co.*, 38 W. Va. 149, 18 S. E. 478; *Roach v. Dickinsons*, 9 Gratt. 154; *Clark v. Franklin*, 7 Leigh 7; *Fairfax v. Lewis*, 2 Rand. 20; *Ayres v. Robins*, 30 Gratt. 105; *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 595; *Young v. Ellis*, 91 Va. 298, 21 S. E. 480; *Harris v. Lewis*, 5 W. Va. 575; *Clark v. Franklin*, 7 Leigh 1. See generally, the title CONTRACTS, ante, p. 307.

The plaintiff must aver the performance of conditions precedent on his part or his readiness and offer to perform. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597.

But where the defendant has prevented a performance by the plaintiff it is not necessary that the plaintiff should aver or prove a performance; it is sufficient to show a readiness to perform and that he was hindered by the defendant. *Kern v. Zeigler*, 13 W. Va. 716; *Gas Co. v. Wheeling*, 8 W. Va. 369; *Schwarzback v. Protective Union*, 25 W. Va. 649; *Jones v. Singer Mfg. Co.*, 38 W. Va. 149, 18 S. E. 478; *Clark*

v. Franklin, 7 Leigh 7; *Roach v. Dickinsons*, 9 Gratt. 154; *Young v. Ellis*, 91 Va. 298, 21 S. E. 480.

3. Averment of Breach.

In General.—It is clear that a breach should be so set out as that it may clearly appear to be within the covenant sued on. *Austin v. Whitlock*, 1 Munf. 492.

And when the breach is not of the covenant set forth, the declaration is clearly defective and will not sustain a recovery. *Laughlin v. Flood*, 3 Munf. 255.

Covenants of Title.—See the title COVENANTS.

Alternative Covenants.—Where a covenant is in the alternative, the breach should be assigned as to both parts thereof. *Austin v. Whitlock*, 1 Munf. 492.

In an action of covenant on an agreement to convey the party's interest in a certain suit, and in case the defendant in that suit was not legally bound by his undertaking, then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land without setting forth a failure to recover in the suit, and a subsequent refusal to convey the land, is substantially defective, and is not cured by a general verdict assessing damages. *Austin v. Whitlock*, 1 Munf. 487.

Bond with Collateral Condition.—In an action of covenant on a bond executed with collateral condition, if there is no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failure to pay the penalty; but where such stipulation is either expressed or implied, the failure to perform the covenant may be assigned as the breach. *Ward v. Johnston*, 1 Munf. 45. See also, *Supervisors v. Leonard*, 16 W. Va. 491. See the title BONDS, vol. 2, p. 507.

Breach of One of Several Covenants in Agreement Sued on.—In covenant

upon an agreement of lease, which, besides the stipulation to pay the rent, contained other clauses, binding the lessee to board the lessor and wife part of the term, and to return the premises uninjured, the declaration described so much of the agreement as related to leasing the property and paying the rent, charging the defendant with having broken the covenant generally, and particularly in failing to pay the rent, but said nothing about the other stipulations. It was decided that this was not a substantial variance. *Backus v. Taylor*, 6 Munf. 488.

Assignment of Several Breaches.—

In *Jarrett v. Jarrett*, 7 Leigh 93, an action was brought on a covenant whereby the defendant acknowledged that he had received from the plaintiff two bonds for collection, which when collected were to be credited on a bond of a third person held by the defendant. One count in the declaration assigned the breach, that though the defendant collected the two debts he did not give credit for the amount. Another count assigned the breach that the defendant did not and would not collect the debts, or make any endeavor to collect them, and failed in any manner to account for the same. A third count alleged that by the covenant the defendant promised to endeavor to collect the debts, and assigned for breach that he did not endeavor to collect. Upon oyer to the covenant and demurrer to the declaration it was held, that all of the counts were good.

In covenant by F. against C., the declaration sets forth a covenant whereby plaintiff, a carpenter, undertook the carpenter's work of a wooden house for defendant, at certain specified prices per piece, the whole to be done in a workmanlike manner, and defendant contracted to furnish the materials as they should be wanted; and alleged, that plaintiff entered upon and executed a great part of the work; and then alleged breaches, first, A. that defend-

ant did not furnish materials, and second, that, in consequence of defendant's own negligence, after plaintiff had erected the house and executed a large portion of the work, the house was blown down by tempest, and defendant refused to pay the plaintiff for the work that had been done. It was held, that the declaration is good upon general demurrer. *Clark v. Franklin*, 7 Leigh 1.

Defect in Assignment of Breach Cured by Verdict.—

If a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined on the plea that the defendant had not broken the covenant. *Buster v. Wallace*, 4 Hen. & M. 82.

On a covenant in which the plaintiff engaged to serve the defendant as his overseer for a year, and the defendant to pay to the plaintiff a certain part of all grain "made on the plantation" (after deducting the seed), oats excepted, a declaration charging that the defendant did not at the close of the year pay to the plaintiff such part of the grain "made on the plantation," but which does not set forth what crop was made, is good after verdict. *Laughlin v. Flood*, 3 Munf. 255. See the title PLEADING.

4. Misjoinder of Counts.

It was held, that it was good ground for arresting judgment and awarding a repleader after a general verdict for the plaintiff, that there were two counts in the declaration, one beginning in covenant, and concluding in case, and, the other, entirely in case, to which the defendant pleads only, that he has not broken the covenants. *Terrell v. Page*, 3 Hen. & M. 118. But under the recent Virginia statute (acts, 1897-98, p. 103), providing that in any case where an action of covenant will lie, an action of assumpsit may be maintained also, common counts in assumpsit may be joined with covenant for the breach of an agreement under seal. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4. See the

titles ACTIONS, vol. 1, p. 122; PLEADING.

B. PLEA.

1. In General.

In covenant, by the common law, there is no general issue or plea, which amounts to a general traverse of the whole declaration, and of course obliges the plaintiff to prove the whole; but the evidence is strictly confined to the particular issue, raised by a special plea. *Greenleaf Ev.*, § 233. *Riddle v. Core*, 21 W. Va. 532.

"If the deed is not put in issue by the plea of non est factum, the defendant by the rules of the common law is understood to admit so much of the deed as is spread upon the record. *Greenleaf Ev.*, § 234." *Riddle v. Core*, 21 W. Va. 532.

2. Not Guilty.

A plea of not guilty to an action of covenant is cured by a verdict. *Hunnitt v. Carsley*, 1 Hen. & M. 153.

3. Covenants Performed.

a. When Proper.

The plea of covenants performed is proper where the covenant sued on is affirmative. *Chewning v. Wilkinson*, 95 Va. 669, 29 S. E. 680.

b. Form and Requisites.

"The general rule as to the mode of pleading the performance of conditions of covenants is that the party must not plead generally that he performed a covenant or condition, but must show specially the time, place, and manner of performance, and even though the subject to be performed should consist of several different acts, yet he must show the performance of each." 4 *Minor's Inst.*, pt. 2, p. 1202 (3d Ed., 1893). *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 437, 23 S. E. 737; *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313.

"This rule is said to admit of relaxation in certain classes of cases, as, for instance, where the subject comprehends a great multiplicity of particulars, as in the case of a sheriff's

bond for the performance of all of his multifarious duties. 4 *Minor's Inst.*, pt. 2, p. 1203 (3d Ed.)." *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 437, 23 S. E. 737.

In an action of covenant, for covenant broken for rent due, the defendant should not be allowed to prove, and have allowed against such debt, any payment which is not so described in his plea, as in an account filed therewith, as to give the plaintiff notice of its nature; and, if such evidence is admitted on the general plea of covenants performed, to plaintiff's injury, and against his objection, it is sufficient ground for setting aside the verdict and awarding a new trial on motion of plaintiff. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313.

Where the declaration is in covenant for condition broken for rent, the defendant must, in order to be able to show payment, plead the payment specially, or the general issue with a brief statement of the facts. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313.

c. Effect.

In an action for the breach of a covenant of warranty a plea of covenants performed, without a plea of non est factum, admits the making of the deed and warranty and no proof thereof is necessary. *Riddle v. Core*, 21 W. Va. 530.

As to evidence admissible under plea, see post, "Admissibility," IV, A.

4. Covenants Not Broken.

When Proper.—The plea of "covenants not broken" is not a proper plea in an action on an affirmative covenant. In such an action the proper plea is "conditions performed" or "covenants performed." *Chewning v. Wilkinson*, 95 Va. 667, 29 S. E. 680.

Form and Requisites.—In an action against the heir on a covenant entered into by the ancestor, if the breach is assigned to have been committed both by the heir and ancestor and the defendant pleads that "he has not broken

the covenant," without saying anything as to the breach by the ancestor, and the jury finds for the plaintiff that "the defendant has broken the covenant," judgment ought not to be arrested, as the defect is cured by the statute of jeofails. *Woodford v. Pendleton*, 1 Hen. & M. 303.

Effect.—Where in an action of recovery for breach of warranty of title the declaration sets out the making of the deed and the general warranty of title therein contained, and no plea of non est factum is pleaded, a plea of "covenants not broken" admits the making of the deed and the warranty, and no proof thereof is necessary. *Riddle v. Core*, 21 W. Va. 530.

5. Statute of Limitations.

A plea to an action of covenant that defendant "did not, within 20 years next before the bringing of this suit, break his covenant, as the plaintiff hath alleged," is a good plea of the statute of limitations, as it is equivalent to saying that the cause of action did not accrue within that time. But even if such plea were defective, it is cured after verdict, where it is not demurred to, by Va. Code, 1873, ch. 177, § 3, which provides that no judgment shall be reversed for any defect or imperfection in the pleadings which might have been taken advantage of on demurrer, but was not so taken advantage of. *Davis v. McMullen*, 86 Va. 256, 9 S. E. 1095. See the title LIMITATION OF ACTIONS.

IV. Evidence.

A. ADMISSIBILITY.

Evidence to Support Plea of Covenants Performed.—Where a defendant pleads "covenants performed," this plea can only be supported by the evidence which shows that the covenant has been performed; and evidence showing that nonperformance has been excused by the act of the plaintiff, or any other, does not support the issue, as this might tend to surprise the plaintiff at

the trial. *Fairfax v. Lewis*, 2 Rand. 20; *Wallace v. Shaffer*, 12 Leigh 623; *Long v. Colston*, Gilmer 98; *Scrags v. Hill*, 37 W. Va. 706, 17 S. E. 185; *Chewning v. Wilkinson*, 95 Va. 669, 29 S. E. 680.

In a contract between A, B and C by which A purchases from B part of a tract of land, the title to which was in D, and B covenanted to procure a conveyance for that part of the land to A, and C purchases the residue of the land of B and purchases also from A that part which A had purchased of B, for which A covenants with C to procure him a proper conveyance; and, in the same contract, B covenants with C to procure him a conveyance of the whole tract; upon the general plea of covenants performed by A, proof that B procured a conveyance of the whole land to C does not support the issue on the part of A. *Fairfax v. Lewis*, 2 Rand. 20.

Title bond executed by S. to W. with condition, that S. should convey good title to W., not to him and his assigns, in 200 acres of land; this bond is assigned by W. to M. and M. to B. and while the bond is held by M., the first assignee, S. and his wife make a conveyance of the title to M. who refuses to accept the same; in action by W. for benefit of B., the last assignee, and upon pleas of conditions performed, and of conveyance to M.; it was held, that the condition of the bond requires that the title shall be made to W. and if there was proof of a conveyance of title to M. that would not sustain the plea of conditions performed, and the second plea of a conveyance to M. is nought. *Wallace v. Shaffer*, 12 Leigh 622.

B. WEIGHT AND SUFFICIENCY.

In an action on a deed of trust given merely as collateral security for a promissory note the existence of a deed of trust is not sufficient evidence of covenants broken, and a verdict founded on such evidence alone is unwarranted. *Wolf v. Violett*, 78 Va. 57.

V. Variance.

Variance between Writ and Declaration.—In cases of judgments by default, the statute of jeofails does not apply to cure errors and defects in the proceedings. In such cases, the writ is part of the record; and writ being in assumpsit and declaration in covenant the variance is fatal. *Wainwright v. Harper*, 3 Leigh 270. See the title VARIANCE.

Variance between Declaration and Evidence.—Where there is a plain variance between the declaration and the bond offered in evidence under it, there is no error in refusing to permit it to go to the jury in evidence. *Harris v. Fisher*, 5 W. Va. 575.

In an action of covenant the declaration describing the covenant as sealed, by the defendant, without mentioning any other person; and the plea being "covenants performed," though without prayingoyer, a joint and several covenant, sealed by the defendants, and others, but in other respects answering to the description in the declaration, is admissible as evidence to the jury. *Hollingsworth v. Dunbar*, 3 Munf. 168. See *Meredith v. Duval*, 1 Munf. 79; *Winslow v. Com.*, 2 Hen. & M. 459.

Effect of Oyer.—Where in an action on a deed the plaintiff makes profert of the deed in his declaration, and defendant takes oyer of it, the deed is thereby made part of the declaration, and the defendant can not object to the deed as evidence at the trial, on the ground of variance. *Jarrett v. Jarrett*, 7 Leigh 93; *Armstrong v. Armstrong*, 1 Leigh 491.

If the defendant crave oyer, and then plead "conditions performed," he can not take advantage of a variance be-

tween the declaration and bond; and though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient. *Meredith v. Duval*, 1 Munf. 76. See the title PROFERT AND OYER.

VI. Questions of Law and Fact.

In an action of covenant upon articles, by which the defendants authorized the plaintiff to take in his possession certain mills, to put the same in complete repair, and to make such alteration in the construction thereof, as should be in his opinion best calculated to give them their full power and effect; and engaging that they, at all times would be ready to pay the amount of expenditures incurred, upon the production of proper vouchers; and that the plaintiff should retain the possession and use of the premises for a term of years, paying a certain rent; "provided, that in all the repairs and improvements, thus left to his discretion, he would not consider his own temporary accommodation only, but the permanent advantage of the property also, and proportion the expenditures accordingly;" upon the plea of "covenants performed" and issue, the question whether the plaintiff has complied with the terms of the proviso is properly left to the jury. *Fenwick v. M'Murdo*, 2 Munf. 244.

VII. Verdict.

In the action of covenant, a verdict for a larger sum than the damages laid in the declaration or stated in the writ, must be set aside and a new trial awarded. *Cloud v. Campbell*, 4 Munf. 214. See the title VERDICT.

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CROSS REFERENCES.

See the titles ASSUMPSIT, vol. 2, p. 1; BONDS, vol. 2, p. 834; CONDITIONS, ante, p. 50; CONTRACTS, ante, p. 307; DAMAGES; DEEDS; DEEDS OF TRUST; ESTOPPEL; EVIDENCE; EXECUTORS AND ADMINISTRATORS; FENCES; HUSBAND AND WIFE; ILLEGAL CONTRACTS; IMPLIED CONTRACTS; INJUNCTIONS; INTERPRETATION AND CONSTRUCTION; LANDLORD AND TENANT; LIMITATION OF ACTIONS; MORTGAGES; RESTRAINT OF TRADE; SALES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER; WARRANTY.

As to covenants to stand seized, see the title TRUSTS AND TRUSTEES. As to the action of covenant, see the title COVENANT, ACTION OF.

I. Definitions.

The modern covenants, now used in the place of ancient warranty, are stipulations in the deed of conveyance, and are not representations to induce the

purchase of the thing sold. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

It has been held, that a covenant of warranty not broken, and which never may be, is clearly not a debt provable

in bankruptcy. *Whitten v. Saunders*, 75 Va. 572.

II. Creation.

A. EXPRESS COVENANTS.

It has been held, that no particular words are required to create an express covenant. Any words which import an agreement between the parties to a deed, will be sufficient for that purpose. *Supervisors v. Leonard*, 16 W. Va. 491.

B. IMPLIED COVENANTS.

See generally, the title IMPLIED CONTRACTS.

Whether Covenants of Title Implied from Grant.—A grant of land does not contain an assertion of title in the grantor, nor imply a covenant with the grantee to warrant the land. Hence, where the parties to a transfer of property intend that the grantor shall be responsible for the title to the property sold, they should require the insertion of one or more covenants in the articles of conveyance, showing an intention that the grantor should be bound in case of want or imperfection of title. *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406; *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 71; *Anderson v. Snyder*, 21 W. Va. 632; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858; *Tucker v. Cocke*, 2 Rand. 51; *Black v. Gilmore*, 9 Leigh 446.

Whether Covenant Implied from Assertion as to Quantity.—See generally, the title VENDOR AND PURCHASER.

And where land is conveyed by a particular description and with an enumeration of the quantity of acres, the latter is held to be matter of description merely, and can not be deemed an implied covenant for quantity. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028; *Maxwell v. Wilson*, 54 W. Va. 500, 46 S. E. 349.

A conveyance of a particular tract of land, without a specification of quantity, does not bind the vendor to warrant a particular number of acres, if

there has been no false representation, and no concealment of facts within his knowledge; although there may have been an expectation in both parties, founded on documents and other evidence known to both, that the number of acres is greater than it turns out to be, upon a subsequent survey. *Tucker v. Cocke*, 2 Rand. 51; *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 356; *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028; *Maxwell v. Wilson*, 54 W. Va. 500, 46 S. E. 349.

"Unless there is an express covenant that there is the quantity of land mentioned, the clause as to the quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises but it can not control the rest of the description." 2 *Devlin on Deeds*, § 1044; *Maxwell v. Wilson*, 54 W. Va. 501, 46 S. E. 349.

But it has been held, that a deed which sells, grants and conveys a certain number of trees of a particular kind, of certain dimensions, and containing a certain mark of designation, "now sound and growing upon the lands" of the grantor, imports a covenant or warranty that such trees exist of the kind and character named, as the language used is not a mere descriptive recital, but is the essence of the conveyance. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

Whether Covenant for Quiet Enjoyment Implied from Words of Lease in Deed to Freehold.—Where a conveyance is of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment. *Black v. Gilmore*, 9 Leigh 446.

Thus where a declaration in covenant set forth, that the defendant, by an indenture, did rent and lease to the plaintiff a tract of land, to have and to hold the same so long as he, the plain-

tiff, should live, and averred as a breach of the covenant, that the defendant entered upon the possession of the plaintiff, and expelled and removed him, it was held, that on general demurrer, that no covenant for quiet enjoyment was to be implied from the words set forth, and that the action could not be maintained. *Black v. Gilmore*, 9 Leigh 446.

No Implied Covenant That Premises Are Fit for Any Particular Purpose.—

Where a lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on the premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased, or that six salt wells are of any particular quality or fitness for manufacturing salt. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

No Implied Covenant by Lessee to Repair Damages Caused by Unavoidable Accident.—It has been held in West Virginia that where a written lease of property provides that the lessee shall keep the same in repair except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858. See the title LANDLORD AND TENANT.

Covenant May Necessarily Be Implied from Express Words.—Although courts are careful in inferring covenants and promises not contained in written contracts, yet what is necessarily implied is as much a part of the instrument as if plainly expressed, and will be enforced as such. If the language leaves the meaning of the parties in doubt, the court will take into consideration the occasion which gave rise to

it, the obvious design of the parties, and the object to be attained, as well as the language of the instrument itself, and give effect to that construction which will best effectuate the real meaning and intent of the parties. *Southern R. Co. v. Franklin, etc.*, R. Co., 96 Va. 693, 32 S. E. 485.

And a necessary inference from a written contract of an obligation to do what the parties actually intended, which results in implying a covenant in a contract, is not an addition to the contract, but is only giving effect to the intent of the parties thereto. *Southern R. Co. v. Franklin, etc.*, R. Co., 96 Va. 693, 32 S. E. 485.

Covenant for Free Use of Turnpike by Landowner.—

In the year 1830 a turnpike company constructed a turnpike road through the lands of A, taking rock from quarries on the adjacent lands of said A to use in constructing the same; and no proceedings of condemnation appear to have been instituted against the lands of said A, although the lands of twenty-five others were condemned for the purposes of said road by said company in said county. In July, 1850, a letter was received by A from the president of said company, recognizing the right of his tenant, when on his business, to pass the toll gates of said company free; and said A and his family and servants passed through said toll gates at pleasure, free of toll, until the death of A, which occurred on the 26th of August, 1877. By the will of A the land through which said road runs for a mile, and on which A resided, was devised to his son B, with all the privileges and appurtenances thereto belonging; and said B exercised the same privileges, with reference to said road, for eleven years after his father's death, when toll was demanded of him by the gate keepers on said road. It was held, that under the circumstances of this case the law will presume that a contract was made between said A and said company, of such a character as to

constitute a covenant running with the land, at the time said road was constructed, for the passage of A, his family and tenants, over said road, toll free. *Lucas v. Smithfield, etc., Turnpike Co.*, 36 W. Va. 427, 15 S. E. 182.

III. Parties to Covenants.

See post, "Liability on Covenants," VII.

Married Women.—Where a husband unites with his wife in a deed conveying, with a covenant of general warranty, land of the wife in which the husband has a freehold estate, the warranty in the deed does not bind the wife, but is obligatory upon the husband alone. *Sine v. Fox*, 33 W. Va. 521, 11 S. E. 218.

But it was held, that if a feme covert be privily examined, her covenant for further assurance in a deed was obligatory. *Nelson v. Harwood*, 3 Call 394. See the titles ACKNOWLEDGMENTS, vol. 1, p. 104; HUSBAND AND WIFE.

IV. Covenants in Restraint of Trade.

See the titles ILLEGAL CONTRACTS; RESTRAINT OF TRADE.

V. Construction and Operation.

A. GENERAL RULES OF CONSTRUCTION.

See generally, the title INTERPRETATION AND CONSTRUCTION.

1. Clauses Construed as Covenants Rather than Conditions.

If it is doubtful whether a clause operates as a condition or as a covenant, the courts will incline to the latter construction as most favorable to the tenant. *Millan v. Kephart*, 18 Gratt. 9; *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 39 S. E. 701.

Conditions subsequent are not favored in law because they tend to destroy estates. When relied upon to work a forfeiture, they must be created by express terms or clear implication,

and are strictly construed. Hence, if it be doubtful whether a clause in deed be a covenant or a condition the court will incline against the latter and adopt the construction upholding the instrument and leaving the parties to pursue the appropriate remedies for the breach of the covenant. *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 39 S. E. 701; *Millan v. Kephart*, 18 Gratt. 9. See the titles CONDITIONS, ante, p. 50; DEEDS.

2. Construed against Covenantor.

The rule that the language of a written instrument is to be construed most strongly against the user thereof is applicable to covenants. *Allemong v. Gray*, 92 Va. 224, 23 S. E. 298; *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406; *Allen v. Yeater*, 17 W. Va. 128; *Tate v. Tate*, 75 Va. 522.

It has been said, however, that this is a rule of last resort, and only applicable where all other rules of construction fail. *Tate v. Tate*, 75 Va. 527. And that it is seldom or never applied except where the intention of the covenantor evidently harmonizes with the rule, and its application is therefore useless. *Allemong v. Gray*, 92 Va. 224, 23 S. E. 298.

A and his brothers, B and C, held real and personal property in common, and also owed joint and individual debts. An agreement was made by A of the one part, and B and C of the other part, whereby, for consideration therein mentioned, the said B and C bound themselves "to pay all the debts due from the said A, B and C, together with any sum that may be in arrear towards the purchase money of the Poston place, or may be recovered against them by the widow and heirs of D, so as to leave the said A free from debt and litigation." It was held, applying the rule that the words of the covenant must be construed most strongly against the covenantor, that the covenant in substance was to make such payment as would leave A "free from debt and litigation;" and it was impossible to give effect to this lan-

guage without construing the words as referring to all the debts of A, both individual and partnership. *Tate v. Tate*, 75 Va. 522.

3. Effect Must Be Given to Every Part.

In the interpretation of covenants, every part of the writing must be made, if possible, to take effect, and every word of it must be made to operate in some shape or other. *Tate v. Tate*, 75 Va. 527; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 245, 37 S. E. 851.

B. JOINT OR JOINT AND SEVERAL COVENANTS.

The language of covenants is generally sufficient to indicate the intention of the parties, and the nature of the covenant whether joint, several or joint and several. *Click v. Green*, 77 Va. 836.

"Whether the liability created by covenants for title be joint or several, or joint and several, obviously depends upon the terms in which they are expressed. When an obligation is created by two or more, the general presumption is that it is joint, and words of severance are required in order to confirm the liability of the covenantor to his own acts." *Click v. Green*, 77 Va. 836.

A and B being jointly in possession as joint owners of land, jointly sell and convey the same. In their deed they said: "And the said A and B covenant that they will warrant generally," etc. It was held, that this was a joint and several warranty; and that both warrantors were responsible to the vendees, upon their eviction, for the payment of the full measure of the damages. *Click v. Green*, 77 Va. 827.

C. DEPENDENT OR INDEPENDENT COVENANTS.

See generally, the title *CONTRACTS*, ante, p. 307.

1. Determination of Character of Covenant.

In General.—It is often very difficult to determine whether covenants are dependent or independent, and to arrive at just and satisfactory conclusions by

applying the rules of construction in such cases. *Ayres v. Robins*, 30 Gratt. 105.

Perhaps there is no other branch of the law, in which is to be found a larger number of decisions or a greater apparent conflict of authorities than that in which the effort has been made to define the dependence and independence of covenants, and to designate the class to which any given case in dispute is to be referred. The great effort, however, in the more recent decisions has been to discard, as far as possible, all rules of construction founded on nice and artificial reasoning, and to make the meaning and intention of the parties, collected from all parts of the instrument, rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings. *Roach v. Dickinsons*, 9 Gratt. 154; *Ayres v. Robins*, 30 Gratt. 105; *Snodgrass v. Wolf*, 11 W. Va. 165.

Stipulations in a covenant or other contract are to be regarded as dependent or independent, according to the intention and meaning of the parties, and the good sense of the case. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597; *Brockenbrough v. Ward*, 4 Rand. 352; *Snodgrass v. Wolf*, 11 W. Va. 165.

Covenants to Make Title and Pay Purchase Money.—A contract to sell land implies a covenant on the part of the vendor to convey a good title unless it is otherwise stipulated and a purchaser is not bound to pay the purchase money until a good title is made. Covenants of obligation to pay and that to pass title are mutual and dependant; the one can not be required before the other is ready to be performed. *Watson v. Coast*, 35 W. Va. 466, 14 S. E. 249; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 224; *Roach v. Dickinsons*, 9 Gratt. 154.

"In general, where, in an agreement, there is no express stipulation to the contrary, it is understood that the cov-

enant of the purchaser to pay the price of the land is dependent on the vendor's covenant to make a good title and to convey the estate. In such a case, the obligation of the vendor on the one part, and of the purchaser on the other, are mutual and dependent. The vendor, in his action, must make his part of the agreement precedent, showing that he has a good title; and that he has on his part, actually performed the contract, or done all that in him lay for that purpose." *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 224, citing *Roach v. Dickinsons*, 9 Gratt. 154.

Where there was a covenant on the part of the vendee of real estate to pay \$1,400 at a certain time, the residue of the purchase money on a certain tract of land, and the vendor upon the payment of such sum covenanted to give the vendee a deed of conveyance to the land, it was held, that the covenants were dependent, and that in an action by the vendor to recover the money it was necessary to aver either that he had executed or tendered a deed, and that an averment that he was ready and willing to execute and deliver it was not sufficient. *Roach v. Dickinsons*, 9 Gratt. 154.

On the 31st of July, 1866, R. and A. enter into a contract by which R. sells to A. a tract of land on Cherrystone creek, and covenants that by the 1st of January, 1867, he will convey the land to A. by deed, with general warrants at the cost of the vendee by proper deed tendered by A., and will deliver possession free of incumbrance. And A. covenants to pay to R. \$9,000, of which \$5,000 by the 1st of January, 1867, and sooner if R. shall have made the conveyance and delivered possession, and for the balance in one and two years, with lien on the land from the day the conveyance is made and possession given. And R. covenanted that he would on or before the 1st of May, 1867, remove or cause to be removed the stakes marking the oyster

grounds of S. and D., so that these grounds shall be left unencumbered by the latter, and remain to the use of A. It was held, that the covenants to pay the two deferred payments and to remove the stakes of S. and D., were dependent; and R. not having removed them, A. is entitled to have an abatement from the purchase money to the extent of the damage he has sustained by this failure of R. to execute his covenant. *Ayres v. Robins*, 30 Gratt. 105.

Covenant for Assignment of Bonds, and Covenant to Convey Land.—

Where two parties contract, the one to assign bonds, and the other to convey and surrender lands, at the same time, the covenants are dependent on each other; and neither party can insist on the performance of the other, unless he himself performed, or offered to perform, his part of the agreement. An allegation in the declaration, of an offer to perform, after the day, is an incurable error. *Robertson v. Robertson*, 3 Rand. 68; *Roach v. Dickinsons*, 9 Gratt. 162; *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597.

2. Effect of Dependent Covenants.

Necessity of Performance or Offer to Perform.—Where a contract is entire and the covenants are dependent the plaintiff is in general obliged to aver and prove a complete performance of all that was to be done and performed on his part, before he is entitled to demand performance from the other party. *Kern v. Zeigler*, 13 W. Va. 716; *Gas Co. v. Wheeling*, 8 W. Va. 320; *Schwarzbach v. Ohio Valley, etc., Union*, 25 W. Va. 649; *Jones v. Singer Mfg. Co.*, 38 W. Va. 149, 18 S. E. 478; *Roach v. Dickinsons*, 9 Gratt. 154; *Clark v. Franklin*, 7 Leigh 7; *Fairfax v. Lewis*, 2 Rand. 20; *Ayres v. Robins*, 30 Gratt. 105; *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597; *Young v. Ellis*, 91 Va. 298, 21 S. E. 480.

And where an act is done by one party by way of condition precedent

to his right to claim performance on the part of the other, he can not claim such performance without averring the doing of such act or his readiness and offer to do it. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597.

So where the reciprocal acts are concurrent, and to be done at the same time, neither party can maintain an action against the other without averring performance of his own part of the agreement, or that which is equivalent. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 597.

In dependent covenants, when the plaintiff has performed a part, for which he can have no other remedy than by an action on the covenant, an action may be maintained in the same manner, as if the covenants were independent. *Lewis v. Weldon*, 3 Rand. 71.

Effect Where One Covenantor Prevents Performance by Other.—But to this well-established rule there is the equally well-established exception, that, where the defendant has prevented a performance by the plaintiff on his part it is not necessary that the plaintiff should aver or prove a complete performance, to entitle him to his action. He may recover without doing so; and it is sufficient to show a readiness to perform, and that he was hindered by the defendant. *Kern v. Zeigler*, 13 W. Va. 716; *Gas Co. v. Wheeling*, 8 W. Va. 320; *Schwarzbach v. Ohio Valley, etc., Union*, 25 W. Va. 649; *Jones v. Singer Mfg. Co.*, 38 W. Va. 149, 18 S. E. 478; *Clark v. Franklin*, 7 Leigh 7; *Roach v. Dickinsons*, 9 Gratt. 154.

A covenantor is excused from performing his part of an agreement when the other party hinders the performance, and when so hindered, the covenantee may be estopped from setting up the default of the covenantor. *Young v. Ellis*, 91 Va. 298, 21 S. E. 480.

The failure of one party to perform his covenants, can in no case excuse the other party from performing his, unless such failure goes to the whole

consideration. *Fairfax v. Lewis*, 2 Rand. 20.

What Constitutes a Performance of One of Two Dependent Covenants.—

L. covenanted with C. "to make over by deed of bargain and sale, certain lands in England, and that L.'s wife should annex such covenants and warranties as would ultimately assure the premises to C.;" in consideration of which, C. covenanted to convey other lands in the United States to L. The execution of a deed of bargain and sale by L. and wife, with her privy examination and relinquishment of dower in Virginia, is such a performance by L., as entitles him to an action against C., for refusing to convey the lands in the United States. C. having bound himself to pay \$20,000 in money and lands, for the lands in England, will be entitled to relief for any deficiency in their value, short of that sum. *Long v. Colston, Gilmer* 98.

3. When Dependent Covenants Will Be Treated as Independent.

Courts construe agreements so as to prevent a failure of justice, and hold dependent covenants to be independent, when the necessity of the case and the ends of justice require it, notwithstanding the form. *Todd v. Summers*, 2 Gratt. 167.

Where reciprocal covenants have been contracted, and one party has partially performed the covenants on his part, and has no remedy for compensation therefor but by an action on the covenant, whatever be the form of the contract, and even though the covenants are expressly dependent covenants in form, and though they are pleaded as dependent covenants, yet they shall be held independent covenants, and the plaintiff shall recover compensation for his part performance. *Bream v. Marsh*, 4 Leigh 21.

Where the courts hold dependent covenants to be independent, the claim of the party suing upon one of the covenants as independent must be held

as being modified by the just demands of the other side, growing out of the circumstances of the case, and arising from his own neglect or failure to perform his other covenant. *Todd v. Summers*, 2 Gratt. 167.

D. COVENANTS RUNNING WITH THE LAND.

1. In General.

It is a general rule of the common law that choses in action are not assignable. But to this general rule there are exceptions, one of which is, that covenants running with land pass with the land to the assignee thereof. *Dickinson v. Hoopes*, 8 Gratt. 395.

2. What Covenants Run with Land.

a. In General.

A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. *Willard v. Worsham*, 76 Va. 396.

It is almost impossible to lay down any precise rule, as to what covenants run and what covenants do not run with the land, but as a general rule it may be said that if some interest in the land, or a right of way or incorporeal hereditament issuing out of land, is granted, and in the deed the grantee covenants with the grantor and his assigns that he will do an act which concerns the land and which thus becomes united to it, so that it affects the value of the land in whosoever hands it may come, such covenant runs with the land, and there is privity of the estate between the covenantor and the covenantee. *Lydick v. Baltimore, etc.*, R. Co., 17 W. Va. 427.

"A covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land." *Hurxthal v. Boom Co.*, 53 W. Va. 92, 44 S. E. 520.

"Where the covenant concerns land, and is one that is capable of being annexed to the estate, and it appears that it is the intention of the parties, as

expressed in the instrument, then it shall be construed as running with and charging the land thereafter." *Parsons v. Baltimore, etc., Loan Ass'n*, 44 W. Va. 335, 29 S. E. 1001.

b. Necessity of Privity of Estate.

In General.—To create a covenant real there must be a privity in estate between the parties—otherwise it is simply a personal obligation, neither binding nor benefitting the land in the hands of heirs, devisees or assigns. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427; *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 631; *Hurxthal v. Boom Co.*, 53 W. Va. 92, 44 S. E. 520.

"It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenantee." *Hurxthal v. Boom Co.*, 53 W. Va. 92, 44 S. E. 520.

When the covenant is contained not in a lease but in an absolute conveyance, or in an instrument of any sort other than a lease, the burden of a covenant can never run with the land, so as to bind in every case the purchaser of the land as assignee of the covenantor. The burden of a covenant charging land made by the owner with an entire stranger to the land so charged will never run with the land or rest upon the parties taking the land by assignment. To charge the land with the burden of any covenant, there must be some privity of estate between the covenantor and the assignee of the land so burdened. *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600.

Covenant by Stranger to Title.—A covenant by a stranger to the title can not run with the land though it respects the land, and is intended to benefit it. *Dickinson v. Hoopes*, 8 Gratt. 353.

Covenants in Deeds Made by Grantor Out of Possession.—Of course where

conveyances by a grantor out of possession are void as against public policy, the conveyer must be in possession, as well in order to convey any estate in the land as to enable his covenants to run with the land. *Randolph v. Kinney*, 3 Rand. 397.

Whether Purchaser at Judicial Sale Is a Privy in Estate.—One purchasing at a judicial sale lands sold from a person is a privy in estate with such former owner, and is entitled to the benefit of a real covenant running with the land and bound as *res judicata* by a decree binding a former owner. *Hurxthal v. Boom Co.*, 53 W. Va. 88, 44 S. E. 520. See the titles FORMER ADJUDICATION OR RES ADJUDICATA; JUDICIAL SALES.

Covenant for Transportation of Products of Land over Certain Railroad.—It has been held, that a covenant by a landowner with a railroad providing that the products of the land shall be transported to market exclusively over the line of the covenantee does not run with the land, as there is no privity of estate between the parties. *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

c. Necessity for Covenant to Be Contained in Deed Granting Premises.

"A covenant does not run with the land unless contained in a grant thereof, or of some estate therein." *Hurxthal v. Boom Co.*, 53 W. Va. 92, 44 S. E. 520.

In order that a covenant be a real covenant running with land, it must be in a grant thereof, or some estate or interest therein. There must be privity in estate between the parties. It is not sufficient that it merely concerns land. *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S. E. 520.

Parol Contract.—A parol contract, whatever its character, can not at law run with the land, but if the parol contract is of such character that it would, if it were a covenant, run with the land and be a covenant real, such parol contract will be regarded by a court of

equity as running with the land, and equity will, at the instance of the party who owns the land and has acquired it under the covenantee, whether it holds a legal or equitable title, specifically enforce such contract. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

d. Effect of Intention of Parties.

It seems to be well settled in law that if a covenant is not, in nature and kind, a real covenant, the mere declaration of the parties that it shall run with the land will not make it a real covenant, though so stated in the document. *Hurxthal v. Boom Co.*, 53 W. Va. 93, 44 S. E. 520.

A covenant not in the nature and kind a covenant real, but providing that the heirs, devisees and assigns of the covenantee shall have its benefit, which covenant benefits, and does not charge land, can be enforced by an alienee deriving the land from the covenantee. *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S. E. 520.

e. Particular Covenants.

(1) Covenants of Title.

(a) In General.

Of the covenants usually contained in a conveyance of land, some run with the land and some do not. Those which are broken if at all, at the instant of their being made, such as the covenant of seisin, of right to convey, or against incumbrances, do not run with the land; while those which may be broken afterwards, such as the covenant of warranty, for quiet enjoyment, or for further assurance, do run with the land. *Dickinson v. Hoomes*, 8 Gratt. 396.

Covenants for quiet enjoyment, covenants of warranty, and covenants for further assurance, which are prospective in their nature, descend to heirs and vest in assignees and run with land. *Willard v. Worsham*, 76 Va. 396; *Dickinson v. Hoomes*, 8 Gratt. 353.

(b) Covenant of Warranty.

In General.—A covenant of warranty is inseparable from the land with respect to which it is made, and passes

to the vendee of the covenant as incident to the land and not as an assignment, separate and distinct from the conveyance. *McConaughey v. Bennett*, 50 W. Va. 172, 40 S. E. 540; *Dickinson v. Hoomes*, 8 Gratt. 399.

A covenant of warranty runs with the land, and may be enforced by the grantee and his representatives and assigns, for the protection of the owner in whose time the breach occurs. *Marbury v. Thornton*, 82 Va. 704, 1 S. E. Rep. 909; *Dickinson v. Hoomes*, 8 Gratt. 396; *Sheffey v. Gardiner*, 79 Va. 313.

Land was devised to A with a limitation over upon his dying without issue to B, if he should survive him, or his representative. A conveyed the land, and B was a party to the deed which contained a special warranty of title. It was held, that the covenant was one which ran with the land that a purchaser claiming under A's grantee, a portion of the land by a regular chain of conveyances was entitled to the benefit of B's covenant for his indemnity against the claim of B's children claiming as devisees under the will, B having died during A's lifetime. *Dickinson v. Hoomes*, 8 Gratt. 353.

Necessity for Estate to Be Granted by Covenantor to Covenantee.—It seems that it is not necessary that some estate should pass from the covenantor to the covenantee in order that the covenant of warranty may run with the land. *Dickinson v. Hoomes*, 8 Gratt. 402.

If a covenant of warranty contained in a conveyance from a person in possession but without title, is effectual and will run with the land, it would seem, a fortiori, that where the grantor is not only in possession but has a title to the land, though not such a title as is conveyed and warranted to the purchaser; the covenant of warranty will be effectual and will run with the land. *Dickinson v. Hoomes*, 8 Gratt. 401.

After Breach.—After breach of such

covenant, it can no longer run with the land, nor has it any existence or virtue, save for the purpose of supporting a right of action for damages on the part of him who held it at the time of the breach, against the covenantor. *McConaughey v. Bennett*, 50 W. Va. 172, 40 S. E. 540; *Dickinson v. Hoomes*, 8 Gratt. 353; *Randolph v. Kinney*, 3 Rand. 394.

A covenant running with the land, when broken, ceases to run with the land from the time it is broken, for a broken covenant is a mere chose in action, which, by the common law, is not assignable, being no longer inherent in the land, which alone gives to the covenant its assignable quality. *Dickinson v. Hoomes*, 8 Gratt. 353.

(c) Covenant against Encumbrances.

A covenant against encumbrances is broken the instant the deed in which it is contained is made, where an encumbrance upon the land exists at the time of the making of the deed, and hence it is a mere right of action not assignable at law, and does not run with the land to a subsequent grantee. *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Dickinson v. Hoomes*, 8 Gratt. 395.

(2) Covenant by Railroad to Build and Maintain Switch.

In a case in which a right of way through land was granted to a railroad company, and in the deed, as the consideration for the grant, the railroad company covenanted with the grantor, his heirs and assigns, to build and forever maintain a switch from the railroad to a mill situated on the land, for the use of the mill, it was held, that this was a covenant real which ran with the mill. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427. See the title RAILROADS.

(3) Covenant to Maintain and Repair Dams.

In an agreement one party covenants with the other to maintain and repair dams to supply water to the mill of the

covenantee, and to prevent trash from gathering in a mill race conveying the water. This is a personal, not a real covenant. *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S. E. 520. See the title MILLS AND MILL DAMS.

(4) Covenant to Pay Expenses of Constructing Party Wall.

A deed signed, sealed and acknowledged, which establishes and secures to adjacent lot owners mutual interest in a party wall, and in which one of the parties covenants that he or his grantee, whenever they make use of such wall, will pay one-half of the expenses of the construction thereof, and which further provides that such covenant shall run with the lot, creates a charge or lien on such lot, which will bind the same in the hands of subsequent purchasers until discharged. *Parsons v. Baltimore, etc., Loan Ass'n*, 44 W. Va. 335, 29 S. E. 999. See the title PARTY WALLS.

The promise to pay being personal to the owner of the lot constructing the wall, such owner may assign the same to any one she may please; and such assignee may maintain a suit to enforce payment of such liability. *Parsons v. Baltimore, etc., Loan Ass'n*, 44 W. Va. 335, 29 S. E. 999.

(5) Covenant for Free Use of Turnpike Road.

In a case in which it appeared that a turnpike company had allowed an adjacent landowner to pass over the turnpike free of toll, for a period of forty-six years, in return for land given by the landowner upon which to construct the road, it was held, that under the circumstances the law would presume that a contract was made between the proprietors of the turnpike and the landowner, of such a character as to constitute a covenant running with the land, at the time the road was constructed, for the passage of the landowner, his family and tenants, over the road free of toll; and the land having passed by descent to the son

of the original landowner, he was held entitled to the benefit of the contract. *Lucas v. Smithfield, etc., Turnpike Co.*, 36 W. Va. 427, 15 S. E. 182. See also, *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427. See the title TURNPIKES AND TOLLROADS.

(6) Covenant by Grantee of Mortgaged Premises to Pay Mortgage.

"A covenant by the grantee of mortgaged premises to pay the mortgage debt is a mere personal covenant; it does not run with the land, and is binding only upon him who creates it. Such was the character of the covenant in *Vanmeter v. Vanmeter*, 3 Gratt. 148. Its object plainly was the relief and indemnity of the grantor, and not an additional security for the creditor. And yet, in the opinion of this court, it enured to the benefit of the latter, who were permitted to enforce it in a court of equity. That case would therefore, seem a direct authority in this." *Willard v. Worsham*, 76 Va. 396. See the title MORTGAGES.

(7) Covenant for Exclusive Mercantile Privileges at Railroad Station.

A small tract of land at a railroad station was sold, together with exclusive mercantile privileges at, in, and around the junction, including the exclusive right to sell goods, wares and merchandise; and to keep houses of public entertainment and refreshment; and to establish and erect warehouses, factories, foundries and shops on a larger tract of which the part sold was a small proportion. It was provided that the covenant should apply to heirs and assigns and should run with the land to whomsoever it might be devised or conveyed. It was held, that the covenants were personal, binding the grantor, and did not run with the land; and upon a subsequent conveyance of a portion of the larger tract restricting the grantee from engaging in the enterprises above mentioned, the restriction was declared void. *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 677.

See also, *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600. See the title **RESTRAINT OF TRADE**.

(8) Covenant Restricting Use of Premise to School Purposes.

Where a deed conveying property to an incorporated school contains a covenant "that said land and buildings shall be used for the purposes of said school, and for no other purpose," this covenant does not create a base or qualified fee, but it restricts the use of the land to a particular purpose, which is binding on all those taking title to the property with notice thereof, and imposes a servitude on the land which a court of equity will enforce in a proper case. *Supervisors v. Bedford High School*, 92 Va. 293, 23 S. E. 299.

As to conditions in deed of conveyances, see the title **DEEDS**.

(9) Covenant in Lease to Pay Taxes.

It has been held, that a covenant to pay taxes is a covenant which runs with the land. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

An assignee of a lease is fixed with notice of a covenant therein to pay the taxes, and takes the estate of his assignor cum onere and each successive assignee of the lease because of privity of estate, is liable upon covenants maturing and broken while the title is held by him. *West Virginia, etc., R. Co. v. McIntire*, 48 W. Va. 210, 28 S. E. 696. See the titles **LANDLORD AND TENANT**; **TAXATION**.

3. Effect of Division or Apportionment of Land.

A covenant of warranty running with the land is apportionable and its benefits accrue to a grantee of a portion of the premises to which it is applicable. *Dickinson v. Hoomes*, 8 Gratt. 407.

"It is true, as a general principle of law, that covenants are not apportionable; and so, also, it is true, as a general principle of law, that covenants

are not assignable. But as covenants which run with land are assignable, because the land itself is assignable, so, also, it would seem that covenants which run with land are apportionable because the land itself is apportionable. A covenant running with land would be of very little value if it ceased to run with the land whenever the land was divided, whether by act of law or by the act of the owner. We know that covenants for the payment of rent are apportionable, both by act of law and by the acts of parties." *Dickinson v. Hoomes*, 8 Gratt. 407.

4. Whether Subject to Defenses Existing between Original Parties.

A covenant real, when sued on by any other than the original covenantee, is not subject to any equities which might exist between the original parties to the covenant, but if a parol contract, which if sealed would be a covenant real, is sought to be specifically enforced in a court of equity by any party though he be not the original promisee; the court will hold it to be subject to all the equities which would exist between the original parties to the contract, and if such parol contract has been modified by them or by any parties entitled to the benefit of it, equity will enforce it as modified, and only as modified. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

E. CONSTRUCTION AND OPERATION OF PARTICULAR COVENANTS.

1. Covenant of Warranty.

a. Definition and Nature of Warranty.

(1) At Common Law.

"We are told by Coke, 1 Inst. 365, a. that 'a warrantie, is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by judgment in a writ of warrantia chartæ, to yield other lands and tenements to the value of those that shall be evicted by a former

title.'" *Threlkeld v. Fitzhugh*, 2 Leigh 455.

At the common law warranty was exclusively a covenant real running with the land, for the breach of which the warrantor was not liable in damages, but was primarily bound to yield other lands. *Tabb v. Binford*, 4 Leigh 132; *Burtners v. Keran*, 24 Gratt. 42; *Stout v. Jackson*, 2 Rand. 142.

"The warranty in deed was introduced at a very early period of English tenures. Its object was, in case of eviction of the title warranted, to secure to the warrantee lands of equal value to the lands from which he was evicted." *Stout v. Jackson*, 2 Rand. 172.

"Warrant was a technical term, having its own peculiar signification and without the use of which, the contract, imported by that term, could not be created, unless in cases in which the law implied the contract. The import of the word, when applied to freehold estate, was 'that the warrantor would, upon voucher, or by judgment in a writ of warrantia chartæ, yield other lands and tenements to the value of those that shall be evicted by a former title.' The contract to warrant had the same effect in all respects, as if the party had contracted in the terms of this definition, if such a contract were allowed, and the specific execution of it could be enforced." *Stout v. Jackson*, 2 Rand. 142.

(2) In Virginia and West Virginia.

Warranty, as it existed at the common law, has since been discontinued; and warranty is now considered a personal covenant, sounding merely in damages. Under our statutes and decisions it is treated as a covenant to warrant and defend, while it has also all the effect of a covenant for quiet enjoyment. *Tabb v. Binford*, 4 Leigh 132; *Burtners v. Keran*, 24 Gratt. 42; *Yancey v. Lewis*, 4 Hen. & M. 390; *Cain v. Fisher (W. Va.)*, 50 S. E. 753; *Moreland v. Metz*, 24 W. Va. 119;

Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899.

The covenant of general warranty, as used in this country, corresponds more nearly to a covenant for quiet enjoyment than to the common-law warranty. *Cain v. Fisher (W. Va.)*, 50 S. E. 753; *Dickinson v. Hoomes*, 8 Gratt. 353.

The covenant of warranty creates personal rights, wholly independent of the estate, and which may survive long after it is extinguished, for the benefit of the covenantee. *Burtners v. Keran*, 24 Gratt. 68.

The modern covenants, now used in place of the ancient covenants, may affect the nature and quality of the thing sold, but are stipulations in the conveyance and not representations to induce the purchase of the thing sold. "These, as the name implies, are stipulations in a deed of conveyance." *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

"And at the present day it has often been urged in cases of apparent hardship that the modern covenant of warranty should do more than protect against 'the consequences incident upon a defective title,' and should, at least to some extent, comprise within itself the virtues of all the covenants for title. Yet in the absence of peculiar local construction, and, as has been suggested, with the exception of a somewhat peculiar effect given to its operation by way of estoppel or rebutter, such a construction is generally denied, and the covenant of warranty is held to be simply a covenant for quiet enjoyment; the only difference being that under the latter, as sometimes expressed, a recovery may be had where it would be denied under the former." *Rawle on Cov. for Tit.* § 114. Hence it is in substance and effect a guaranty against actual eviction and loss of title, constituting constructive eviction. *Cain v. Fisher (W. Va.)*, 50 S. E. 753; *Yancey v. Lewis*, 4 Hen. & M. 390; *Tabbs v. Binford*, 4

Leigh 132; *Rex v. Creel*, 22 W. Va. 373; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246; *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

It has been held, that a covenant that the grantor will warrant and defend the title against the claims of all persons whomsoever, is a personal covenant of warranty and not an old common-law warranty. *Rex v. Creel*, 22 W. Va. 373; *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899; *Tabb v. Binford*, 4 Leigh 132.

b. Kinds of Warranty.

Warranties of title in conveyances are either "general" or "special." *Allen v. Yeater*, 17 W. Va. 128.

"Usually if the vendor proposes to make himself responsible for the title, no matter in whom it may exist—or rather for the legal eviction of the grantee or bargainee—he inserts in the deed a covenant of general warranty. On the other hand, ordinarily, if the grantor or bargainor does not intend to make himself responsible for any title or right that at the time of the grant, may be in another, not conferred by the grantor or bargainor or in any manner occasioned by his act or failure to act—or for any eviction of the grantee or bargainee by reason of such title or right; yet, expressly or by implication, asserts that no such title has by him been conferred on another, or by his act or failure to act has been acquired by another, and proposes to make himself responsible if any such title has been so conferred or acquired; he inserts in the deed a covenant of special warranty." *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 409.

An executor, selling the land of his testator by virtue of a power given by the will, is not bound to convey with a covenant of general warranty, without an agreement to that effect, but only with special warranty against himself and all persons claiming under him, notwithstanding a written agree-

ment, after the sale, that he would make "a good and indefeasible title" to the purchaser; for such agreement is to be understood in reference to the terms of the sale. *Grantland v. Wight*, 5 Munf. 295. See also, *Pennington v. Hanby*, 4 Munf. 140. See the titles EXECUTORS AND ADMINISTRATORS; VENDOR AND PURCHASER.

"Warranty" Means General Warranty.—If the grantor would limit his liability, he must insert a covenant of special warranty. If he does not do so, but conveys with "warranty," the covenant must be regarded as a general warranty, as the deed is always construed most strongly against the grantor. *Allen v. Yeater*, 17 W. Va. 128.

But when a grantor, having title to part of a tract of land, but not in fact having title to the residue thereof, covenants to warrant generally a quantity not exceeding that to which he has title, and to warrant specially a quantity equal to or exceeding that to which he has not title, the covenant of general warranty will be construed as applicable to the land to which the covenantor has title, and the covenant of special warranty to the land to which he has not title. *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406.

Evidence to Show That Warranty Was Intended to Be Special.—Notwithstanding a clause of general warranty is in a deed for land, a court of equity will receive parol testimony to prove that such clause was contrary to the actual agreement, by which the land was to have been conveyed with special warranty only, the written agreement of the vendor to make the conveyance not being produced on the part of the vendor, to whom it was delivered. *Bumgardner v. Allen*, 6 Munf. 439.

c. Effect of Warranty.

(1) General Warranty.

(a) In General.

The covenant of general warranty

creates personal rights, wholly independent of the estate, and which may survive long after it is extinguished, for the benefit of the covenantee. *Burtner v. Keran*, 24 Gratt. 42.

(b) A Warranty of Title, Not Quantity.

A covenant of general warranty in a deed for land relates to title, not quantity, and does not warrant quantity. *Maxwell v. Wilson*, 54 W. Va. 495, 46 S. E. 349; *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028; *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 356; *Carter v. Tyler*, 1 Call 165.

And it is intended to defend only the estate conveyed, and can not enlarge that estate. Hence, when a deed conveys all the grantor's right, title and interest in the land, and contains, in general terms, a covenant of general warranty, the covenant is restricted and limited to the interest conveyed, and does not warrant the title to all the land described in the deed. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49.

In *Nelson v. Matthews*, 2 Hen. & M. 164, there was a sale of land with general warranty as containing a specified quantity more or less, when in fact the vendor's title papers call for less than the specified quantity; and it was held, that he was bound to make the difference to the purchaser. See the titles **MORE OR LESS; VENDOR AND PURCHASER.**

(c) Not to Be Treated as Covenant against Encumbrances.

A covenant of general warranty can never be treated as a covenant against encumbrances, else it would be broken as soon as made, if the incumbrance pre-existed the deed, and would become a mere right of action not assignable at law, and could not pass to the grantee of the land. *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Dickinson v. Hoomes*, 8 Gratt. 395; *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. 193; *Findlay v. Toncray*, 2 Rob. 374.

(d) Where Deed Passes No Estate.

When the deed containing the covenant of warranty passes no estate, it is considered a covenant in gross, to be enforced, and only enforced, by the covenantee or his representatives. The contract being made with him directly and in person, he takes the benefit of it by virtue of his contract, and not as incident to the estate. This rule of construing the warranty as a covenant in gross for the protection of the covenantee, where no estate passes, attains substantial justice, and effectuates the intention of the parties. It has been said that this rule is absolutely necessary in Virginia in order to prevent the gravest injustice and wrong, as in no other state has the government pursued to the same extent the policy of granting the same lands to successive grantees. *Burtner v. Keran*, 24 Gratt. 42.

Though an assignee can only take advantage of the covenant of warranty where an estate passes by the deed, yet, it is, in favor of the grantee, a covenant in gross, and binds the warrantor though no estate passes by the deed. *Burtner v. Keran*, 24 Gratt. 42; *Randolph v. Kinney*, 3 Rand. 394.

But in *Dickinson v. Hoomes*, 8 Gratt. 396, it was said: "That it is necessary that some estate should be vested in the covenantee to make a covenant of warranty effectual even between the contracting parties, is undoubtedly true, and results from the very nature of that covenant. The covenants of seisin and of right to convey, are effectual covenants; though no estate be vested in the covenantee; because they are broken, if at all, at the instant of their being made, without any further act or default of the covenantor. But the covenant of warranty and of quiet enjoyment, which are the same in effect, can only be broken by an eviction or ouster by title paramount. They, therefore, presuppose the possession of the estate by the covenantee, and of course can not be effectual

where no such possession has passed to him. A deed purporting to convey land which is in the adverse possession of a third person, will not only not support a covenant of warranty, but is altogether null and void. But if the grantor be in possession of the land at the time of the execution of the deed, his possession and his estate, whatever it may be, will pass to the grantee, and will support a covenant of warranty contained in the deed."

A purchase by one of the trustees from the grantor in the trust deed, and others supposed to be joint owners with him, of a part of the trust property, which the trustees had no authority to sell, and the conveyance to him, are wholly nugatory. And no relief can be granted to the purchaser in consequence of the loss of the land so purchased by him, upon the joint warranty in the deed of his vendors. The effect of such relief would be to make each, including one of his cestui que trust, liable for the consideration received by all, upon a contract utterly null and void, according to the rules of equity; and upon a warranty in a deed which ought to be wholly vacated. *Mundy v. Vawter*, 3 Gratt. 549.

Though an assignee can only take advantage of the covenant of warranty when an estate passes by the deed, yet it is, in favor of the grantee, a covenant in gross, and binds the warrantor though no estate passes by the deed. *Burtner v. Keran*, 24 Gratt. 43.

(e) Warranty in Deed Conveying Part of Incumbered Property.

When a conveyance of part of a judgment debtor's land covered by an encumbrance contains a covenant of warranty, such covenant is generally taken as prima facie evidence of a contract between the vendor and the vendee that the burden of the encumbrance should be borne exclusively by the residue of the lands. And perhaps where there is not a covenant of general warranty, the same rule should

prevail, unless there is evidence of an opposite design. But when there is a covenant of general warranty, if the vendee of a part of the lands covered by an encumbrance agrees in terms or by implication, to be answerable for the encumbrance debt in consideration of a corresponding deduction from the purchase money, the equity is reversed. *McClaskey v. O'Brien*, 16 W. Va. 791.

(f) Effect by Way of Estoppel.

See the title ESTOPPEL.

(2) Special Warranty.

(a) In General.

A covenant of special warranty is not intended to bind the covenantor to indemnify the covenant against eviction or damage by reason of any title or claim, not at the time of the execution of the covenant, in the covenantor or some person acquiring it from or through him. *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406.

If at the time of the execution of a grant or bargain and sale of land, with a covenant of special warranty, the title to the land be in a third person, not because of any act or default of the covenantor, and such person afterwards asserts and enforces the title against the covenantee, the covenant is not thereby broken, and the covenantor is in no way responsible. In such case, if the covenantor, himself afterwards acquires the title to the land, the title does not, by reason of the special warranty, vest in the covenantee, and the covenantor is not estopped to assert it or grant it to another. *Western Mining, etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406.

Where a husband conveys property to his wife, with warranty against the claims of himself and his heirs, his children, deriving title from their mother, will not be affected by the warranty. *Urquhart v. Clarke*, 2 Rand. 549.

(b) As Restricting Operation of Subsequent Covenants.

The covenant of warranty is generally considered the principal covenant in conveyances, and where this is special, and is followed in the same sentence by other covenants in more general language, the subsequent covenants will be restricted by the special covenant of warranty, unless a different intention is manifest. Thus, in a case where the covenants were that the grantors "would warrant specially the land thereby conveyed; that they have the right to convey the said land to the said grantees; that the said grantee shall have a quiet possession thereof, free from all encumbrances; that they will execute such further assurances of said land as may be requisite, and they have done no act to encumber the same," it was held that these covenants were restricted by the preceding covenants of special warranty. *Allemong v. Gray*, 92 Va. 216, 23 S. E. 298.

"The only case in the Virginia reports to which we have been referred as bearing upon this question is that of *Dickinson v. Hoomes*, 8 Gratt. 353. The decision there was that the limited covenant did not operate to restrain the subsequent unlimited covenant. The reasoning of the majority of the court is not given, and therefore the decision sheds very little light upon the subject under investigation." *Allemong v. Gray*, 92 Va. 222, 23 S. E. 298.

2. Covenant against Encumbrances.

Covenant to Pay Encumbrances Out of Fund Not an Assignment of Fund.—Where it appeared that the husband had conveyed land to the wife, with covenant that she was to hold it free from liability under a mortgage thereon, and that he would satisfy such mortgage out of the proceeds of another tract that he had previously sold, it was held, that the covenant in the deed did not operate as an assignment

of, or a lien on, such proceeds. *Evans v. Rice*, 96 Va. 50, 30 S. E. 463.

3. Covenant for Further Assurance.

The covenant in a deed for further assurance means a covenant to execute a deed for further and better assurance of the estate passed in the granting clause, and does not enlarge that estate. *Uhl v. Ohio River R. Co.*, 51 W. Va. 107, 41 S. E. 340.

The covenant for further assurance partakes something of the nature of an agreement to convey land, and it is a well-settled rule that if the title is defective and the defect can be cured by the grantor, a bill in equity for the specific performance of the covenant will lie. *Nelson v. Harwood*, 3 Call 394.

"Discussing this covenant Rawle on Covenant for Title, 104, says that the purchaser's right under it may depend on the estate conveyed, and that when the estate conveyed is a limited estate, this covenant will not require the conveyance of a greater estate. Thus, as the prior clause, the vital operative one, had only given a right of way, this clause only contemplated a further deed for that. Our Code, ch. 72, § 18, limits such a covenant to the land conveyed in the granting clause. This is consistent with the well-known law that a warranty is a dependent covenant, and applies only to the estate granted, and can not increase it." *Uhl v. Ohio River R. Co.*, 51 W. Va. 113, 41 S. E. 340.

It has been held, that a covenant in an agreement conveying a right of way to a railroad company, to execute a deed conveying the land in fee simple is a dependent covenant, and the estate or interest conveyed by the agreement being limited to the right of way, which is an incorporeal hereditament, the operation of said covenant is necessarily restricted and limited by the granting clause, and does not require the conveyance of a greater estate. *Uhl v. Ohio River R. Co.*, 51 W. Va. 107, 41 S. E. 340.

A grantor who has covenanted that he has the right to convey and that he will give further assurance of title, may, before his grantor has suffered any damages or been disturbed in his possession, and before suit for breach of his covenants, set up and supply a missing link in the chain of his title whereby his grantee is assured of his title and possession. *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

4. Covenants in Deed of Lease.

See the title LANDLORD AND TENANT.

VI. Breach.

A. WHAT CONSTITUTES.

1. Covenant of Seisin.

In General.—The covenant of seisin in a deed to convey land, where the grantor is in possession, if broken at all, is broken as soon as the deed is executed, for the covenant is a present one, and an action of covenant for damage resulting from the breach thereof may be maintained immediately. *Dickinson v. Hoomes*, 8 Gratt. 353, 397.

Dower Rights.—A covenant for seisin is not broken by an outstanding inchoate right of dower, as this does not affect the technical seisin of the grantee. *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

Encroachment on Street.—But a covenant of seisin is broken if the lot conveyed and part of the buildings thereon encroach on a public street, on account of which the grantee is obliged to pull down part of such buildings and repave the street, if the fact of such encroachment was not known to the grantee when the deed was made. *Trice v. Kayton*, 84 Va. 217, 4 S. E. 377.

2. Covenant of Right to Convey.

A covenant of the right to convey, which in most cases is equivalent to a covenant of seisin, is not broken by an outstanding inchoate right of dower

as this does not affect the technical seisin of the grantee. *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

A grantor who has covenanted that he has the right to convey, and that he will give further assurance of title, may, before his grantee has suffered any damage, or been disturbed in his possession, and before suit for breach of his covenants, set up and supply a missing link in the chain of his title whereby his grantee is assured of his title and possession. *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

3. Covenant for Quiet Enjoyment.

Possession under Paramount Title.

—Possession under a paramount title at the time of the conveyance amounts to a breach of a covenant for quiet enjoyment, being tantamount to an eviction. *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Sheffey v. Gardiner*, 79 Va. 313; *Haffey v. Birchetts*, 11 Leigh 90; *Ilsley v. Wilson*, 42 W. Va. 757, 26 S. E. 551; *Rex v. Creel*, 22 W. Va. 373.

Encroachment on Street.—A covenant for quiet enjoyment is broken if the lot conveyed and part of the building thereon encroach on a public street, on account of which the grantee is obliged to pull down part of the building and repave the street, if the fact of the encroachment was not known to the grantee when the deed was made. *Trice v. Kayton*, 84 Va. 217, 4 S. E. 377.

A lot in a city was sold and conveyed by metes and bounds with covenants for quiet enjoyment, free from encumbrances. Later, it was ascertained that a house and fence encroached upon the street. The city required their removal, and the purchaser removed them, and afterwards sued grantor for breach of the covenants. It was held, that the plaintiff was entitled to recover the encroachment of the house and fence upon the street, being a hidden fact, not in con-

temptation when the sale was made. *Trice v. Kayton*, 84 Va. 217, 4 S. E. 377, distinguishing *Jordan v. Eve*, 31 Gratt. 1.

4. Covenant against Encumbrances.

Outstanding Encumbrances in General.—A covenant against encumbrances is broken immediately upon the execution of the deed, if there be an existing encumbrance upon the property. *Rosenberger v. Keller*, 33 Gratt. 493.

The covenantee is not compelled to wait until he is ousted or disturbed in his possession. Where the encumbrance is in the nature of a mortgage, or other security for money, the covenantee may himself pay it off, and call upon the covenantor for compensation. But if the encumbrance has not been paid off, and no eviction or disturbance has taken place, the covenantee can recover nominal damages only; for he may never be disturbed in his possession. On the other hand, if the encumbrance be of such a character, that it can not be removed by the covenantee, as in the case of servitude or easement, he may sue on the covenant for damages; but if he has not been disturbed, or sustained some real injury from the easement, his damages will be merely nominal. *Rosenberger v. Keller*, 33 Gratt. 493.

Deed of Trust.—A covenant to convey title free of incumbrance is not broken by the existence of a deed of trust on the land conveyed, where the purchase money has not been paid to the vendor, and the deed of trust provides that the lien thereof shall be released upon receipt of the purchase money for any portion of the land sold. *Anderson v. Creston Land Co.*, 96 Va. 257, 31 S. E. 82.

Easement.—Where land is conveyed through which a public highway runs with a covenant against encumbrances, the public highway is not an encumbrance which is included in the covenant and for which the grantee is en-

titled to compensation. *Jordan v. Eve*, 31 Gratt. 1.

Where at the time of purchase of real estate there is a road or right of way used by the public, such as a public highway, or a road so long that there may be a presumption of a dedication to the public, the purchaser takes the land subject to such right, and he is not protected even by a deed of warranty against encumbrance. *Deacons v. Doyle*, 75 Va. 258; *Patton v. Quarrier*, 18 W. Va. 447.

Where the deed conveys land without reservation, the grantee takes all conveyed by the deed unencumbered, unless in some way notice is brought home to him that the land is sold, subject to the encumbrance of some easement or privilege in another person, or the public. *Deacons v. Doyle*, 75 Va. 258; *Patton v. Quarrier*, 18 W. Va. 258.

Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of such claim, he takes the property without the burden of any such claim, either from the grantor, or any person claiming under him. *Deacons v. Doyle*, 75 Va. 258; *Patton v. Quarrier*, 18 W. Va. 447.

A's administrator filed a bill against B to subject land to satisfy a judgment for purchase money of land conveyed by A to B with covenant against encumbrances. B answered, claiming that there were encumbrances on the land arising out of a previous division of a larger tract, when it was provided that the owners of other parcels of the land should have the right to use water out of a well on the lot sold to him, and also to pass along a lane through his land. This partition was made in 1833, and B had never heard of these encumbrances until since this suit was brought in 1875, and he asked that his answer might be taken as a cross bill, and his damages ascertained by a jury. Upon demurrer by the

plaintiff it was held, that the easements never having been used, and B not having suffered any injury from them, he is not entitled to relief in equity. *Rosenberger v. Keller*, 33 Gratt. 489.

5. Covenant of Warranty.

a. Necessity for Eviction.

In General.—Before an action will lie for breach of covenant of general warranty of title to land, there must be an ouster under a paramount title. *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Beale v. Seiveley*, 8 Leigh 658; *Rex v. Creel*, 22 W. Va. 375; *Burtner v. Keran*, 24 Gratt. 44; *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. 193.

Where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase money, unless he can show a defect of title respecting which the vendor was guilty of fraudulent misrepresentation or concealment, and which the vendee had at the time no means of discovering. *Beale v. Seiveley*, 8 Leigh 658.

Threats to oust the grantee from possession which led the grantee to pay the claimant such a sum as his claim was reasonably worth, of which the grantor had notice, and refused to interfere to prevent the payment does not constitute a breach of the covenant of warranty. *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414.

When Eviction Not Necessary.—A purchases of B sundry tracts of land. Some of the bonds executed for the purchase money are assigned, and judgments obtained thereon by the assignees. A files an injunction, alleging that the acknowledgment of the deed was invalid, and the certificate of the same as to the wife of B was insufficient. That a certain valuable tract of the number purchased, was

descended to the wife, and was her own property, and by reason of the insufficiency of the acknowledgment the deed conveyed the life estate of B only in that tract. That the wife had departed this life, leaving several heirs. That both vendor and vendee supposed the title to be good. The bill asks a rescission of the contract, or an abatement of the purchase money. The deed contains covenants of general warranty. The acknowledgment is clearly erroneous as to the wife. It was held, that the vendor and vendee supposed, at the time of the sale, that the latter would acquire a perfect legal title by the deed, and were mistaken only as to the legal effect of it; and that the vendor had it in his power, during the lifetime of his wife, to have remedied the defect in the title to the particular tract in controversy. Therefore, this does not belong to the class of cases where by reason of a patent defect in the title, and the consequent knowledge of the vendee, he, on account of such knowledge and acquiescence, would be entitled to no relief until eviction. *Renick v. Renick*, 5 W. Va. 285.

b. What Constitutes Eviction.

(1) In General.

In order to constitute a breach of a covenant of warranty, ouster in pais is sufficient. It does not require forcible dispossession; any actual entry and dispossession, adversarily and lawfully made under paramount title, will be sufficient. *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89.

Judicial eviction from land is not indispensable to a recovery upon a general warranty. Actual or constructive ouster will suffice. *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89.

It has been said that demand of possession under a paramount title may be yielded to without a loss of right under the warranty. *Harr v. Shaffer*, 52 W. Va. 210, 43 S. E. 89.

(2) Possession by Third Person under Paramount Title.

The rule as best supported by reason and authority would seem to be that where, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment, or of warranty, will be held to be broken, without any other act on the part of the grantee or the claimant; for the latter can do more towards the assertion of his title, and, as to the former, the law will compel no one to commit a trespass, in order to establish a lawful right in another action. *Rawle on Cov.* 154. *Sheffey v. Gardiner*, 79 Va. 318; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *McConanghey v. Bennett*, 50 W. Va. 172, 40 S. E. 540; *Cain v. Fisher (W. Va.)*, 50 S. E. 754; *Rex v. Creel*, 22 W. Va. 375; *Ilseley v. Wilson*, 42 W. Va. 757, 26 S. E. 551; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909.

In an action of covenant for breach of warranty, if it appears that a portion of the land conveyed with covenants of general warranty was in the adverse possession of a stranger at the date of the conveyance, and held by a paramount title, the grantee in such deed will be held to be evicted on the day of the execution of said deed, and the statute of limitations will commence to run against the action from that date, and will be barred in ten years thereafter. *Ilseley v. Wilson*, 42 W. Va. 757, 26 S. E. 551.

"There are, undoubtedly, authorities which hold that there can be no breach of warranty of title, or warranty for quiet enjoyment (and there seems to be no difference between these warranties upon this point), until there has been an actual eviction, and this view has received some slight support from the dicta of certain of the judges in this state. *Dickinson v. Hoome*, 8 Gratt. 353; *Findley v. Toncray*, 2 Rob. 374. But such is clearly not now the accepted doctrine, nor is it supported

by the weight of reason or authority, as a brief reference to a few of the many cases, elsewhere decided, in which this subject has come under review, will show." *Sheffey v. Gardiner*, 79 Va. 315.

In *Haffey v. Birchetts*, 1 Leigh 88, the court said: "Moreover in the case of an incumbrance on the land anterior to that in question the covenant is broken, so soon as the bargainee has been turned out of possession by the first incumbrancer, or even so soon as he has been compelled in invitum to pay off the first incumbrance. There is no necessity for him to involve himself in a law suit to defend himself against a title, which he is satisfied must prevail. For the covenant to warrant and defend implies a covenant for quiet enjoyment, and it is broken by any lawful disturbance of a third person." *Rex v. Creel*, 22 W. Va. 375.

The fact that the deed recites that "immediate possession is delivered," and declaration in an action for breach of covenant avers no eviction, does not estop the grantee to deny that he got possession. *Sheffey v. Gardiner*, 79 Va. 313.

(3) Outstanding Incumbrances.

(a) In General.

Though a covenant of warranty is not a covenant against incumbrances, an incumbrance which eventuates in an eviction of the covenantee works a breach of such covenant. *Cain v. Fisher (W. Va.)*, 50 S. E. 752.

But where a vendor conveys with covenants of general warranty, and adverse titles are set up which the vendor buys in, it is no objection that the conveyances for such titles are made to the vendor, in a suit by the vendee claiming an abatement of the purchase money for defective titles. *Thompson v. Edwards*, 3 W. Va. 659.

(b) Deeds of Trust.

Where there is a conveyance with general warranty, and the land is at

the time under a prior deed of trust given by the grantor, under which the land is sold away from the covenantee in possession, who then quits possession, such sale under the paramount claim is a breach of such warranty. *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89.

Where the maker of a note conveyed land to trustees as security for the note, and to indemnify his accommodation indorsers thereon, and therein covenanted for himself and heirs with the trustees and the holder of the note, that he was possessed of the absolute estate in the land and that he would warrant and defend the same against all persons, and the land was afterwards sold under a prior deed of trust after the death of the grantee, it was held, that the covenant in the second deed was thereby broken. *Haffey v. Birchetts*, 11 Leigh 83; *Harr v. Shaffer*, 52 W. Va. 211, 43 S. E. 89.

Where a person buys land and obtains from his vendor a deed therefor with covenants of general warranty, and the land, at the time it was so purchased and conveyed, was encumbered with a deed of trust executed by his vendor, such purchaser has the right to have the unpaid purchase money remaining in his hands applied in discharge of said trust debt, if the same be not otherwise satisfied. *Douglas v. Rutherford*, 25 W. Va. 708.

Where a tract of land is conveyed to a vendee with covenants of general warranty, and said vendee executes his bonds to the vendor for the purchase money, and said purchaser is compelled to pay off trust liens which had been executed by the vendor thereon in order to obtain a clear title therefor, said vendee is entitled to substitution to the rights of the parties who held said liens, and in a suit by the vendor to recover said purchase money may set off the amounts so paid against the claim of his vendor for purchase money. *Hoke v. Jones*, 33 W. Va. 501, 10 S. E. 775.

(c) Mortgages.

Nor is the existence of a mortgage a breach of warranty of title if the covenantee has not been evicted or kept out of possession by parties in possession under a better title. *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. 193.

(d) Claim for Taxes.

Where land has been conveyed by deed with a covenant of special warranty, a subsequent sale thereof for nonpayment of taxes charged thereon against the grantor prior to the conveyance, and while he owned the land, constitutes a breach of the covenant of warranty. *Cain v. Fisher (W. Va.)*, 50 S. E. 752.

Failure of the grantee in such case to prevent the sale by payment of the taxes or redemption of the land from delinquency and sale, neither bars his action on the covenant nor mitigates the damages. *Cain v. Fisher (W. Va.)*, 50 S. E. 752.

(e) Easements.

When land lying on a river is conveyed by deed with general warranty, calling for low water mark on the river as one of its boundaries, the warranty is not broken by reason of the fact that the public owned an easement thereon, and the state, or one of its municipal corporations, has perpetually enjoined the purchaser from building a walk or private landing on the land below highwater mark, without first obtaining a license to do so. *Barre v. Flemings*, 29 W. Va. 314, 1 S. E. 731.

c. Estoppel to Show Eviction.

It has been held, that because a deed recites that "immediate possession is delivered," and declaration avers no eviction, the covenantee is not thereby estopped to deny that he got possession. *Sheffey v. Gardiner*, 79 Va. 313.

B. DAMAGES FOR BREACH.

1. Covenant of Warranty.

a. General Rule.

It may be laid down as the general

rule that the proper measure of damages for the breach of a covenant of warranty is the amount of the purchase money with interest from the date of the actual eviction, the costs incurred in defending the title, and such damages as the vendee may have paid, or may be shown to be clearly liable to pay, to the person who evicted him. *Threlkeld v. Fitzhugh*, 2 Leigh 451; *Jackson v. Turner*, 5 Leigh 119; *Click v. Green*, 77 Va. 827; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646; *Stout v. Jackson*, 2 Rand. 132; *Nelson v. Matthews*, 2 Hen. & M. 164, 3 Am. Dec. 620; *Humphreys v. McClenachan*, 1 Munf. 493; *Haffey v. Birchetts*, 11 Leigh 83; *Sheffey v. Gardiner*, 79 Va. 313; *Crenshaw v. Smith*, 5 Munf. 415; *Abernathy v. Phillips*, 82 Va. 773, 1 S. E. 113; *Tod v. Baylor*, 4 Leigh 509; *Tabb v. Binford*, 4 Leigh 143; *Thompson v. Guthrie*, 9 Leigh 106; *Norman v. Cunningham*, 5 Gratt. 75; *Roller v. Effinger*, 88 Va. 641, 14 S. E. 347; *Lowther v. Com.*, 1 Hen. & M. 202; *Wilson v. Spencer*, 11 Leigh 278; *Moreland v. Metz*, 24 W. Va. 138; *Butcher v. Peterson*, 26 W. Va. 454; *Smith v. Parsons*, 33 W. Va. 646, 11 S. E. 69.

b. Purchase Money.

Purchase Price, Not Value at Time of Eviction, Governs.—The measure of damages to be recovered against the vendor of real estate on his covenant of warranty, where there has been an eviction, is not the value of the land at the time of the eviction, but the amount of the purchase money with interest. *Jackson v. Turner*, 5 Leigh 127; *Stout v. Jackson*, 2 Rand. 132; *Wilson v. Spencer*, 11 Leigh 278; *Lowther v. Com.*, 1 Hen. & M. 202; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113.

The best standard of value is, in general, the price agreed upon at the time of the sale. *Stout v. Jackson*, 2 Rand. 132.

Where a freehold estate has been

~~conveyed with warranty~~, and warrantee afterwards evicted, the proper measure of damages is the value of the land at the time of the warranty, and not at the time of the eviction. *Stout v. Jackson*, 2 Rand. 132.

Where a purchaser buys land with notice of infirmity of the title, and, after improving it, sells it at an increased price, and the purchaser from him is evicted as to one-fourth thereof, the first purchaser can recover of his vendor only one-fourth of the price paid by him, while he must pay to his purchaser one-fourth of the price received from him. *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2. See also, *Jackson v. Turner*, 5 Leigh 119.

Where Land Is Worth More than Consideration Given for It.—The fact that the land was worth more than the consideration paid for it, can not be considered in estimating the damage to which the vendee is entitled. *Stout v. Jackson*, 2 Rand. 132.

In *Threlkeld v. Fitzhugh*, 2 Leigh 451, the purchase money with interest, etc., was held to give the proper measure of damages in the particular case, but the opinions of the judges leave it still questionable, whether the actual value of the land at the time of sale, is proved to be greater than the purchase money, with interest, etc., may not be justly demanded. See also, *Moreland v. Metz*, 24 W. Va. 137.

Increase in Value Subsequent to Purchase Can Not Be Considered.—The fact that the land has increased in value since the conveyance, either by reason of improvements erected upon it or on account of its natural appreciation, can not be considered in estimating the damages for the breach of the covenant, but the grantor will be limited to the consideration paid with interest. *Stout v. Jackson*, 2 Rand. 132.

The purchaser can only recover rents and profits of the vendor, and not the value of any improvements he may have put upon the land. *Stout v. Jackson*, 2 Rand. 132.

c. Damages Paid to Person Evicting Vendee.

In an action by the vendee for damages for the breach of a covenant of warranty the plaintiff is entitled to recover such damages as he may have paid to the person evicting him, or which he may be liable to pay. *Jackson v. Turner*, 5 Leigh 127; *Threlkeld v. Fitzhugh*, 2 Leigh 451.

d. Cost of Defending Title.

In General.—The plaintiff is entitled to recover the costs incurred in defending the title. *Jackson v. Turner*, 5 Leigh 127; *Lowther v. Com.*, 1 Hen. & M. 202; *Threlkeld v. Fitzhugh*, 2 Leigh 451; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2.

When Covenantor Employs Counsel to Defend Title.—Where the vendee is evicted for failure of title, which the vendor employs counsel to defend, the vendee can not recover from the vendor his counsel fees in addition to the price paid for the land and interest from the date of the eviction. *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2.

Cost of Defending Baseless Claim.—Though a sale of land be made with covenant of general warranty, yet the purchaser can not claim against the vendor for costs expended by the purchaser in defense of a suit by an adverse claim of the land, which suit results in favor of the purchaser, and the title which he acquired by his purchase. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68.

"A covenant of warranty is not a guaranty against mere groundless claims, not a guaranty against actions, but against eviction and loss of title by reason of a paramount title in some other person. Hence, it was held, in *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68, that money expended in defending a baseless action against the covenantee was not recoverable as damages for a breach of warranty." *Cain v. Fisher* (W. Va.), 50 S. E. 755.

e. Interest.

From What Time Interest Runs.—

In an action for the breach of a covenant of warranty by an eviction the plaintiff is entitled to recover interest upon the purchase money from the date of the actual eviction, not from the day of sale. *Jackson v. Turner*, 5 Leigh 127; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Roller v. Effinger*, 88 Va. 641, 14 S. E. 337.

f. Recovery for Delay in Giving Possession.

And if a vendor sells land with warranty of title, and at the time the land has been rented by his agent, without his direction or knowledge, and the vendee is thereby delayed in getting possession, the measure of damages is the fair rental value for the lost time, and prima facie the rent agreed to be paid by the tenant is the fair rental value. *Moreland v. Metz*, 24 W. Va. 119.

In an action of covenant for the failure to deliver to the plaintiff possession of a mill which he had rented of the defendant, the plaintiff not having sustained any special damage, he is entitled to recover only the difference between the rent contracted to be paid, and a fair rent for the time when it should have been delivered. A conjectural estimate of the profits which might have been made, is no legitimate basis upon which to fix the damages. *Newbrough v. Walker*, 8 Gratt. 16.

g. Where Vendee Buys up Outstanding Title.

If the vendee buys up a better title than that of vendor, and the latter is guilty of no fraud, he can only be compelled to refund the amount paid for better title. The vendee can not disavow the vendor's title. *Roller v. Effinger*, 88 Va. 641, 14 S. E. 337.

R., with knowledge of outstanding claims, buys real estate upon contract for conveyance with special warranty of title, assuming to pay a vendor's

lien thereon. Afterwards, at a sale under a decree for division among the heirs-at-law, in order to perfect his title, he purchases said outstanding claims. It was held, that he is entitled to deduct, from the price agreed, the amount he actually paid at the judicial sale, and no more. *Roller v. Effinger*, 88 Va. 641, 14 S. E. 347.

A vendee entering before a conveyance is perfected, is affected with an equity in favor of his vendor; and if he purchases an adverse title, he can not set it up against his vendor, who is entitled to have it upon reimbursing purchaser. *Roller v. Effinger*, 88 Va. 641, 14 S. E. 347.

h. Where Title Fails only as to Part of Tract.

Where land is conveyed with general warranty of title, and it is found that the title to part of it is defective, the vendee is entitled to compensation for that part, according to its relative value to the whole tract. *Clarke v. Hardgrove*, 7 Gratt. 399; *Butcher v. Peterson*, 26 W. Va. 454; *Heavner v. Morgan*, 30 W. Va. 343, 4 S. E. 411; *Renick v. Renick*, 5 W. Va. 291; *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 880; *Humphreys v. M'Clenachan*, 1 Munf. 493; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2.

The measure of compensation for the land lost where the vendee is evicted from a portion of the tract, in those cases in which the vendor has acted in good faith believing that he had the right to sell the land, is such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. *Butcher v. Peterson*, 26 W. Va. 447; *Humphreys v. M'Clenachan*, 1 Munf. 493; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2.

In *Humphreys v. M'Clenachan*, 1 Munf. 493, it was held, that in case of a deficiency, the value at the time of the contract gives the rule, of which the purchase money is the standard,

where it does not appear that the actual value was different.

On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor (in whom the legal title remains), claiming compensation for a deficiency, credits for payments and a conveyance; the court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser (though not parties to the suit), if the balance of the purchase money be paid on or before a certain day; and if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs. *Humphreys v. M'Clenachan*, 1 Munf. 493.

i. Covenant in Mortgages or Security Deeds.

In the case of a sale, as seen above, the measure of damages is the value at the time of the sale, and the test of this value is the purchase money. But in case of an incumbrance, this principle can have no application, for price is not a subject of adjustment in a treaty for a security. Adequacy alone is inquired into. The true measure of damages, therefore, in such case, where there is an eviction by superior title, is the value of the mortgaged or trust subject at the time of eviction, provided it does not exceed the amount of the debt secured; for it is obvious that the creditor can never be injured to a greater amount than that. *Haffey v. Birchetts*, 11 Leigh 83.

2. Covenant of Seisin.

The covenant of seisin, if broken at all, is broken as soon as it is made, but the damages to be recovered therefor are not necessarily the consideration paid, but are to be measured by the actual loss sustained, and if, before any injury sustained, the covenantor perfects his title by inurement,

the recovery for the breach of the covenant will be limited to nominal damages only. *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

The damages to be recovered are measured by the actual loss at the time sustained. If the purchaser has bought in the adverse right, the measure of his damage is the sum paid. If he has been deprived of the whole subject of his bargain, or of a part of it, they are measured by the whole consideration in the one case, a corresponding part in the other. *Building, etc., Co. v. Fray*, 90 Va. 565, 32 S. E. 58.

3. Covenant to Keep Premises in Repair.

The measure of the lessee's liability for breach of covenant to keep the premises in repair is not what the lessor may think proper to expend, but what is necessarily expended in restoring the property to its former condition, or such sum as will be sufficient to compensate the lessor for the damage and loss sustained by the injury to the property. *Moses v. Old Dominion, etc., Co.*, 75 Va. 95.

One breach of a covenant to maintain and repair dams to supply water for a mill will not be a total breach during its whole term and abrogate the contract and entitle the covenantee to recover permanent damages, past and future, in one action. *Hurxthal v. Boom Co.*, 53 W. Va. 88, 44 S. E. 520. See the titles LANDLORD AND TENANT; MILLS AND MILL DAMS.

C. ASSIGNMENT OF RIGHT OF ACTION FOR BREACH.

A claim for damages for breach of warranty may be assigned, in whole or in part. *McConaughey v. Bennett*, 50 W. Va. 172, 40 S. E. 540.

Any language or act which makes an appropriation of a debt, fund or chose in action amounts to an equitable assignment thereof. *McConaughey v. Bennett*, 50 W. Va. 173, 40 S. E. 540.

VII. Liability on Covenants.

See ante, "Parties to Covenants," III.

Personal Representatives of Covenantor.—The personal representatives of a covenantor in a covenant for quiet enjoyment, are liable for the breach of the covenant, although not expressly bound by the covenant. *Harrison v. Sampson*, 2 Wash. 155; *McConaughey v. Bennett*, 50 W. Va. 173, 40 S. E. 540.

Under the West Virginia statutes an action can not be maintained at law against the heirs, the remedy being in equity. *Rex v. Creel*, 22 W. Va. 373.

Where there was a devise to A, with a limitation over upon his dying without issue at his death, to his brother B, if he should survive him, or his representatives, and B died in the lifetime of A, and sold and conveyed the land to C; and B, though he did not convey the land, was a party to the deed, and A and B covenanted as follows: That the said A for himself and his heirs, and the said B, as contingent devisee under the will by which said land was devised to A, do hereby covenant and agree to and with the said C, that, they will warrant and defend the fee simple estate, etc., to said land, to him and his heirs forever, against the claim of themselves and their heirs, and the claim of any person claiming under them by virtue of the will aforesaid, and do relinquish and fully confirm to said C, all the right they or their heirs now have or may hereafter have to said land or any part thereof, to him and his heirs, free from the claim of the said A and B and their heirs, and of all other persons in the whole world. It was held, that this covenant of B extended to the claim of his children to the land, though they claim not as his heirs, but as devisees under the will of the testator. *Dickinson v. Hoomes*, 8 Gratt. 353.

In *Dickinson v. Hoomes*, 8 Gratt. 353, it was held, that the heirs of a

covenantor having inherited from him lands in Kentucky, and as by the laws of that state, lands descended may be subjected to the payment of the debts of the ancestor, and the heir is bound by such a covenant of warranty by the ancestor, a court of equity in the state of Virginia might compel the heirs residing within the jurisdiction, to account for any lands in Kentucky descended to them as his heirs, as a trust subject for the payment of his debts. But the heirs were held bound to account for only so much of the Kentucky lands as they had actually gotten or may get possession of, with the rents and profits derived therefrom, deducting the cost and expense of recovering the land.

But the heirs of a wife are not barred from claiming the land to which she was entitled, by the collateral warranty of the husband, who was their father, in his deeds conveying it to the purchasers from him. *Norman v. Cunningham*, 5 Gratt. 63.

Assignee of Covenantee.—An assignee of a lease is charged with notice of its covenants, and takes the estate of his assignor cum onere, and each successive assignee of a lease, because of privity of estate, is liable upon covenants maturing and broken while the title is held by him. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

In general the assignee of a term of years is not liable for the breach of a covenant in a lease, before assignment; but if the assignee, by express covenant with the assignor bind himself to pay the rent, and perform all the covenants contained in the lease required to be performed on the part of the lessee, such a covenant binds the assignee not only to fulfill the covenants during his own time, but makes him liable for breach before his time. *Farmers' Bank v. Mutual Assurance Soc.*, 4 Leigh 69.

And a mortgagee of a term of years, though he never in fact enters into

possession, is, like any other purchaser, bound to perform the covenants in the lease, after the date of the mortgage. *Farmers' Bank v. Mutual Assurance Soc.*, 4 Leigh 69.

Discharge in Bankruptcy as a Release of Liability.—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel, because the covenant runs with the land. *Gregory v. Peoples*, 80 Va. 355. See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

VIII. Actions.

A. ACTIONS AT LAW.

1. Jurisdiction.

In General.—The remedy for the vendee for loss of land paid for by him and conveyed to him by vendor with warranty of title is by action at law. *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113.

Action by Assignee of Right of Action for Breach of Warranty.—If the assignee of a right of action for the breach of a covenant of warranty takes the entire claim, his remedy is by an action of covenant, and he has an adequate remedy at law, and can not sue therefor in a court of equity. It is otherwise, however, where only part of the claim is assigned. *McConaughy v. Bennett*, 50 W. Va. 173, 40 S. E. 540.

2. Limitation of Action.

On a covenant of warranty as to the kind and character of trees on land conveyed, implied from words of description in the deed, a suit may be maintained for a deficiency in the number of trees conveyed within ten years from the date thereof. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

In an action of covenant for breach of warranty, if it appears that a portion of the land conveyed with covenants of general warranty was in the adverse possession of a stranger at the date of the conveyance, and held by

a paramount title, the grantee in such deed will be held to be evicted on the day of the execution of said deed, and the statute of limitations will commence to run against the action from that date, and will be barred in ten years thereafter. *Ilsley v. Wilson*, 42 W. Va. 757, 26 S. E. 551. See the title **LIMITATION OF ACTIONS**.

3. Form of Action.

a. Assumpsit.

An action of assumpsit may be brought upon covenants contained in a lease to pay the rents, taxes and assessments thereon when legally demandable, and such action is not barred in five years, as against the lessee who has not signed the lease. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696. See the title **ASSUMPSIT**, vol. 2, p. 1.

b. Covenant.

An action of covenant may be maintained for the breach of a covenant of warranty in a deed. *Dickinson v. Hoomes*, 8 Gratt. 353; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909. See the title **COVENANT, ACTION OF**, ante, p. 731.

c. Ejectment or Unlawful Entry and Detainer.

Where a lease contains a clause of forfeiture for breach to pay rent, or for the breach of any other covenant, the deed containing no clause of re-entry, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture, but the actions of ejectment and unlawful detainer afford additional remedies. Thus, where a tenant fails to comply with the covenant to pay rent, and the landlord demands payment at the time, place, and in the manner prescribed by the common law, and payment is not made in proper time, it is optional with him to either enter upon the leased premises or maintain an action against the lessee for the recovery of the same. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754;

Bowyer v. Seymour, 13 W. Va. 12. See the titles **EJECTMENT**; **FORCIBLE ENTRY AND DETAINER**.

4. Parties.

a. Parties Plaintiff.

In General.—A person is not entitled to recover in an action for breach of warranty, when according to the terms of the deed he was not entitled to the possession of the land, but was only empowered to sell and convey under certain circumstances. *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. 193.

Grantee Who Conveys before Breach.—One who has parted with the title conveyed by the deed can not maintain an action for the breach of covenants of warranty and for quiet enjoyment contained in the deed which are alleged to have been broken, but in such case there must be an eviction in order to constitute a breach of the covenant. *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Sheffey v. Gardiner*, 79 Va. 313.

Assignee of Right of Action for Breach.—Where a covenant of warranty is broken as soon as it is made, owing to there being an outstanding title, the covenantee may assign his right of action for damages, and, in such case, the assignee may maintain an action thereon. *McConaughey v. Bennett*, 50 W. Va. 172, 40 S. E. 540.

Executor of Covenant.—"If a covenant of warranty is broken in the lifetime of the covenantee, or one holding the covenant, his executor must sue upon it, and not his heirs." *McConaughey v. Bennett*, 50 W. Va. 186, 40 N. E. 540.

Heirs and devisees of Covenantee.—"The heirs or devisees of the grantee may maintain a joint action upon a covenant of warranty." *McConaughey v. Bennett*, 50 W. Va. 186, 40 S. E. 540.

But this can only be done when the breach occurs after the death of the

ancestor, and possibly where, although the breach occurred in the lifetime of the ancestor, the damage accrued to the heir. *McConaughy v. Bennett*, 50 W. Va. 186, 40 S. E. 540.

Right of Assignee of Covenant Real to Sue in Name of Assignor.—"Where the covenants entered into with a purchaser are covenants in gross, and he afterwards sells, the purchaser from him, being entitled to the benefit of the former covenants, can compel him to allow his name to be used for the purpose of enforcing the covenants." *Dickinson v. Hoomes*, 8 Gratt. 405.

b. Parties Defendant.

Executors or Administrators of Covenantor.—An action of covenant for the breach of a covenant for quiet enjoyment, will lie against executors, though not expressly bound. *Harrison v. Sampson*, 2 Wash. 155.

"The only question existing in the cause is, whether this action will lie against the executors, they not being specially bound in the covenant, and therefore it is supposed, that this being a covenant real, the action will only lie against the heir. I contend that though the heir is not bound unless he be particularly named, yet in all cases the executors are, whether the covenant respect real estate, or be purely personal." *Harrison v. Sampson*, 2 Wash. 155.

Where, in a deed of bargain and sale, the grantor covenants for himself and his heirs, to and with the grantee, that he will warrant and forever defend to the said grantee, his heirs and assigns, the title to the said parcels of land against all persons whatever, this is a mere personal covenant of warranty, for the breach of which, by eviction under judgment in ejectment, an action of covenant will lie against the bargainor's administrator. *Tabb v. Binford*, 4 Leigh 132, 26 Am. Dec. 317; *Rex v. Creel*, 22 W. Va. 376; *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 901.

When a covenantor, before suit brought, has died testate, and the relief sought, in a suit by an assignee of the right of action for breach is only the establishment of the claim against the estate and the bill does not pray for a sale of the testator's real estate, marshaling of the assets and settlement of the estate, the only necessary and proper parties defendant are the executors of the will. *McConaughy v. Bennett*, 50 W. Va. 173, 40 S. E. 540.

Heirs of Covenantor.—At common law, where the ancestor made a covenant of general warranty expressly binding "his heirs," the heir might be sued for breach of such covenant; but the judgment would have to be satisfied out of the lands descended to him. *Rex v. Creel*, 22 W. Va. 373; *Dickinson v. Hoomes*, 8 Gratt. 353.

But under ch. 86, W. Va. Code, an action can not be maintained at law against the heirs, but a suit in equity is the proper remedy. *Rex v. Creel*, 22 W. Va. 373.

5. Declaration.

In General.—In declaring on a covenant, it is sufficient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover. *Buster v. Wallace*, 4 Hen. & M. 82.

Where the declaration in covenant set forth, that the defendant, by an indenture, did rent and lease to the plaintiff a tract of land, to have and to hold the same so long as he, the plaintiff, should live; and averred, as a breach of the covenant, that the defendant entered upon the possession of the plaintiff, and expelled and removed him, it was held, on demurrer, that no covenant for quiet enjoyment was to be implied from the words set forth, and that the declaration was demurrable. *Black v. Gilmore*, 9 Leigh 446.

Action by Heir for Breach of Covenants Made to Ancestor.—In an action by the heir for breach of cove-

nants contained in a conveyance of lands to the ancestor, if the declaration avers the entry, seisen and death of the ancestor, "and that the lands, covenants and writings aforesaid have descended on plaintiff," without setting forth the manner in which he derived his title, it is good after verdict. *Woodford v. Pendleton*, 1 Hen. & M. 303.

Performance of Conditions Precedent.—In an action by a lessee against the lessor to recover damages for a refusal to renew the lease, the lessee must aver and prove performance on his part, at the time and in the manner stipulated for, of all that was required of him by the terms of the lease, as a condition of such renewal, or give some valid excuse for his nonperformance. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4. See the title LANDLORD AND TENANT.

Assigning Breach—In General.—In assigning a breach it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. If, therefore, the declaration charge a covenant to sell to the plaintiff a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had no land at all" in the place specified. *Buster v. Wallace*, 4 Hen. & M. 82.

If a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined on the plea that the defendant had not broken the covenant. *Buster v. Wallace*, 4 Hen. & M. 82.

Averment of Eviction in Action for Breach of Warranty.—In an action for a breach of covenant of general warranty the declaration must aver that the plaintiff was evicted or kept out of possession by one in possession under paramount title; otherwise, it is demurrable. *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414.

"It being then well settled that it is not necessary for the covenantee, when the premises are in the actual possession of a third party holding by a paramount title at the time of the execution of the conveyance, to prove either an actual entry or eviction, it can not be necessary that the declaration should contain an averment of either of these facts. And, accordingly, we find it stated that there is in 5 Wentworth's Pl. 53, a form of declaration in an action of covenant where the breach assigned is that the plaintiff was hindered and prevented from entering, and was kept out of possession." *Sheffey v. Gardiner*, 79 Va. 319.

Thus where a declaration in covenant states that in consequence of a prior lien and incumbrance upon the tract of land in question, the "plaintiffs have been disturbed in and evicted from the possession and enjoyment of said tract of land," and there is no averment that the plaintiffs were kept out of possession of the premises by any person or persons in possession under a paramount title, or that they were evicted by judgment of eviction followed by ouster, it is demurrable. *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909.

In action of covenant plaintiff declared that defendant had for value conveyed to him certain land with general warranty, and delivered possession thereof; that plaintiff had in turn conveyed and delivered same in like manner to third party; that a claimant of said land, under paramount title, had threatened to oust him and his grantee from possession; that to prevent such ouster he had been obliged to pay to claimant such a sum as his claim was reasonably worth; that defendant had had notice of all thereof, but had refused to interfere to prevent such ouster, and that thereby he, the defendant, had broken said covenant of general warranty, and plaintiff demanded \$1,000 damages; to this declaration defendant demurred,

and the demurrer was sustained; it was held, no error because an action for breach of covenant can not be maintained where no ouster is alleged. *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414.

6. Plea.

In General.—In covenant, by the common law, there is no general issue or plea, which amounts to a general traverse of the whole declaration, and of course obliges the plaintiff to prove the whole; but the evidence is strictly confined to the particular issue, raised by a special plea. *Greenleaf Ev.*, § 233. *Riddle v. Core*, 21 W. Va. 532.

Effect of Failure to Plead Non Est Factum.—"If the deed is not put in issue by the plea of non est factum, the defendant by the rules of the common law is understood to admit so much of the deed as is spread upon the record. *Greenleaf Ev.*, § 234." *Riddle v. Core*, 21 W. Va. 532.

Where in an action of covenant for breach of warranty of title the declaration sets out the making of the deed and the general warranty of title therein contained, and no plea of non est factum is pleaded, but the only pleas are "covenants performed" and covenants not broken, the making of the deed and the warranty are admitted by the pleadings, and no proof thereof is necessary. *Riddle v. Core*, 21 W. Va. 530.

Performance of Covenants.—The general rule is that the defendant must plead specially the performance of the covenant when he desires to rely upon the same as a defense to the action, and must, in general, show specially the time and manner of performance. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313; *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 413, 23 S. E. 737, 739.

In an action of covenant, for covenant broken for rent due, the defendant should not be allowed to prove, and have allowed against such debt, any payment which is not so described

in his plea, as in an account filed therewith, as to give the plaintiff notice of its nature; and, if such evidence is admitted on the general plea of covenants performed, to plaintiff's injury, and against his objection, it is sufficient ground for setting aside the verdict and awarding a new trial on motion of plaintiff. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313.

By agreement under seal between three parties, A, B and C, A assumes to pay B a certain sum of money in land, out of a tract which D was bound to convey to him and warranted the land to be clear of all claims for taxes; B binds himself to procure a proper conveyance of the said quantity of the tract to C from D; and A engages to procure from D a conveyance of the whole tract to C. To a declaration by C against B, assigning breach of B's covenant aforesaid, defendant pleaded that the plaintiff took on himself to procure, and did procure from A an order on D for a conveyance of the whole tract to the plaintiff, under which order the plaintiff procured a conveyance to himself to be made and delivered by D of the whole tract; plaintiff replies that D's wife was living at the time of the said conveyance and she survived him, and never relinquished to the plaintiff her dower interest in the land, nor did D ever execute to the plaintiff any deed containing any covenant that the land was free from all claims for taxes, nor did the plaintiff ever accept from D any conveyance of the land in satisfaction of defendant's covenant. On general demurrer to the replication, it was held, that the plea was sufficient, and the replication naught. *Fairfax v. Lewis*, 11 Leigh 233.

Plea of Payment in an Action for Breach of Covenant for Rent.—Where the declaration is in covenant for condition broken for rent, the defendant must, in order to be able to show payment, plead the payment specially, or the general issue with a brief state-

ment of the facts. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313.

Plea Setting Up Fraud in Procuring Deed.—Where a deed is procured by fraudulent misrepresentations, the defense can only be made at law, in the mode provided by the statute, Va. Code, 1860, ch. 172, § 5; and the defendant should file a special plea averring the fraud, or special circumstances which entitle him to relief in equity. And the facts should be set forth with sufficient precision and certainty to apprise the plaintiff of the character of the defense intended to be made; and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief. *Burners v. Keran*, 24 Gratt. 43.

Defects in Plea Cured by Verdict.—In an action against the heir on a covenant entered into by the ancestor, if a breach is assigned to have been committed both by the ancestor and the defendant; the defendant pleads that "he has not broken the covenant," without saying any thing as to the breach by the ancestor; and the jury finds for the plaintiff that "the defendant has broken the covenant;" judgment ought not to be arrested, the defect being cured by the act of joinders. *Woodford v. Pendleton*, 1 Hen. & M. 303. See the title PLEADING.

7. Evidence.

a. Burden of Proof.

When the vendee sues upon the covenant of warranty, the burden of proving an eviction, or what is equivalent to it, under a paramount title is upon the plaintiff. *Burners v. Keran*, 24 Gratt. 44; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Beale v. Seiveley*, 8 Leigh 658; *Rex v. Creel*, 22 W. Va. 375.

b. Admissibility.

Recovery in Ejectment as Evidence of Breach of Warranty.—Eviction for its equivalent may be established by

the production of the record of the recovery in ejectment or other real action, by the adverse claimant, in connection with evidence of a change of possession. If the vendee has given the vendor proper notice of the pendency of the ejectment, and required him to defend it, in the action upon the covenant, the judgment in ejectment is evidence, not only of the recovery, but of the existence of a valid paramount title. The vendee is, however, not compelled to give notice. When he omits it, the vendor is not regarded as a party or privy to the adverse proceeding; and as against him, the record can not be relied on to show a paramount title. It is, however, *prima facie* evidence of a recovery and of the eviction; and vendee being then required to establish, by independent evidence, that the recovery was by lawful right and paramount title. *Rayle on Covenants for Title*, 225 to 232. *Burners v. Keran*, 24 Gratt. 61.

"The plaintiff might have given defendants notice of the Illinois suit; it would have been better that he should have given it, but it was not essential to the maintenance of this action, or to the admissibility of the record as evidence. Having failed to do so, the record is evidence of a recovery and eviction only, open to examination by defendants for fraud or collusion and want of jurisdiction in the court." *Burners v. Keran*, 24 Gratt. 62.

Evidence of Acts Resulting in Breach.—Where a breach of covenant to maintain a sufficient water supply in a pond for milling purposes charged in the declaration, is that during a specified period of time, the defendant deprives the plaintiff of the water necessary for his mill by diverting it therefrom, and suffering it to be diverted by others, the plaintiff is not limited in proving acts committed by the defendant or other persons, to the period stated in the declaration, but may prove previous acts, in consequence of which the injury was sus-

tained during that time. *Hollingsworth v. Dunbar*, 5 Munf. 199.

Admissibility of Evidence on Question of Damages.—In an action for breach of a covenant to renew a lease, evidence of the future profits to be made from the property if a certain price can be obtained for the product thereof is inadmissible on the question of damages. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

Evidence of Fraud in Obtaining Deed.—Where the question of fraud in obtaining the deed was not in issue before the jury, by a special plea though the evidence of the fraudulent misrepresentation was introduced without objection, the court, on the motion of the plaintiff, properly instructed the jury to disregard it. *Burners v. Keran*, 24 Gratt. 44.

8. Variance.

In an action of covenant the declaration describing the covenant as sealed, by the defendant, without mentioning any other person; and the plea being "covenants performed;" though without praying over; a joint and several covenant, sealed by the defendants, and others, "but in other respects answering to the description in the declaration, is admissible as evidence to the jury. *Hollingsworth v. Dunbar*, 3 Munf. 168.

In an action against the heir on a covenant entered into by the ancestor, if a breach is assigned to have been committed both by the ancestor and the defendant; the defendant pleads that "he has not broken the covenant;" without saying any thing as to the breach by the ancestor; and the jury finds for the plaintiff that "the defendant has broken the covenant;" judgment ought not to be arrested, the defect being cured by the act of jeofails. *Woodford v. Pendleton*, 1 Hen. & M. 303.

In covenant upon an agreement of lease, which, besides the stipulation to pay the rent, contained other clauses,

binding the lessee to board the lessor and wife part of the term, and to return the premises uninjured, the declaration described so much of the agreement as related to leasing the property and paying the rent; charging the defendant with having broken the covenant generally, and particularly in having failed to pay the rent; but said nothing about the other stipulations. It was held, that this was not a substantial variance. *Backus v. Taylor*, 6 Munf. 488.

9. Questions of Law and Fact.

K. leased to M. a house and lot in the city of A. for four years, but there was a stipulation in the lease, that if K. sold the property before the time ran out, upon a proper notice of such sale M. should deliver up possession of the premises. The lease had been destroyed, and contents were proved by parol evidence. K. did sell the property before the four years expired, and gave notice to M. to deliver possession. It was held, that it was for the jury to ascertain from the evidence whether the stipulation for the surrender of the property upon a sale and notice, was a collateral limitation, or a covenant. *Millan v. Kephart*, 18 Gratt. 1.

Where the extent of the plaintiff's right under the covenant depends, in part, upon extrinsic testimony, the court ought not to instruct the jury, "that if, upon the said evidence, they shall be of opinion that certain facts are established, then the defendant has broken his covenant as charged in the declaration;" for it is not competent to the court to say whether such facts are sufficient, or not, to warrant such conclusion, unless the sufficiency thereof had been duly submitted to its judgment by a demurrer to the evidence. *Hollingsworth v. Dunbar*, 5 Munf. 199.

10. Verdict and Judgment.

Verdict.—Where the declaration in an action against the heir on a covenant entered into by his ancestor al-

leges that the heir has assets by descent, if he fails to plead that he has no assets, or does not set forth the assets in particular, it is not necessary for the jury to find assets. *Woodford v. Pendleton*, 1 Hen. & M. 303.

Judgment.—In a suit by an administrator to convene creditors of a decedent under § 7, ch. 86, W. Va. Code, 1899, one claiming a demand against the estate under a contract with the decedent binding one to maintain dams to supply water to a mill, presents it in such suit for allowance, and it is resisted by the administrator and heirs of the decedent on the ground that the covenant was broken, and that the party was not entitled to compensation for maintaining such dam for that reason, a decree allowing such demand is conclusive to show that such agreement was not broken in the lifetime of the decedent, as between the covenantor and an assignee of the land benefitted by the covenant to show compliance with the covenant in the lifetime of the decedent. *Hurxthal v. Boom Co.*, 53 W. Va. 88, 44 S. E. 520. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

B. REMEDIES IN EQUITY.

1. Recovery of Damages for Breach of Covenant.

Action by Assignee of Part of Claim for Damages for Breach of Warranty.

—If only a part of the claim for damages for breach of warranty be assigned, the assignee has no remedy in a court of law, and must seek his recovery thereon in a court of equity, although the relief he asks is merely pecuniary. *McConaughy v. Bennett*, 50 W. Va. 172, 40 S. E. 540.

In a suit in equity by the assignee of a right of action for the breach of a covenant of warranty if the devisees and heirs be made parties to such bill with the executors, a demurrer to it should be overruled as to the executors and sustained as to the devisees and heirs and the bill dismissed as to

them. *McConaughy v. Bennett*, 50 W. Va. 173, 40 S. E. 540.

2. Injunction against Collection of Purchase Money.

See generally, the titles INJUNCTIONS; VENDOR AND PURCHASER.

a. Grounds for Injunction.

(1) Title Defective.

A vendee in possession, under a conveyance with general warranty may enjoin the collection of the purchase price where the title to the land is clearly defective. *Morgan v. Glendy*, 92 Va. 89, 22 S. E. 854; *Beale v. Seivley*, 8 Leigh 675; *Clarke v. Hardgrove*, 7 Gratt. 399; *Peers v. Barnett*, 12 Gratt. 416; *Rosenberger v. Keller*, 33 Gratt. 494; *Lane v. Tidball*, Gilm. 130; *Koger v. Kane*, 5 Leigh 606; *Ralston v. Miller*, 3 Rand. 44; *Keyton v. Brawford*, 5 Leigh 39; *Kinport v. Rawson*, 29 W. Va. 487, 2 S. E. 85; *Long v. Israel*, 9 Leigh 556; *Lovell v. Chilton*, 2 W. Va. 410; *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 879; *Thompson v. Catlett*, 24 W. Va. 539; *Wamsley v. Stalnaker*, 24 W. Va. 222; *Heavner v. Morgan*, 30 W. Va. 342, 4 S. E. 410.

What Constitutes a Defective Title.

—Proof of an outstanding title in a third person is ground for an injunction. *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 410; *Yancey v. Lewis*, 4 Hen. & M. 390; *Grantland v. Wight*, 5 Munf. 295.

In *Yancey v. Lewis*, 4 Hen. & M. 390, it was held, that where a purchaser seeks equitable relief against a judgment at law for the purchase price, on the ground of a defect in the grantor's title, it is not enough to allege such defect or want of title, but he must allege and prove an actual eviction or a superior title in some third person. *Ralston v. Miller*, 3 Rand. 44.

A being the owner of a tract of land supposed to adjoin a tract of land owned by B, but which in fact covers a part of B's tract, which fact is well known to A, who afterwards enters

into a contract with, and obtains a conveyance with covenants of general warranty from B for all of his tract at a specified price by the acre, he will not be entitled to withhold payment of the purchase money of so much of B's land as interlocks with A's land, upon the ground that A's title to the interlock held by him, before he made such purchase, is an older and better title than that derived from B, except upon the clearest proof, that the title so acquired from B was absolutely defective. *Thompson v. Catlett*, 24 W. Va. 524.

And where a party in consideration of a certain price per acre undertook to procure the party in possession of a tract of land, as owner thereof, to make a good deed for the same to a third party with general warranty, and he purchased the land from the party in possession paying him the purchase money and directing him to make the conveyance to the third party which was accordingly done with general warranty, the purchaser executing his notes for the price agreed upon and taking possession of the land which he held without eviction or disturbance, it was held that equity would not enjoin the collection of the money due by the purchaser whatever be the defects of the title to the land conveyed, there being no eviction or disturbance of the possession. *Long v. Israel*, 9 Leigh 556.

(2) Title Questioned by Suit.

A vendee in possession of land, under a conveyance with general warranty, may enjoin the collection of the purchase money on the grounds of defect of title, if the title is questioned by a suit either prosecuted or threatened. *Morgan v. Glendy*, 92 Va. 89, 22 S. E. 854; *Beale v. Seiveley*, 8 Leigh 675; *Clark v. Hardgrove*, 7 Gratt. 399, 407; *Peers v. Barnett*, 12 Gratt. 416; *Rosenberger v. Keller*, 33 Gratt. 494; *Lane v. Tidball*, Gilm. 130; *Thompson v. Catlett*, 24 W. Va. 539;

Wamsley v. Stalnaker, 24 W. Va. 222; *Heavner v. Morgan*, 30 W. Va. 342, 4 S. E. 410; *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 879; *Koger v. Kane*, 5 Leigh 606; *Ralston v. Miller*, 3 Rand. 44; *Keyton v. Brawford*, 5 Leigh 39; *Long v. Israel*, 9 Leigh 556; *Lovell v. Chilton*, 2 W. Va. 410; *Kinport v. Rawson*, 29 W. Va. 487, 2 S. E. 85.

When it is said that an injunction will lie "if the title is questioned by a suit either prosecuted or threatened," it is not meant that it is sufficient to allege that the bill in "a suit is threatened" merely but the bill on its face must allege the grounds upon which the threatened suit is based and must be such as will put a reasonable man in just apprehension of the loss of the land. *Kinport v. Rawson*, 29 W. Va. 487, 2 S. E. 85; *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 411.

b. Where Vendee Purchases Subject to Defect in Title.

Where A sells and conveys land to B with general warranty, and then B sells and conveys to C such title as A has conveyed to him, equity will not give C relief against B on the ground of defect of title, because C purchased of him only A's title, nor give him relief against A, for A has no claim against C which he can be enjoined from enforcing. *Koger v. Kane*, 5 Leigh 606.

Equity will not enjoin the collection of the purchase price of land where the vendor only conveys to his vendee such title as he has. *Koger v. Kane*, 5 Leigh 606.

c. Where Deed Contains Other Covenants Besides Warranty.

Quære, whether equity will interfere to relieve against the collection of purchase money of land, on ground of defect of title, in a case, in which the conveyance contains covenants of seizin, good title, or the like, on which vendee may bring suit at law against

vendor, before actual eviction. *Koger v. Kane*, 5 Leigh 606.

It was said in *Wamsley v. Stalnaker*, 24 W. Va. 224: "It would seem, therefore, that the extension of the right of a court of equity to enjoin the collection of the purchase money by the vendor because of defect of title, however clear, might perhaps be confined to the case, when there was no other covenant but the covenant of warranty, and might not be recognized when there were also covenants, on which the vendee could sue at any time at law, such as covenants of good title."

d. Injunction against Collection of Purchase Money Bonds.

Where, by an agreement under seal between the vendor and the purchaser of a tract of land, it is covenanted that if any part thereof should be recovered from the purchaser, the vendor will abate, or refund in proportion, and that he will not bring suit upon the bond for the purchase money until the quantity of land which the purchaser is to get is ascertained, provided the purchaser prosecutes a suit for that purpose within a reasonable time, a court of equity will give relief by injunction against a premature suit on the bond; and if it appears that the purchaser prosecuted his suit in a reasonable time and could not recover the land the court will decree that the injunction be perpetual; that whatever money has been paid be refunded; that the bond be surrendered and cancelled, and the contract rescinded. *Bullitt v. Songster*, 3 Munf. 54.

H. sells land to C. and conveys to him with general warranty; and C. assigns to H. the bond of S. in payment of the purchase money. The title to a part of the land is afterwards discovered to be clearly defective. It was held, that C. may enjoin H. from collecting so much of the bond of S. as will compensate him for the land to which the title is defective. *Clarke v. Hardgrove*, 7 Gratt. 399.

e. Injunction against Enforcement of Judgment for Purchase Money.

When the vendor by his deed "covenants with the vendee for general warranty of title, and that he is seized of the land conveyed in fee simple, and has a good right to convey the same, and that the same shall not be subject to any liability from incumbrances now thereon," and there are recorded judgment liens on the land at the time of the conveyance, a court of equity will not enjoin or stay the collection of a judgment against the vendee for the purchase money, unless the bill shows that the vendor has no other lands sufficient to satisfy the judgment liens, and that he is unable to pay them because of his pecuniary condition. *Wamsley v. Stalnaker*, 24 W. Va. 214. See the titles INJUNCTIONS; JUDGMENTS AND DECREES.

f. Injunction against Enforcement of Deed of Trust Securing Purchase Money.

Where land is sold with general warranty and a deed of trust given on the land itself to secure the payment of the purchase price, if an adverse claim to the land is afterwards discovered a court of equity will enjoin the sale under the trust deed until the adverse claim is regularly decided. *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle*, 5 Leigh 460; *Lane v. Tidball*, Gilmer 130.

3. Injunction to Enforce Covenant to Keep Streets Open.

Upon a covenant to make a good title to certain lots of land (according to a plat for extending the streets of a town), including the use of the streets, and appurtenances therein mentioned, and that the covenantee, his heirs and assigns may, at all times thereafter, enter into possession and enjoy the said lots, with the streets, etc., without the let, hinderance or molestation of the covenantor, his heirs and assigns: a court of equity, by injunction, will compel the covenantor, his heirs and

assigns, to remove all obstructions by them put in the said streets, and open the same to the free and full use of the covenantee, his heirs and assigns and permit him and them ever thereafter to use the same, without let, hinderance or molestation. *Brooke v. Barton*, 6 Munf. 306. See *Trueheart v. Price*, 2 Munf. 468.

4. Specific Performance.

It has been held, that if a feme covert be privily examined, her covenant for further assurance on a deed is obligatory, and a specific performance of it will be decreed. *Nelson v. Harwood*, 3 Call. 394. See the title SPECIFIC PERFORMANCE.

Covenants in Restraint of Trade.—A

court of equity would not enforce the performance of covenants in restraint of trade by a subsequent purchaser of the land, though he bought the land with full notice of the existence of such covenant. *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600. See the title RESTRAINT OF TRADE.

But it may be regarded as established as a general rule, that when a covenant is reasonable and is valid at common law, the court will not refuse to specially enforce it, by enjoining the obligor from violating it upon the ground that the covenant is in restraint of trade. *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 621.

Coverture.

See the title HUSBAND AND WIFE, and references given.

CRAFT.—See the title SHIPS AND SHIPPING and references given.

In *Owners of Steamboat Wenonah v. Bragdon*, 21 Gratt. 693, it is said: "Craft, we are told by lexicographers, is 'a name now sometimes applied to all kinds of sailing vessels,' though 'formerly restricted to the smaller vessels.' Worcester's Dictionary, in which Johnson is cited as authority." In that case it was held, that steamboats, also, were embraced in the word craft.

Credibility of Testimony.

See the titles EVIDENCE; WITNESSES.

CREDIBLE.—In *Peck v. Chambers*, 44 W. Va. 270, 28 S. E. 708, it is said: "Now, it must be presumed that the legislature meant something when it used the word **credible**; it surely thereby designated a class of persons who might serve process. Bouvier in his dictionary defines '**credible** witness' as one who, being competent to give evidence, is 'worthy of belief;' and Webster defines a **credible** person as one 'worthy of belief.' In order, then, that a person should be competent to serve process under the statute, he must be a person worthy of belief." See generally, the titles SERVICE OF PROCESS; WITNESSES.

CREDIT.—See the title TAXATION.

Where one by writing empowers another to sell land, implying a cash sale, and the agent simply transfers the writing to a third person, without payment of purchase money, this is not a sale. The court said: "No money was paid nor terms of **credit** provided for. If we treat this assignment as a finished sale, we would have to call it, as between agent and purchaser, a **credit**, one unauthorized by the power, not binding Camden, he ignorant of it." *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 542.

CREDITOR.—See the titles **FRAUDULENT AND VOLUNTARY CONVEYANCES**; **RECORDING ACTS**.

In *Hardy v. Norfolk Mfg. Co.*, 80 Va. 423, it is said: "A creditor is one who has the right to require the fulfillment of an obligation or contract."

In *Witz v. Mullin*, 90 Va. 807, 20 S. E. 783, it is said: "Webster defines creditors as 'one who credits, believes, or trusts; one who gives credit in business matters; and hence, one to whom money is due.'"

A party claiming damages for the acts of another, must be regarded in law as much the creditor of that other, as one holding his bonds or other promise to pay. *Harris v. Harris*, 23 Gratt. 739. See also, the title **DEBT**.

In *Davis v. Bonney*, 89 Va. 759, 17 S. E. 229, it is said: "The appellants, however, contend that the statute, so far as creditors are concerned, includes only creditors without notice; but this is not the true construction of the statute. The word creditors is here used in the same sense in which it is used in the statute of fraudulent conveyances and in the registry acts—that is to say, it includes all creditors, whether with or without notice. 2 Min. Insts., marg. p. 872; *Guerant v. Anderson*, 4 Rand. 208." See also, the title **CREDITORS' SUITS**.

Creditors' Bills.

See the title **CREDITORS' SUITS**.

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I. Definitions and Distinctions.

Definitions.—Creditors' bills, in their most comprehensive sense, are bills in equity by creditors to enforce the payment of debts out of the property of debtors, under circumstances which impede or render impossible the collection of debts by the ordinary process. *Fink v. Patterson*, 21 Fed. Rep. 602; *Finney v. Bennett*, 27 Gratt. 365.

Where the object of a suit is to convene the creditors, to ascertain and pay the debts of the estate, and to make distribution of the surplus, it is sub-

stantially a creditors' suit. *Norvell v. Little*, 79 Va. 141; *Scott v. Ashlin*, 86 Va. 589, 10 S. E. 751; *Harvey v. Steptoe*, 17 Gratt. 289; *Bank of Old Dominion v. Allen*, 76 Va. 200.

And although the bill is not in form a general creditors' bill, yet if the case stated and the relief contemplated and prayed are such as are contained in a general creditors' bill, it will be considered and treated as such. Thus, where a creditor files a bill against a company, alleging its insolvency, asking that the creditors be convened, that the

amount of debts and assets be taken, and that a receiver be appointed, it is a creditors' bill in substance and legal effect as if it had been framed as such in the technical form, although the bill does not in so many words profess to be on behalf of himself and other creditors. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 508.

A bill to discover the real and personal assets of a deceased debtor, to settle the administration accounts, and subject the assets to the payment of the debts of the creditors, is a creditors' bill, although filed by one or more creditors, even though no mention be made of other creditors. *Carter v. Hampton*, 77 Va. 631.

Single Creditor's Bill and General Creditors' Bill Distinguished.—A bill filed by a cestui que trust in two deeds of trust to a trustee, in his own name and the name of the trustee, to enforce his trust lien upon a particular tract of land, alleging priority over all other liens by one of his trust liens, but admitting the priority of certain other trust liens and judgment liens, designated by his bill and exhibits, over his secured trust lien, and making those particular lienors parties to the suit and praying to convene those creditors before a commissioner, to ascertain and audit their respective debts in the order of their priorities, and that such land as may be necessary may be sold, is held to be a single creditor's bill against all lienors and the particular tract of land designated in the bill and not a general creditors' bill, such as would call for the marshaling of all the lien debts existing upon all the lands of the debtor. *Baugh v. Eichelberger*, 11 W. Va. 217, distinguishing *Reynolds v. Bank*, 6 Gratt. 180; *Duerson v. Alsop*, 27 Gratt. 229.

II. Classification.

A. SUITS BY LIEN CREDITORS OF LIVING PERSONS—GENERAL CREDITORS' SUITS.

A suit by one or more lien creditors

of a living debtor, in behalf of himself or themselves and all other creditors for an account and application of assets to the payment of liens is a technical creditors' suit. Such suit may be brought although the creditors bringing the suit hold conflicting mortgages or other liens. *Poindexter v. Green*, 6 Leigh 504; *Reynolds v. Bank*, 6 Gratt. 174; *Hudgins v. Lanier*, 23 Gratt. 494; *Winchester, etc., R. Co. v. Colfelt*, 27 Gratt. 777; *Crawford v. Weller*, 23 Gratt. 835; *Johnson v. National Exchange Bank*, 33 Gratt. 473; *Schultz v. Hansbrough*, 33 Gratt. 567; *Haskin Wood Vulcanizing Co. v. Cleveland*, 94 Va. 439, 26 S. E. 878; *Penn v. Guggenheimer*, 76 Va. 839; *Barton v. Brent*, 87 Va. 385; *Fisher v. Dickenson*, 84 Va. 318, 4 S. E. 737; *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554; *Farr v. Baldwin*, 1 Va. Dec. 753; *Wyatt v. Thompson*, 10 W. Va. 645; *Snyder v. Martin*, 17 W. Va. 276; *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. 949; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101; *King v. Burdett*, 44 W. Va. 561, 29 S. E. 1010; *Sturm v. McGuffin*, 48 W. Va. 595, 37 S. E. 561; *Gilbert Bros. v. Lawrence (W. Va.)*, 49 S. E. 155; *Flanary v. Kane (W. Va.)*, 46 S. E. 312; *Pecks v. Chambers*, 8 W. Va. 210.

But it is not essential that a creditors' suit should be such in its inception. A bill filed by a single lien creditor, if in other respects proper, may by an order of reference to a commissioner and convention of other creditors entitled to be provided for in the suit, be converted into a general creditors' suit, and it will be regarded as such from the time such order of reference is made. *Arnold v. Casner*, 22 W. Va. 444. See post, "Suits by Creditors of Decedent," II, B; "Intervention," V, E, 5.

B. SUITS BY CREDITORS OF DECEDENT.

A suit by one or more creditors of a deceased person on behalf of himself

or themselves and all other creditors of such deceased person against the personal representative for an account, and an application of his assets, real and personal, to the payment of their several claims, is styled a creditors' suit. *Saunders v. Griggs*, 81 Va. 506; *Kent v. Cloyd*, 30 Gratt. 555; *Ewing v. Ferguson*, 33 Gratt. 548; *Carter v. Hampton*, 77 Va. 631; *Hale v. White*, 47 W. Va. 700, 35 S. E. 885; *Poling v. Huffman*, 39 W. Va. 324, 19 S. E. 423; *Broderick v. Broderick*, 28 W. Va. 379; *Duval v. Trent*, 6 Munf. 29; *Finney v. Bennett*, 27 Gratt. 365; *Easley v. Barksdale*, 75 Va. 274; *Kelly v. Lively*, 23 W. Va. 1; *White v. Kennedy*, 23 W. Va. 221.

To constitute such suit a creditors' suit it is not essential that it be such in its inception. Although filed by a single creditor of a decedent's estate, if in other respects proper, it may, by order of reference to a commissioner and convention of other creditors entitled to be provided for in the suit, be converted into a creditors' suit, and will be regarded as such from the time such order of reference is made. *Arnold v. Casner*, 22 W. Va. 444. See post, "Intervention," V, E, 5.

Under W. Va. Code, 1899, ch. 86, § 7, a suit of this character is subject to the rights of the personal representative to bring such suit within six months from his qualification. *Hale v. White*, 47 W. Va. 700, 35 S. E. 885; *Poling v. Huffman*, 39 W. Va. 323, 19 S. E. 423.

Thus it is provided by statute that, where the personal estate of a decedent is insufficient for the payment of his debts, and his executor or administrator has failed within six months after qualification to institute proceedings to subject the real estate to the payment of debts as provided by statute, any creditor of the decedent, whether he has taken a judgment at law for his claims or not, may institute and prosecute such suit on behalf of himself and the other creditors of the decedent. W.

Va. Code, 1899, ch. 86, § 7. See the title EXECUTORS AND ADMINISTRATORS.

C. TO SET ASIDE FRAUDULENT CONVEYANCES.

An usual instance of a creditors' bill is where property of the debtor legally liable to execution has been fraudulently, in fact or in law, transferred or encumbered by the debtor. The object of such suit is to clear away the conveyance or encumbrance and subject it to the debts of the creditor or creditors filing such bill. *Fones v. Rice*, 9 Gratt. 568; *Johnston v. Zane*, 11 Gratt. 552; *Dance v. Seaman*, 11 Gratt. 778; *Gordon v. Cannon*, 18 Gratt. 387; *Morriss v. Harveys*, 75 Va. 726; *Stokes v. Oliver*, 76 Va. 72; *Lucas v. Clafflin*, 76 Va. 269; *Hatcher v. Crews*, 78 Va. 460; *Planters' Bank v. Whittle*, 78 Va. 737; *Smith v. Pattie*, 81 Va. 654; *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420, 41 S. E. 854; *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497; *Rankin v. Goodwin*, 103 Va. 81, 48 S. E. 521; *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864; *Kline v. Kline*, 103 Va. 263, 48 S. E. 882; *Tate v. Liggat*, 2 Leigh 99; *Bullock v. Gordon*, 4 Munf. 450; *Peay v. Morrison*, 10 Gratt. 149; *Wright v. Hencock*, 3 Munf. 521; *Garland v. Rives*, 4 Rand. 282; *Chamberlayne v. Temple*, 2 Rand. 384; *Kelso v. Blackburn*, 3 Leigh 299; *Claiborne v. Gross*, 7 Leigh 331; *Greer v. Wright*, 6 Gratt. 154; *Shipe v. Repass*, 28 Gratt. 716; *Almond v. Wilson*, 75 Va. 613; *Com. v. Drake*, 81 Va. 305; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Witz v. Lockridge*, 39 W. Va. 463, 19 S. E. 876; *Thorn v. Sprouse*, 46 W. Va. 225, 33 S. E. 99; *Crim v. Price*, 46 W. Va. 374, 33 S. E. 251; *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268; *Wheby v. Moir* (W. Va.), 47 S. E. 1005; *Noyes v. Carter*, 2 Va. Dec. 218; *Ellington v. Moore*, 4 Va. L. Reg. 608; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553; *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. 288; *Hume v. Condon*, 44 W. Va. 553, 30 S. E. 56; *Lock-*

hard *v.* Beckley, 10 W. Va. 87; Hunter *v.* Hunter, 10 W. Va. 321; Martin *v.* Rexroad, 15 W. Va. 512; Goshorn *v.* Snodgrass, 17 W. Va. 717; Stockdale *v.* Harris, 23 W. Va. 499; Herzog *v.* Weiler, 24 W. Va. 199; Maxwell *v.* Henshaw, 24 W. Va. 405; Tuft *v.* Pickering, 28 W. Va. 330; Burton *v.* Gibson, 32 W. Va. 406, 9 S. E. 255; First Nat. Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES.**

D. SUITS BY CREDITORS OF CORPORATIONS.

A bill to wind up the affairs of an insolvent corporation, and to distribute its assets, among its creditors, is a creditors' bill, and is in many respects analogous to a bill in behalf of creditors of a decedent. *Finney v. Bennett*, 27 Gratt. 365. See also, *Williamson v. Washington City, etc., R. Co.*, 33 Gratt. 624; *Gibert v. Washington City, etc., R. Co.*, 33 Gratt. 645. And see the title **CORPORATIONS**, ante, p. 510.

"That one or more lien creditors of a living man, as well as of a corporation, may maintain a creditors' suit in behalf of themselves and all others similarly situated to enforce the liens binding the property of their debtor, is well settled. The point was expressly determined in *Bank of the Old Dominion v. Allen*, 76 Va. 200, and again in the recent case of *Preston v. Aston*, 85 Va. 104, 7 S. E. 344." Per *Lewis, J.*, in *Paxton v. Rich*, 85 Va. 380, 7 S. E. 531.

The executors of A and others, sued for themselves and others, the holders of guaranteed stock of a railroad company, the company and others, and the holders of the common stock of the company, to enforce contracts between the plaintiffs and the company in respect to the plaintiffs' participation in certain dividends of the company. Upon demurrer the bill was dismissed by the circuit court. Upon appeal the

supreme court decreed (see 78 Va. 522) that all the holders of the guaranteed stock were entitled to receive such dividend obligations and dividends as had been issued to the holders of the common stock at specified rates, and that the suit be remanded for proper proceedings to carry out its decree and to allow proper counsel fees against guaranteed stockholders not already represented by counsel. But the circuit court, not regarding it as a creditors' suit, decreed that only such guaranteed stockholders as had been plaintiffs in the record, or represented by counsel (and the latter only to the extent so represented), were entitled to any benefit in the suit under the decree of the supreme court, and that the company should issue obligations and pay dividends to the two classes indicated; and rejected the petitions of guaranteed stockholders, who had not been parties to the record, or represented by counsel to become parties, and to partake of the benefit of the decree of the supreme court, and also rejected the petitions of the counsel to be allowed fees as indicated. On the second appeal to the supreme court it was held, that the suit was a creditors' suit in form, nature and object, and should be so treated. *Gordon v. Richmond, etc., R. Co.*, 81 Va. 621.

E. SUITS TO ASCERTAIN LIENS AND PRIORITIES.

A lien creditor may file a bill to ascertain the property of his debtor and the liens and priorities against the same. *Casto v. Greer*, 44 W. Va. 332, 30 S. E. 100; *Ambler v. Leach*, 15 W. Va. 677; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Carlington v. Didier*, 8 Gratt. 261.

Thus where a party has conveyed all his property to a trustee to pay all his debts, not specifying them, the trustee, to avoid multiplicity of suits, may file a bill like a creditors' bill to ascertain all liens. *Ambler v. Leach*, 15 W. Va. 677.

III. Equity Jurisdiction.

A. SPECIFIC LIENS.

1. In General.

It is well settled that a general creditor can not file a bill in equity to enforce a claim against a living person or corporation which is a going concern, unless he has first obtained a lien upon the property, except where otherwise provided by statute. There must be some specific lien of the creditor against the property sought to be subjected. If he has no certain claim upon the property of the debtor, he has no concern with the disposition that the debtor may make of his property. *Rhodes v. Cousins*, 6 Rand. 188; *Tate v. Liggat*, 2 Leigh 84; *Kelso v. Blackburn*, 3 Leigh 299; *McCullough v. Somerville*, 8 Leigh 415; *Zell Guano Co. v. Heatherly*, 38 W. Va. 415, 18 S. E. 612; *Wallace v. Treacle*, 27 Gratt. 486; *Spindle v. Fletcher*, 93 Va. 186, 24 S. E. 910; *Armstrong v. Pitts*, 13 Gratt. 235; *Virginia Passenger, etc., Co. v. Fisher (Va.)*, 51 S. E. 198; *Hume v. Condon*, 44 W. Va. 553, 30 S. E. 56; *Nunnally v. Strauss*, 94 Va. 225, 26 S. E. 580.

Under this rule to subject real estate he must obtain a judgment at law, or other specific lien, and to subject personal estate he must have a judgment and execution. *Rhodes v. Cousins*, 6 Rand. 188.

2. Suits by Simple Contract Creditors of Decedent.

See the title EXECUTORS AND ADMINISTRATORS.

3. Fraudulent Transfers.

By statute, in both Virginia and West Virginia, there is a qualification of the general rule when applied to creditors who file bills to set aside fraudulent transfers of property by their debtor. A creditor before obtaining judgment may not sue in equity to avoid a fraudulent transfer of his debtor's property. Va. Code, 1887, § 2460; W. Va. Code, 1899, ch. 133, § 2; *Gugenheimer v. Lockridge*, 39 W. Va. 457,

19 S. E. 874; *Armstrong v. Pitts*, 13 Gratt. 235; *Johnson v. Riley*, 41 W. Va. 140, 23 S. E. 698; *Tuft v. Pickering*, 28 W. Va. 330. The discussion of this exception to the general rule properly falls under the treatment of a creditors' bill to avoid fraudulent and voluntary conveyances, and reference is therefore made to the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

B. EXISTENCE OF LEGAL REMEDY AS DETERMINING JURISDICTION.

See post, "Exhaustion of Legal Remedy," V, F, 3, c.

1. General Rule.

Independent of statute the general rule prevails that a creditor can not have the aid of a court of equity to prevent, or interfere with, any disposition which his debtor may make of his property, unless the creditor has proceeded as far as he can at law; it being a well-established principle of equity jurisprudence that equity has no jurisdiction where there is a full, complete and adequate remedy at law. See the title ADEQUATE REMEDY AT LAW, vol. 1, p. 161.

A general creditor of a deceased person can not sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal demand, or that such remedy, for some good cause, would be inadequate or unavailing. *Hale v. White*, 47 W. Va. 700, 35 S. E. 884.

Judgment against Deceased Joint Guarantor—Remedy against Survivor.

—But the fact that a deceased debtor is one of two joint and several guarantors, and creditors have a remedy at law against the surviving guarantor, does not deprive them of their remedy in equity against the assets of the deceased guarantor. **Carter v. Hampton*, 77 Va. 631.

Where Will Charges Whole Estate with Payment of Debts.—Where by will a testator charges his whole estate,

real and personal, with the payment of his debts, such charge converts the real estate into equitable assets, which can be reached only by a bill in chancery, and in such case the door of equity is open to creditors of every description to come in and call for an execution of the trust. A suit at law is never considered a necessary prerequisite to such bill. *Poindexter v. Green*, 6 Leigh 504. For bills filed against real and personal representatives for discovery of personal assets, and sale of lands to satisfy debts, see the title EXECUTORS AND ADMINISTRATORS.

2. Virginia Rule.

It is not necessary since the revision of the law in 1849, that a creditor shall exhaust his remedy at law before going into equity to subject the land of his debtor to satisfy his judgment. He does not have to proceed first by execution to subject the personal estate. *Price v. Thrash*, 30 Gratt. 516; *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195; *Stovall v. Border Range Co.*, 78 Va. 188; *Borst v. Nalle*, 28 Gratt. 423. Nor does he have to allege or prove want of personal assets. *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

Judgment against Executors of Surety.—In *Duval v. Trent*, 6 Munf. 29, it was held, that a creditor, having obtained judgment against the executors of the surety for a debt, he was not bound to take out execution, before he could file his bill in equity, for an account of the personal and real estate of the principal and surety, and to get satisfaction out of the real, in default of the personal estate.

Conveyance of Land in Trust after Judgment—Elegit.—Where subsequent to judgment the debtor conveyed his land in trust for payment of his debts, or on other trusts authorizing the sale of the land, it was held, that a court of chancery would decree a sale and satisfy the judgment, and that it was not necessary that the judgment creditor should have issued an elegit on his

judgment, before going into equity for relief. *Taylor v. Spindle*, 2 Gratt. 44.

3. West Virginia Rule.

Under the Code of West Virginia a chancery suit to enforce the lien of a judgment can not be filed until the issue and return of a fieri facias unsatisfied. W. Va. Code, 1899, ch. 139, § 7; *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. Compare *Pecks v. Chambers*, 8 W. Va. 210, construing § 8, ch. 139, W. Va. Code, 1868.

And a bill to enforce a judgment lien must state that a writ of fieri facias has been returned "no property found," or that no execution issued within two years from the date of the judgment. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

This is not required as to judgments of date before the act of March 13, 1891. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

The act did not apply to suits pending when it went into force. *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101.

4. Reviving Dormant Judgment.

As there need be no execution before subjecting land to the lien of a judgment, in Virginia, a bill in equity may be maintained against the personal representative of the decedent, and his devisees or heirs at law, to subject the real estate of the decedent to the payment of a judgment recovered against him in his lifetime, without first reviving such judgment at law. *James v. Life*, 92 Va. 702, 24 S. E. 275. See the title DORMANT JUDGMENTS.

IV. Property and Interests Subject to Claim.

A. CHOSSES IN ACTION AND OTHER PERSONAL PROPERTY.

1. General Consideration.

Where a creditor is in pursuit of his demand, and the debtor transfers his choses in action, money, stock or other funds, which can not be reached by ex-

ecution, to trustees for his own benefit, leaving no property out of which the debt can be made, the creditor is entitled to demand the assistance of equity in getting at the property. *Mercer v. Beale*, 4 Leigh 207.

"It may safely be laid down as a just deduction from the elementary principles of our law, that the general rule is that the rights of property of a debtor, whether in possession or in action, present or revisionary, in law, or in equity, and of value, adequate to pay his debts, and without which he is insolvent, and the payment of his debts must be frustrated, can not, by the mere volition of the debtor, in the form of assignment, surrender, or other modes of arrest, pass to volunteers without valuable consideration, and be thereby placed in the hands of such volunteers, beyond the reach and secure from the claims of such creditors." *Dold v. Geiger*, 2 Gratt. 98; *Penn v. Guggenheimer*, 76 Va. 854.

2. Assignor's Interest in Assigned Contract.

In *Carroll v. Tiffany*, 9 Gratt. 269, a father made a contract with a county court for building a courthouse, and by the terms of the contract he was to give security for his performance; but owing to his insolvency he was not able to give the security, and with the consent of the county court entered of record, he assigned the contract to his son who gave the security, the persons becoming security for the son being unwilling to become securities for the father. The son then sold the contract for \$1,000. The court held upon these facts that the father did not have at any time such an interest in the contract as could be subjected to the satisfaction of his creditors.

3. Subject Matter of Contract.

In a given case it was held that creditors could assert their claims against the whole subject matter of a contract, where such contract was made for the sale of real estate, payable in confeder-

ate paper, and was partly executed, and the vendor died. *Weeden v. Bright*, 3 W. Va. 548.

4. Right of Creditor to Have Expenses of Ward Charged to Guardian When Latter Died Solvent.

Where the wards of a guardian are his infant children, the general creditors of the guardian after his death, are not entitled, upon filing a creditors' bill, to have charged upon such guardian's account the expenses incurred in educating and maintaining the wards, when the guardian is solvent at the time of his death, though there are losses occurring after his death which make it impossible to pay in full his indebtedness. *Griffith v. Bird*, 22 Gratt. 73. See the title GUARDIAN AND WARD.

5. Distributive Share of Debtor in Estate of Decedent.

A creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate in Virginia, may go into a court of equity, for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt, out of the share of the absent debtor, in the said estate. *Moores v. White*, 3 Gratt. 139. See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

6. Legacy Vesting by Election.

If by one clause of a will a legacy is given to a person, and by another clause an estate, of which such legatee is the owner, is given to another person, the former is required to make an election, and when such election has once been made, and thereby an estate vests in such party, the latter can not defeat the right of his creditors to subject such estate to their claims, by a disclaimer of title, and his creditors may resort to a court of equity for the purpose. *Penn v. Guggenheimer*, 76 Va. 839. See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

7. Choses in Action of Wife—Liability to Creditors of Husband.

In *Dold v. Geiger*, 2 Gratt. 98, it was held, that choses in action, to which the wife becomes entitled during coverture, are liable to the claims of the husband's creditors, and a voluntary relinquishment of them by the husband, and a settlement upon the wife, before being reduced into possession, will not protect such choses in action from such creditors' claims. Cited in *Penn v. Guggenheimer*, 76 Va. 839. See the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

B. REAL PROPERTY AND INTERESTS.

1. Lands of Decedents.

See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; MARSHALING ASSETS AND SECURITIES.

Preference over Personality.—Where lands are devised (without any specific charge by will or deed) they ought not to be charged in equity to satisfy the bond debt of the deviser, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow. *Foster v. Crenshaw*, 3 Munf. 514.

Dividends from Real Assets.—Upon a bill by creditors of a decedent, to charge the debts due on the debtor's real estate in the hands of devisees, the court should always make an order to call in all creditors of the estate, to receive their dividends of the real estate. *Kinney v. Harvey*, 2 Leigh 70.

2. Life Estates.

A life interest in realty may be subjected to the lien of a judgment creditor. *Sturm v. McGuffin*, 48 W. Va. 595, 37 S. E. 561.

August 8, 1854, A, in consideration of his affection for his wife, M, and his children born and to be born of his said wife, M, conveyed to L all his property after payment of the debts he

then owed—"In trust for the benefit of my wife and children aforesaid, giving, granting and conveying for his wife an estate for life, and at her death for my children an estate in fee simple, the whole of what belongs to me over and above my just debts being in trust conveyed to the aforesaid L." And he directed that none of the principal of the trust property should be expended during the life of his wife, unless L should think it necessary for the support of his wife and children. During A's life he executed bonds in which his wife joined, and after his death she gave her bonds or notes for debts contracted by her. Upon a bill by these creditors to subject the life estate of M in the trust property, it was held, that M took a life estate in the property which could be subjected to satisfy the debts in which she joined, either as surety or principal. *Leake v. Benson*, 29 Gratt. 153.

3. Homestead Exemptions.

It has been held, that where a fraudulent conveyance of property is subsequently annulled at the suit of a creditor, the grantor is not estopped to claim his right to homestead in the property as against the creditor. *Shipe v. Repass*, 28 Gratt. 716; *Marshall v. Sears*, 79 Va. 49; *Boynton v. McNeal*, 31 Gratt. 456. See the title HOMESTEAD EXEMPTIONS.

4. Roadbed of Railroad.

It is not against public policy to decree a sale of a portion of a roadbed of a railroad to satisfy prior liens on the lands. *Flanary v. Kane* (W. Va.), 46 S. E. 312. See the title RAILROADS.

5. Improvements on Estate of Others.

A court of equity will not at the instance of the husband's creditors attempt to charge a wife's separate property with alleged improvements put thereon by the skill and labor of the husband, unless the evidence establishes the existence, and at least the approximate amount, of such improvements. *Board of Education v. Mitchell*,

40 W. Va. 431, 21 S. E. 1017. See *Rose v. Brown*, 11 W. Va. 122; *Lockhard v. Beckley*, 10 W. Va. 87.

C. EQUITABLE INTERESTS.

See the title TRUSTS AND TRUSTEES.

1. Operation of Judgment Lien on Equitable Interests.

A judgment creditor has a lien in equity on the equitable estate of the debtor in the same manner that at law he has a lien upon his legal estate. *Coutts v. Walker*, 2 Leigh. 268; *Haleys v. Williams*, 1 Leigh 140; *Withers v. Carter*, 4 Gratt. 407; *Findlay v. Toncray*, 2 Rob. 374. See the title JUDGMENTS AND DECREES; LIENS.

But where statutory enactments do not interfere, a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist in favor of third parties; and a court of equity will limit the lien of the judgment to the actual interest which the debtor has in the estate. *Wise v. Taylor*, 44 W. Va. 492, 29 S. E. 1005. See also, *Pack v. Hansbarger*, 17 W. Va. 314; *Snyder v. Martin*, 17 W. Va. 276.

2. Trust Funds Generally.

Estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the person to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the like in the things holden or possessed, as in the use or possession thereof. Va. Code, 1887, § 2428. *Coles v. Hurt*, 75 Va. 380.

3. Property Conveyed in Fraud of Creditors' Rights.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

As a general rule a court of equity, at the suit of a creditor of an insolvent debtor, will pursue property, the avails of his labor, in the hands of parties

united with him, to screen the same from his creditors, or in the hands of voluntary purchasers from such parties. *Com. v. Ricks*, 1 Gratt. 416.

4. Equitable Interests of Married Women.

See the title SEPARATE ESTATE OF MARRIED WOMEN.

5. Equities between Husband and Wife.

See the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

6. Remainder after Life Annuity.

In *Coutts v. Walker*, 2 Leigh 268, real estate was vested in a trustee by deed of marriage settlement, in trust to pay the wife's annuity out of the profits, and, subject to the annuity, in trust for the son of the grantor. While the annuitant was yet living, a creditor of the son recovered a judgment against him, and exhibited his bill in chancery, to subject the son's equitable interest in the estate to the debt. The court held, that such an equitable interest could not be taken in execution at law, but that it was bound by the judgment in equity, which court would apply it to the satisfaction of the debt. See the title MARRIAGE CONTRACTS AND SETTLEMENTS.

7. Equity of Redemption.

Where the owner of real estate has executed a valid deed of trust upon the same to secure the payment of a loan, which is evidenced by note or bond, contracted to be paid in installments, which have not yet matured, when a creditor obtains a judgment against the grantor in the trust deed, and proceeds to enforce his judgment lien in a court of equity, he can only subject the equity of redemption; and the court has no power to change the terms and conditions of the deed of trust as to the maturity of the loan thereby secured. *Wise v. Taylor*, 44 W. Va. 492, 29 S. E. 1005, citing *Curry v. Hill*, 18 W. Va. 370; *Shurtz v. Johnson*, 28 Gratt. 657. See the titles DEEDS OF TRUST; MORTGAGES.

Where a trust deed is attacked as being in fraud of the rights of creditors, and is declared valid, the surplus, after paying the debt secured, is liable to the claims of creditors attacking the deed. *Sipe v. Earman*, 26 Gratt. 563.

8. Interest of Secret Beneficiaries Where Deed Does Not Show Trust.

If deeds do not show upon their face any trust to be held upon land therein conveyed, which land has been sold to third parties, judgments against parties who are alleged to be secret beneficiaries in such deeds can not be enforced against the lands on the hands of third parties, who are innocent purchasers without notice. *Hill v. Ruffner*, 3 W. Va. 538. See the title TRUSTS AND TRUSTEES.

9. Prospective Profits from Trust Estate.

And in *Markham v. Guerrant*, 4 Leigh 279, a grantor by deed conveyed land and slaves and other personalty to a certain grantee, in trust, for the support and maintenance of himself and wife, and their children, and family, during the joint lives of the grantor and his wife, and the life of the longest liver of them, and the remainder to their children with full power to the trustee to manage the estate, and to sell any part of the trust subject to pay the debts of the grantor then due; the grantor in the space of seven months contracted a debt to merchants for goods furnished to an amount equal to the whole yearly profits of the trust estate. In a contest between creditors and the trustee, the court held, that the debt contracted by the grantor could not be properly charged by a court of chancery on the prospects of the estate, so as to bereave the grantor's wife and children of support.

10. Vendor's Interest in Land for Unpaid Purchase Money.

A creditor by judgment or decree may in equity subject the debtor's equitable interest in land sold by him, for

the purchase money unpaid. And such creditor will be preferred to an assignee of the purchase money claiming under an assignment made subsequent to the judgment or decree. *Withers v. Carter*, 4 Gratt. 407. See generally, the title VENDOR AND PURCHASER.

V. Pleading and Practice.

A. SOURCE OF AUTHORITY TO INSTITUTE SUIT.

The authority for a creditors' suit is not derived from but exists independently of statute. *Arnold v. Casner*, 22 W. Va. 444.

B. TIME OF INSTITUTING SUIT.

Premature Institution.—According to the statute and practice in West Virginia, a writ of *fi. fa.* goes in the hands of the officer, to be executed and returned in good faith, according to the exigency of the writ, without avoidable delay; and the officer is not required by the statute to hold it throughout the time the writ has to run, but may properly render it before the return day. Consequently the institution of a suit by creditors before the expiration of sixty days does not make the suit one that is prematurely instituted. *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244. This does not prevent the debtor from showing the return to have been made falsely and collusively, in advance of the statute, to enable the plaintiff to institute chancery proceedings without exhausting the mere personal estate. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

Limitation.—In a creditors' suit, where the object and purpose are to ascertain all the liens upon the debtor's estate, and their priorities, and to provide for their payment, the statute of limitations will in general cease to run against such liens after the entry of an order of reference. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561. See the title LIMITATION OF ACTIONS.

The Virginia Code, 1887, § 2915, limiting the time within which suit may be brought to recover land, has no application to the suit of a judgment creditor to enforce his lien against the land. *Flanary v. Kane* (Va.), 46 S. E. 312.

C. PROCESS AND APPEARANCE.

See the title SUMMONS AND PROCESS.

Summons by Publication.—Under the West Virginia Code, 1891, ch. 139, § 7, providing that, in every suit to enforce judgment liens, all persons having liens on the land to be subjected shall be made parties, it is not sufficient, in a creditors' bill to reach land encumbered by a trust deed, to make the trustees formal parties by publication. *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227.

Effect of Service.—Where a bill was filed by certain lien creditors against a debtor, his wife, a trustee in a deed executed by the debtor and his wife, the creditors secured by the deed and others, praying for a sale of the real estate of the debtor, and the application of the proceeds of the sale to the satisfaction of the debts, and for general relief, and the debtor was served with process, and answered, it was held, that he continued to be a party in the cause during all of the subsequent proceedings. *Crawford v. Weller*, 23 Gratt. 835.

Waiver.—In *Barger v. Buckland*, 28 Gratt. 850, there were three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt. The trustee and creditor were made defendants in each of them. The process was properly served on all the parties in two of the cases, and on the trustee and creditor in the third. The court made an order that the causes should be consolidated and heard together, and that was done; and the debtor appeared and made defenses in all the causes without objecting that the process was not properly served in the third case. By

so doing he was held to have waived the objection on that ground, if he had any.

D. JURISDICTION.

See the titles APPEAL AND ERROR, vol. 1, pp. 418, 475; CONSOLIDATION OF ACTIONS, ante, p. 125; JURISDICTION.

1. Consolidation to Give Jurisdiction.

Where several creditors have distinct and independent claims, these can not be united to give the supreme court jurisdiction. *Hartsook v. Crawford*, 85 Va. 413, 7 S. E. 538; *Thompson v. Adams*, 82 Va. 672.

2. State Courts Having Concurrent Jurisdiction.

Though a creditors' suit is an exception to the rule, that as between two courts with concurrent jurisdiction, the one first acquiring jurisdiction shall dispose of the whole controversy, and each creditor may sue regardless of the other creditors' suits, if a court in which one such suit is pending orders a reference convening the creditors, all proceedings in the other suits must be stayed. *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317.

A suit by creditors against the debtor and his trustee for creditors, not brought for the administration of the estate among the creditors generally, but to secure a lien on, and divert to payment of complainant's claims, the share which by the deed of trust would fall to other creditors, is not a creditors' suit, and hence not excepted from the rule that, as between courts of concurrent jurisdiction, the one first acquiring jurisdiction shall dispose of the whole controversy. *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317.

3. As to State and Federal Courts.

In *Barr v. White*, 20 Gratt. 531, a creditor filed his bill in the circuit court to subject the real estate of a certain debtor to satisfy a judgment with interest and costs, which he had recovered against him. The bill charged that the rents and profits would not dis-

charge the debt in five years. The bill was taken for confessed, and there was a decree that the appointed commissioner sell the land or so much as would be necessary to satisfy the judgment and the costs of the suit, upon credits stated. The land was accordingly sold for \$2,000 to a purchaser, who complied with the terms of the sale; and the commissioner reported the sale to the court, and it was confirmed. After the sale, but before it was confirmed the debtor was declared a bankrupt; and without taking any step in the state court he applied to the United States district court, and there obtained a decree setting aside the sale, which decree was reversed by the United States circuit court, and the assignee in bankruptcy was directed to proceed in the case in the state court to obtain such relief as he might be entitled to. It was held that the state court having possession of the case, and having made a decree therein before the bankruptcy of the debtor, he or his assignee should only proceed in that court to maintain their rights. See also, *Sively v. Campbell*, 23 Gratt. 893, *Francisco v. Shelton*, 85 Va. 779, 8 S. E. 789, as discussing and sustaining the general rule that the court that first obtains jurisdiction of the parties and the subject matter (when there is concurrent jurisdiction) retains it.

E. PARTIES.

See the title PARTIES. See also, post, "As to Parties," V, F, 3, a.

1. Parties Who May Maintain Suit.

Any number of creditors may unite in one suit, although their claims are distinct and separate. *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420, 41 S. E. 854.

But it is not a requisite to the validity of the bill that all creditors be made formal parties. A bill may be filed by one creditor on behalf of himself and all other creditors in the same situation, who may choose to come in and contribute to the expenses of the

suit. *Norris v. Bean*, 17 W. Va. 655; *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268; *Reynolds v. Bank*, 6 Gratt. 174; *Howard v. First Nat. Bank*, 2 Va. Dec. 513; *Honesdale Shoe Co. v. Montgomery (W. Va.)*, 49 S. E. 434; *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 210.

So two or more creditors may unite for themselves and other creditors and file a bill against their common debtor. *Reynolds v. Bank*, 6 Gratt. 174; *Livesay v. Beard*, 22 W. Va. 585.

Thus in *Reynolds v. Bank*, 6 Gratt. 174, a debtor conveyed a large property, real and personal, in trust to secure numerous creditors, who were divided into three classes. The first two classes were creditors by judgment. The trustees not having signed the deed, refused to act; and thereupon two of the creditors of the first class filed a bill on behalf of themselves and the other creditors secured by the deed, against the grantor and the trustees, and for general relief. The grantor appeared and demurred to the bill for want of proper parties plaintiffs. The court held, that in such case, one or more creditors could sue for themselves and the other creditors secured by the deed.

And as it is not essential that a creditors' suit should be such in its inception, a bill filed by a single creditor of a decedent's estate, or a single judgment creditor of a living person or corporation, though it does not make other judgment creditors parties, and though it be not in terms a suit for the benefit of the plaintiff and other judgment creditors, if in other respects proper, may by an order of reference to a commissioner and convention of other creditors entitled to be provided for in the suit, be converted into a creditors' suit, and it will be regarded as such from the time such order of reference is made. *Arnold v. Casner*, 22 W. Va. 444; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Honesdale Shoe Co. v. Montgomery (W. Va.)*, 49 S. E.

434; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621; *Stephenson v. Taverners*, 9 Gratt. 398; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Duerson v. Alsop*, 27 Gratt. 229; *Ewing v. Ferguson*, 33 Gratt. 548; *Hurn v. Keller*, 79 Va. 415; *Carter v. Hampton*, 77 Va. 631; *Williams v. Newman*, 93 Va. 724, 26 S. E. 19; *Laidley v. Kline*, 23 W. Va. 565; *Hudgin v. Hudgin*, 6 Gratt. 320; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531; *Gordon v. Richmond, etc., R. Co.*, 81 Va. 621; *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49; *Bell v. List*, 6 W. Va. 469; *Marling v. Robrecht*, 13 W. Va. 440; *Neely v. Jones*, 16 W. Va. 625; *Jackson v. Hull*, 21 W. Va. 601.

In *Williams v. Newman*, 93 Va. 724, 26 S. E. 19, the court said: "It is well settled that a suit in chancery brought by one creditor against the estate of a decedent, although filed on behalf of himself only, may, by decree convening all the creditors and directing a statement of accounts, be converted into a general creditors' bill, and from the date of such a decree it will be so considered, and will carry with it all the incidents and consequences attending the filing of a technical creditors' bill."

Upon an order of the court to convene liens it is a suit for the benefit of all presenting liens, though no mention of such liens be made in the bill. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

As to the right of other creditors to intervene, see post "Intervention," V, E, 5.

The more formal and better practice is for the plaintiff to file his bill in behalf of himself and other creditors of his class, but this, as stated, is not absolutely required. *Marling v. Robrecht*, 13 W. Va. 440; *Neely v. Jones*, 16 W. Va. 625; *Jackson v. Hull*, 21 W. Va. 601; *Arnold v. Cassner*, 22 W. Va. 444.

Suit by Widow of Decedent.—A widow can not bring a suit in chancery to have all the lands of her husband

sold, and out of the proceeds of such sale to have the value of her dower paid, and the residue paid to the creditors of her husband, and if any surplus remains, to have it divided among her children the sole heirs of her husband. Such general creditors' bill she can not bring; and no suit, which she brings, can by petition or in any other manner be converted into a creditors' bill. *Hull v. Hull*, 26 W. Va. 2.

Single Creditor at Large of Decedent.

—Whether a single creditor at large could sue in equity for an account of assets and the payment of his debt, was formerly doubted. *Duerson v. Alsop*, 27 Gratt. 236; *Reynolds v. Bank*, 6 Gratt. 174. It has been decided, however, that a single creditor at large of a deceased debtor, may sue the personal representative in equity for an account of assets and the payment of his debt, and general relief. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621.

Bill Making Administrator, Widow and Heirs Parties.—A bill to which the administrator, widow, and heirs are made defendants, and the prayer of which is that the amount of the complainant's debt be ascertained by a master commissioner; that an account of the assets, real and personal, and of the debts of the estate, be taken; and for general relief, is a creditors' bill, though it does not profess to be filed on behalf of all the creditors of the decedent. *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621.

2. Control Exercisable by Creditor Bringing Suit.

Creditors described but not named in the bill are not parties thereto in any sense, nor do they become so unless and until further action be had in the cause. Until such action the suit is the suit of the plaintiff of record—he is *dominus litis*—has the absolute dominion of the suit, and therefore may deal with the suit as he pleases. But the

sole dominion ceases when and as soon as other creditors become parties. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 508; *Craig v. Hoge*, 95 Va. 281, 28 S. E. 317. See post, "Dismissal," V, F, 7.

So the control of the creditor bringing the suit ceases as soon as a decree is made which may enure to the benefit of the other creditor, who can not after such decree institute another suit of their own. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 512.

"In *Woodgate v. Field*, 2 Hare 211, 212 (cited 1 Story's Eq. Jurisp. § 548a, note 3), Vice Chancellor Wigram, advertising to the remark in *Sterndale v. Hankinson*, that on the filing of a creditor's bill, every creditor has an inchoate right in the suit, observes, 'the meaning of that expression is, that a right then commences which may indeed fail, but also be perfected by decree; and it is not inaccurately called an inchoate right. After the decree every creditor has an interest in the suit; but the question is, whether the plaintiff until the decree, is not dominus litis, so that he may deal with the suit as he pleases. There is nothing to prevent other creditors from filing bills for the like purpose, and there is nothing more common than for several suits to exist together, and the court permits them to go on together until a decree in one of them is obtained, because it is possible, before the decree, that the litigating creditor may stop his suit.' Per Burks, J., in *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 511. See also, *Stephenson v. Taverners*, 9 Gratt. 398; *Harvey v. Steptoe*, 17 Gratt. 289; *Kent v. Cloyd*, 30 Gratt. 555.

3. When Creditors Not Named Become Parties.

Creditors not named in the bill become parties in a general sense when a decree or order for a general account is entered under which they may prove their demands. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 508; *Duerson*

v. Alsop, 27 Gratt. 229; *Arnold v. Casner*, 22 W. Va. 444; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Honesdale Shoe Co. v. Montgomery (W. Va.)*, 49 S. E. 434; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621; *Stephenson v. Taverners*, 9 Gratt. 398; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Ewing v. Fergerson*, 33 Gratt. 548; *Hurn v. Keller*, 79 Va. 415; *Carter v. Hampton*, 77 Va. 631; *Williams v. Newman*, 93 Va. 724, 26 S. E. 19; *Laidley v. Kline*, 23 W. Va. 565; *Hudgin v. Hudgin*, 6 Gratt. 320; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531; *Gordon v. Richmond, etc., R. Co.*, 81 Va. 621; *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49; *Bell v. List*, 6 W. Va. 469. However, before any decree for a general account is entered, a creditor may, in a proper case, be admitted as a party on the record upon a special application for the purpose. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 512; *Duerson v. Alsop*, 27 Gratt. 229.

As to intervening parties, see post, "Intervention," V, E, 5.

The usual course is to publish a notice convening the creditors and thereby informally making them parties. And such informal parties have the same control and right to file and have their claims adjudicated in the cause as if they had been formally by name or as a class made parties, and upon filing their claims before the commissioners they become bound by the proceedings in the cause as fully as the most formal parties. *Marling v. Robrecht*, 13 W. Va. 440; *Neely v. Jones*, 16 W. Va. 625; *Jackson v. Hull*, 21 W. Va. 601; *Arnold v. Casner*, 22 W. Va. 144.

Effect of Proving Lien before Commissioner.—Where, in a creditors' suit, a party who held a lien against the property sought to be sold proved his lien before the commissioner, it was held, that he became a substantial party to the cause. *Carnahan v. Ashworth*, 2 Va. Dec. 608.

1. Necessary and Proper Parties.**a. In General.**

"In regard to the necessary parties to a suit in equity, it is impracticable to lay down any rule, free from qualifications and exceptions. The best general rule, perhaps, to be deduced from the numerous authorities is, that all persons having material interests in the subject, which are to be affected by the object of the suit, must be made parties to the bill, either as plaintiffs or defendants. But there are various classes of cases to which the application of the rule would be attended with such delay, inconvenience and expense, as would be found intolerable in the administration of justice. Amongst these are suits brought by creditors against the representative of a deceased debtor, for an account of the assets of his estate, and the application thereof to the payment of his debts. In such cases, all the creditors have common, and at the same time distinct interests in the subject and object of the suit; and a strict adherence to the general rule would require them all to be made formal parties to the bill. To avoid the necessity of this, and yet prevent the unjust and injurious consequences which might otherwise ensue, a practice has grown up, and is well established, of making those who are not plaintiffs, substantial, instead of formal parties, by allowing a few, or one only, of the creditors, to sue in behalf of themselves and all the rest, and those so represented to come in before a master, establish their demands, and participate in the relief. This practice has been extended to cases where a number of creditors are secured by a deed of trust. *Story's Eq. Plead.*, 3d Ed., § 102, and the authorities there cited. It has been sometimes asserted, that the practice is to be limited to cases where all the creditors have a common interest in the object of the bill, and is not allowable to a mortgagee claiming priority of satisfaction; but the more recent authorities, upon

better reason, establish the contrary doctrine; for the bill being filed on behalf of all, they are so far parties to the suit that they have a right to appear, assert their several priorities, and contest those of others." *Reynolds v. Bank*, 6 Gratt. 180.

b. Parties Interested in Controverting Amount of Debt.

The general principles of equity clearly justify a creditor in convening in one suit, as defendants, all parties interested in controverting the amount of his debts, and holding in their own hands, or in the hands of their trustee, the estate on which the debt is chargeable. *Suckley v. Rotchford*, 12 Gratt. 60.

c. Trustees.

In a creditors' suit, the trustees in all deeds of trust on the property sought to be sold are necessary parties. *Carnahan v. Ashworth*, 2 Va. Dec. 608.

Trustees in deeds of trust constituting liens upon land must be made formal parties, before any sale of the debtor's lands can be ordered; and they can not be made informal parties by publication; and where a decree of sale is made in the absence of the trustee, the decree will be reversed, although cestui que trust had his debt audited in the suit. *Bilmyer v. Sherman*, 23 W. Va. 656; *Norris v. Bean*, 17 W. Va. 655.

d. Creditors Named in Deed of Trust.

In a creditors' suit all of the creditors named in a deed of trust on the property sought to be sold are necessary parties. *Carnahan v. Ashworth*, 2 Va. Dec. 608.

Trust creditors in interest should be made parties to a bill by a judgment creditor to enforce his lien against the subject of the trust. *Laidley v. Hinchman*, 3 W. Va. 423.

e. Decree Creditors.

Where the principal object of a bill is to have the profits of a lease collected and applied to pay certain decrees against complainant and an in-

solvent defendant, and there is a prayer that accounts be taken to ascertain the rights of the parties under the lease, and the profits applied to pay the decrees and the balance according to the rights of the parties, the decree creditors should be made parties. *Yates v. Law*, 86 Va. 117, 9 S. E. 508.

f. Lien Creditors.

See the titles JUDGMENTS AND DECREES; JUDICIAL SALES; MORTGAGES.

It is the duty of the plaintiffs in a creditors' bill to make parties thereto all the lien creditors of the debtor known to him, and those whose liens are disclosed by the judgment lien docket or records of the courts of any of the counties, in which are any of the lands sought to be sold. *Bilmyer v. Sherman*, 23 W. Va. 656; *Pappenheimer v. Roberts*, 24 W. Va. 702; *Neely v. Jones*, 16 W. Va. 625. If they are not made formal parties to the bill, he should in the order of reference in the cause provide for calling in all judgment creditors of the debtor by publication. *Livesay v. Feamster*, 21 W. Va. 83. And his failure to do so is ground for reversal of a decree ordering the sale of the land. *Grove v. Judy*, 24 W. Va. 294; *Pappenheimer v. Roberts*, 24 W. Va. 703; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227.

It is necessary, in a bill to enforce a judgment lien by a surety, where such surety has paid the judgment, that the original judgment creditors, whose judgment he has paid, be made parties. *Hoffman v. Shields*, 4 W. Va. 490; *Conaway v. Odbert*, 2 W. Va. 25.

Judgment creditors are necessary parties in proceedings to subject lands, upon which their judgments are liens, to the payment of other judgment liens. *Hoffman v. Shields*, 4 W. Va. 490.

Where there is a suit in equity, to sell land to satisfy a judgment lien, or to enforce the payment of purchase money, if it appears that there is a

prior lien for unpaid purchase money on the land, those entitled to the benefit of such prior purchase money lien, should be made parties to the suit. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

A judgment creditor sued on behalf of himself and all other creditors of B, C and D, and the estate of X against B, C, D, and the administrator of X, defendant, averring in his bill that his judgment was founded on a note owned by X, and drawn by X, and endorsed successively by B, C, D; that a creditors' bill was pending in the same court against the administrator, widow and heirs of X, and also separate suits against B and C to subject the lien of X, B and C to the payment of their respective debts; that X, B, C, and D each owned lands in the county, against which it is believed there are judgment liens; and prays, that the liens and their respective priorities may be ascertained and the lands sold to pay the liens. On demurrer to the bill upon the ground that it improperly sought to charge the lands of X, B, C, and D with the payment of all judgment liens against all or any of the parties, while none of the parties having such liens were made parties to the bill, it was held that under the rule announced in *Neely v. Jones*, 16 W. Va. 645, it appearing that judgments against the defendants were of record in the county where the defendants' lands lay, such ground of demurrer should be sustained. *Shenandoah Valley National Bank v. Bates*, 20 W. Va. 210.

g. Alienees of Land to Be Subjected.

In a creditors' suit, the subsequent alienees of land sought to be subjected are proper parties. *Preston v. Aston*, 85 Va. 104, 7 S. E. 344; *James River, etc., R. Co. v. Littlejohn*, 18 Gratt. 83.

h. Heirs.

If in a suit by a judgment creditor to subject lands in the hands of a bona fide purchaser from the vendee, the

purchaser dies pending the suit, his heirs are necessary parties, and a court will reverse the decree for the want of such necessary parties, even though the objection is not taken in the court below. *Taylor v. Spindle*, 2 Gratt. 44.

In *Triplett v. Romine*, 33 Gratt. 651, a creditor filed his bill against a husband and wife to subject land which had been conveyed by the wife prior to her marriage to a trustee in trust for the use of herself and husband, to the payment of his debt. The husband and wife answered; an account was ordered and taken fixing the amount of the debt, to some items of which the husband excepted. After the death of the wife, and eight years after the suit was brought, the children filed their petition in the cause setting out their claim under the deed, and asking to be made parties in the cause. The administrator of the plaintiff answered the petition, and the court decreed against the children in the lower court. Upon appeal the court held that they should have been made parties; but as their case was fully stated and investigated upon their petition and the answer of the administrator, and after the delay they should not be allowed to disturb the report of the commissioner, therefore the appellate court should not reverse the decree; however, they could be made parties, if they desired, when the cause went back.

Many years after a purchaser had obtained deed to land of a decedent, sold for the payment of taxes, and after a creditors' bill to subject the land to the payment of his debts had been pending for eleven years, certain pendente lite purchasers of the interest of one of the heirs of such decedent, none of whom were parties to that suit, filed their petition therein, claiming the interest of the heirs in the land, and praying to be made defendants thereto, and that their rights therein might be protected from the claims of the creditors, which petition the court dismissed. Held, that it was the duty of

the court to require the plaintiff to amend his bill by making defendants all the heirs of such decedent, or those claiming under them, and to proceed to ascertain the true state and condition of the title of the purchaser thereto before directing a sale of any portion thereof for the benefit of his creditors. *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768.

A judgment creditor sued on behalf of himself and all other creditors of B, C and D, and the estate of X against B, C, D and the administrator of X, defendant, averring in his bill that his judgment was founded on a note owned by X, and drawn by and endorsed successively on B, C, D; that a creditor's bill was pending in the same court against administrator, widow and heirs of X, and also separate suits against B and C to subject the lien of X, B, and C to the payment of their respective debts; that X, B, C, and D each owned lands in the county, against which it is believed there are judgment liens; and prays, that the liens and their respective priorities may be ascertained and the lands sold to pay the liens. On demurrer it is objected that the heirs of X, deceased, were not made parties. Held, that the creditors' bill pending in the same court against the heirs of X could be heard with this cause, and thus the necessity of making the heirs parties to the suit could be obviated. *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 210.

i. Parties to Contract Secured by Trust Deed Executed by Debtor.

Where defendant in a creditors' bill has executed deeds of trust to secure advances made upon a contract to deliver lumber within a given time, in the event of his failure to comply with the terms of the contract, and has failed to comply with it, it is error to declare such deeds absolute liens on the land, and to decree its sale to pay them, without requiring the other contracting parties to be made formal par-

ties to the suit, where they have received lumber after the time specified in the contract, and so may have elected to waive the forfeiture of the contract. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68.

j. Original Debtor or Creditor of Garnishee.

In *Shands v. Grove*, 26 Gratt. 652, G. brought a creditors' suit against the executrix of S., to subject the estate of S. to satisfy a judgment. The order book of the court was destroyed, but some of the papers were preserved; and it was proved by a witness that G. recovered a judgment against the R. I. Co., and issued execution upon it; and then at the instance of S., sued out a suggestion against him as a debtor of the company and that S. appeared in court and acknowledged his indebtedness to the company, and judgment was rendered against him. The proceedings in both cases to the judgments were endorsed on the papers preserved. An account taken in the cause showed the executrix indebted to the estate for considerably more than the claim of the plaintiff, besides large assets in her hands; and an inquiry ordered as to the debts of S. was not acted on, no other creditor making claim. The court held that G. was entitled to recover his debt from the estate of S.; the proceeding being against the estate of S. as the debtor of G., the company was not a necessary party.

k. Assignors.

In a creditors' suit an assignor with recourse of obligation, whereon is founded a judgment sought to be enforced, is a proper party. *Preston v. Aston*, 85 Va. 104, 7 S. E. 344, citing *James River, etc., R. Co. v. Littlejohn*, 18 Gratt. 83.

If an assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleading and proof to induce the belief that it really did not do so, the assignor is not a necessary party to the suit. *Scott v. Ludington*, 14 W. Va. 387.

Assignor of Judgment.—In *Neely v. Jones*, 16 W. Va. 625, it is held, that the assignor of a judgment may be properly made a coplaintiff in a chancery suit to enforce the lien of it on the debtor's lands.

l. Assignees.

But in a creditors' suit where the defendant becomes a bankrupt pendente lite, and his assignee is not made a party, but is counsel in the cause, and one of the commissioners to sell, it is no objection to the sale that he had not been made a party to the suit. *Merchants' Bank v. Campbell*, 75 Va. 455. In a creditors' bill to annul deeds made by a debtor, on the ground of fraud, alleging that the debtor was thereafter adjudged a bankrupt, and had never obtained a discharge, the assignee in bankruptcy is a necessary party. *Tabb v. Hughes* (Va., 1897), 3 S. E. 148.

In a suit by judgment creditors to subject their debtor's land to the payment of their debts, pending the cause the debtor was declared a bankrupt, and he applied for a homestead under the constitution and laws of Virginia and the acts of bankruptcy of the United States. Held, that the assignee in bankruptcy of the defendant debtor should be made a party to the suit. *Barger v. Buckland*, 28 Gratt. 850. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1. p. 2.

m. Co-Obligors, Co-Obligees or Privies.

In a creditors' bill against an administrator and heirs of a decedent, to enforce the collection of a debt, secured to the plaintiff by the joint and several obligation of the decedent, and another obligor, such obligor is a necessary party to the bill, although he may be a nonresident. And in such a case, the nonresident obligor, has the right to appear, and make defense to the bill; and the administrator and heirs of such decedent have the right to require him to be made a party to the suit, so that in case he should ap-

pear his liability for such debt may be ascertained and determined, as between him and the decedent. *White v. Kennedy*, 23 W. Va. 221.

A creditor who has compounded with one of several joint obligors may maintain a creditors' bill against the other obligors without making the released obligor a party defendant, under Va. Code, 1887, §§ 2856, 2857, 2859, providing that the creditor may compromise with any co-obligor without impairing the contract obligation, and that the right of contribution between the co-obligors shall not be impaired thereby. *Penn v. Bahnson*, 89 Va. 253, 15 S. E. 586.

Executor of Co-Obligee.—The executor of a co-obligee of a judgment plaintiff, who dies pending the action on the bond for the breach of which the judgment was recovered, is not a necessary party to such bill. *Beckham v. Duncan*, 1 Va. Dec. 669.

n. Shareholders.

Upon a bill filed by a creditor of an insolvent corporation solely for the purpose of winding up its affairs and of subjecting its property and franchises to the payment of its debts, the shareholders are neither necessary nor proper parties, if no relief is sought against them. They are represented by the company. *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110. See generally, the titles CORPORATIONS, ante, p. 510; STOCK AND STOCKHOLDERS.

o. Beneficiaries of Trust.

When the beneficiaries of a trust are known to the plaintiffs instituting a general creditors' suit against the trustee to subject his property to the payment of his debts, such beneficiaries must be made formal parties to such suit; and they are not bound by the decrees therein by reason of the publication of the general notice to lienholders required by ch. 139, W. Va. Code. *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300.

p. Debtors of Estate.

In a suit by a creditor to settle the estate of a decedent it is not proper to unite the debtors of the estate as defendants. As a general rule, the debtors of the estate must be sued by the personal representative. The creditor can only sue the personal representative for settlement, and, if the land is to be sold, unite with him those interested in the land, unless some independent source of equity shall be made to appear as to the other parties introduced. *Wilson v. Wilson*, 93 Va. 546, 25 S. E. 596. See generally, the title EXECUTORS AND ADMINISTRATORS.

q. Party for Whose Benefit Judgment Obtained.

In a suit in equity by a judgment creditor to reach the property of his debtor and subject it to the satisfaction of his judgment, it is not necessary that the person for whose benefit the suit at law was brought, and the judgment rendered, should be a party to the suit in equity, if he was not a party to the suit at law, unless it should appear that he controverted the plaintiff's right to recover. *Hale v. Horne*, 21 Gratt. 112. See the title JUDGMENTS AND DECREES.

r. Parties Bound by Judgment Introduced in Evidence.

In a suit in chancery to enforce the lien of a judgment against a principal and sureties, if other judgments are proved upon which other persons than those before the court are also bound, it is not necessary to make such other persons parties. *Wytheville Ice, etc., Co. v. Frick*, 96 Va. 141, 30 S. E. 491. See the title JUDGMENTS AND DECREES.

s. Remaindermen.

Remaindermen are not necessary parties to a creditors' bill, as the creditors can only subject their debtor's interest in the land. The omission of a necessary party, who voluntarily appears, is a harmless error. *Moore v.*

Bruce, 85 Va. 139, 7 S. E. 195; Davis v. Bruce, 85 Va. 139, 7 S. E. 195.

In a suit by creditors to subject the real estate of a decedent to the payment of his debts, where it appears that the decedent devised his real estate to his wife for life, with remainder in fee in equal parts to his two children, but, if either died without issue, remainder over to his sister, with power to the wife to sell and reinvest proceeds, if deemed advisable, the sister is not a necessary party. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

t. Where Debtor Is the Holder of Undivided Interest in Real Estate.

Where there is a creditors' bill, in the usual form, to subject the estate of a debtor to the payment of his debts, if the debtor is the holder of an undivided interest in real estate, it is necessary to make all having or claiming a common interest and common liability, as respects the subject matter in controversy, parties to one and the same suit, in order to carry out the single object of the bill. *Hutchinson v. Mershon*, 89 Va. 624, 16 S. E. 874.

u. In Suits to Subject Real Estate of Decedent under West Virginia Code.

See the title EXECUTORS AND ADMINISTRATORS.

When Suit Brought by Executor or Administrator.—When the personal estate of a decedent is insufficient for the payment of his debts and the executor or administrator institutes proceedings under the statute to subject the real estate to the payment of debts, the widow, heirs and devisees, if any, and all known creditors of the decedent, must be made defendants in such suit. *W. Va. Code*, 1899, ch. 86, § 7. See also, ante, "Heirs," V, E, 4, h.

Where Creditor Brings Suit.—Where the personal estate of a decedent is insufficient for the payment of his debts, and the personal representative fails to bring suit within six months after qualification, and suit is instituted by a

creditor on behalf of himself and all other creditors of the decedent, it is proper to make the personal representative, widow, heirs and devisees, if any, of the decedent, parties defendant. *W. Va. Code*, 1899, ch. 86, § 7. *Broderrick v. Broderick*, 28 W. Va. 378. See also, ante, "Heirs," V, E, 4, h.

In every suit under § 7, ch. 86, *W. Va. Code*, 1899, anyone claiming to be a creditor of the decedent, whether he may have been made a party thereto or not, or, whether he may have been served with process or not may present his claim, and upon such presentation, shall be deemed to have been made a party to the suit and to have been served with process therein. And evidence respecting such claim may be taken and the same may be allowed and paid in whole or in part, or rejected in the same manner and with the same effect, as if such decedent had been originally made a party and served with process. See the title EXECUTORS AND ADMINISTRATORS.

v. In Suit to Subject Real Estate of Railroad Company.

In a creditors' suit to subject the real estate of a railroad company to satisfy judgments recovered against the company, where it appears that another railroad company is in possession of the road, it is proper to make that company a party to the suit, to ascertain its interest in it, and that company not responding or showing what its interest is, a decree for leasing the road may be made. *Winchester, etc., R. Co. v. Colfelt*, 27 Gratt. 777. See the title RAILROADS.

w. Effect of Omission of Necessary Party.

The omission of a necessary party who voluntarily appears is a harmless error. *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

But if all the judgment creditors are not made parties to the suit either formally or informally, and this is disclosed in any manner by the record, the

appellate court will reverse any decree ordering the sale of the lands or the distribution of the proceeds of such sale. *Neely v. Jones*, 16 W. Va. 626.

However, if all the judgment creditors are made parties informally by being called by publication before a commissioner under a decree of the court to present their judgments, then the supreme court will not reverse a decree ordering a sale of the lands of the debtor, or the distributing of the proceeds of such sale, merely because the record disclosed that some of the judgment creditors had not been made formal defendants, who ought to have been so made, unless it appears that objection was made to the rendering of such decree on this account in the court below, before such decree was entered. *Neely v. Jones*, 16 W. Va. 626.

In *Hudgins v. Lanier*, 23 Gratt. 494, it was held, that there having been no objection for want of proper parties, the want of such parties was no objection to the proceeding.

5. Intervention.

a. General Right to Intervene.

In a general creditors' bill, creditors not named, whether the bill was filed by the complainant in his own behalf alone, or in behalf of himself and all other creditors, may, by special leave of the court, come into the suit as parties plaintiff. Though, in a general creditors' suit, it is the usual practice for creditors not named to wait and come in under the decree. *Anderson v. Anderson*, 4 Hen. & M. 475; *Carrington v. Didier*, 8 Gratt. 261; *Umbarger v. Watts*, 25 Gratt. 171; *Duerson v. Alsop*, 27 Gratt. 299; *Simmons v. Lyles*, 27 Gratt. 922; *Ewing v. Ferguson*, 33 Gratt. 548; *Smith v. Britton*, 2 Pat. & H. 124; *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 508; *Hurn v. Keller*, 79 Va. 418; *Rice v. Hartman*, 84 Va. 253, 4 S. E. 621; *Preston v. Aston*, 85 Va. 114, 7 S. E. 344; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531; *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Karn v. Rorer*

Iron Co., 86 Va. 760, 11 S. E. 431; *Patterson v. Eakin*, 87 Va. 53, 12 S. E. 144; *Kane v. Mann*, 93 Va. 239, 24 S. E. 938; *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893; *Marlin v. Robrecht*, 13 W. Va. 440; *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768.

And where a bill sets up the claim of the plaintiff only and does not purport to be a creditors' bill, yet it may be treated as such, and other creditors may come into the suit by petition. *Hurn v. Keller*, 79 Va. 415. See also, *Ewing v. Ferguson*, 33 Gratt. 548.

The mere filing of the petition, however, will not operate proprio vigore to make the petitioner a party. To effect this an order of court is necessary. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 512; *Duerson v. Alsop*, 27 Gratt. 229.

b. Creditor Holding Vendor's Lien.

Upon a bill filed by a judgment creditor, on behalf of himself and all other lien creditors of the defendant, a creditor holding a vendor's reserved lien on a part of the land of the defendant may come in by petition, and assert his lien, and it is immaterial whether the rents and profits of that and other lands will, within five years pay and satisfy the amount of such lien. He is entitled to a decree for the sale of the land on which he has a vendor's lien, although he may also have a judgment for the amount. *Kane v. Mann*, 93 Va. 239, 24 S. E. 938. See the title VENDOR AND PURCHASER.

c. Privies.

In *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768, a tract of land was sold at a tax sale and purchased by and in the name of one of the several heirs to the property, and subsequently the land was regularly conveyed. Many years after the purchaser had obtained his deed, and after a creditors' bill to subject the land for the payment of his debt had been pending for eleven years, certain pendente lite purchasers of the interest of one of the heirs, none of whom were parties

to the suit, filed a petition therein, praying to be made defendants and that their rights might be protected. The court held that the plaintiff should have been required to amend his bill by making all the heirs and those claiming under them defendants in order that the true state and condition of the title of the first-named heirs might be ascertained before directing a sale of a portion of the property for the benefit of creditors.

d. Creditors Obtaining Judgment Pending Suit.

Pending a bill in equity to enforce a judgment lien against a debtor's land, persons who have meanwhile obtained judgments against him may be permitted to prove the same before a commissioner, under the general order to enforce, and, so far as practicable, without delaying the plaintiff's cause, may file petitions to be made parties thereto. *Marling v. Robrecht*, 13 W. Va. 440.

e. In Suits to Marshal Assets.

See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; MARSHALING ASSETS AND SECURITIES.

f. In Suits against Representatives of Decedents.

See the titles DESCENT AND DISTRIBUTIONS; EXECUTORS AND ADMINISTRATORS.

g. In Suits to Set Aside Fraudulent Conveyances.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

h. In Suits against Corporations.

See the titles CORPORATIONS, ante, p. 510; RECEIVERS.

i. Laches as Affecting Right.

In a given case a creditor proved a debt against a decedent's estate, but delayed to prove one for which decedent was surety. After the latter debt had been due twenty-five years, though not barred, he filed his petition in a creditors' suit against decedent, explaining his delay, and that there was in the

court's hands enough to pay his debt. No contract for the delay existed, and no notice to proceed against the principal had been given. Held, that the creditor was entitled to the relief prayed for. *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241. See also, *Gilbert v. Lawrence* (W. Va. 1904), 49 S. E. 153. And see the title LACHES. See post, "Claims of Creditors under Decree," V, I, 8.

j. Control Exercisable by Petitioning Creditor.

When a creditor is admitted a party on the record upon a special application for the purpose, he acquires such control of the suit as that it can not be dismissed without his consent. *Piedmont, etc., Life Ins. Co. v. Maury*, 73 Va. 512; *Duerson v. Alsop*, 27 Gratt. 229. See post, "Dismissal," V, F, 7.

F. THE BILL OR PETITION.

1. Parties.

See ante, "Parties," V, E.

2. Statement of Case—Certainty and Definiteness.

A creditors' bill should state the plaintiff's case with reasonable certainty; that is, the right of complainant, the injury complained of, and the relief he seeks with the facts to justify, with such accuracy and fairness, and with such detail of the essential circumstances of time, place and manner, etc., as will so make out his case as to inform the defendant of what he is called upon to meet; stating, not conclusions of law, but the facts out of which arises his right to some specific relief. But the bill may be framed with a double aspect, and ask relief in the alternative, but the state of facts upon which such relief is prayed must not be inconsistent. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

Where a creditors' bill, in connection with the exhibits which are made a part thereof, states the complainant's case with such degree of certainty as to enable the defendants to defend and the court to enter a decree, it is not sub-

ject to the objection of being indefinite and uncertain. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655.

3. Specific Allegations.

a. As to Parties.

See ante, "Parties," V, E.

In instituting a general creditors' suit, the bill should state that it is in behalf of all creditors. *Doonan v. Board of Education*, 9 W. Va. 246; *Hartley v. Roffe*, 12 W. Va. 402; *Anderson v. Nagle*, 12 W. Va. 113; *Harvey v. Steptoe*, 17 Gratt. 289; *Duerson v. Alsop*, 27 Gratt. 235; *Kent v. Cloyd*, 30 Gratt. 555; *Ewing v. Ferguson*, 33 Gratt. 558; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 510.

Nevertheless this fact need not be expressly stated in the bill, as it is sufficient if such fact substantially appears from the tenor of the bill. *Doonan v. Board of Education*, 9 W. Va. 246; *Hartley v. Roffe*, 12 W. Va. 402; *Anderson v. Nagle*, 12 W. Va. 113; *Harvey v. Steptoe*, 17 Gratt. 289; *Umbarger v. Watts*, 25 Gratt. 171; *Duerson v. Alsop*, 27 Gratt. 235; *Kent v. Cloyd*, 30 Gratt. 555; *Ewing v. Ferguson*, 33 Gratt. 558; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 510.

A creditors' bill which states that it is in behalf of all creditors "who may be entitled to become parties to the suit," is not objectionable in not being limited to all lien creditors, as only lien creditors are entitled to become parties to the suit. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655.

b. Fraud.

See the titles FRAUD AND DECEIT; FRAUDULENT AND VOLUNTARY CONVEYANCES.

c. Exhaustion of Legal Remedy.

In General.—A general creditors' bill to subject trust property need not aver that the complainant has exhausted his remedy at law. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655. See ante, "Existence of Legal Remedy as Determining Jurisdiction," III, B.

Want of Personal Assets.—In Virginia it is not necessary that the bill allege or prove want of personal assets. *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

Return of Execution Nulla Bona.—A creditors' bill is not required to allege the return of an execution nulla bona on complainant's judgment. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655; *Barr v. White*, 30 Gratt. 531.

In West Virginia a bill to enforce a judgment lien must state that a writ of fieri facias has been returned "no property found," or that no execution issued within two years from the date of the judgment. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

This is not required as to judgments of date before the act of March 13, 1891. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. The act did not apply to suits pending when it went into force. *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101.

4. Multifariousness.

See the title MULTIFARIOUSNESS.

The bill must not be multifarious; that is, two distinct grounds of equitable relief, even between the same parties, must not be joined in one bill. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. See also, *Turk v. Heverners*, 49 W. Va. 204.

Where a creditors' bill is based upon a judgment on a note, which judgment is joined against all defendants, and he notifies all the creditors having several judgments against any of these defendants severally, the bill is not multifarious. *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 210.

Thus a judgment creditor sued on behalf of himself and all other creditors of B and the estate of X against B, C, D, and the administrator of X, defendant, averring in his bill that his judgment was founded on a note owned by X, and drawn by and endorsed successively on B, C, D; that a creditors' bill was pending in the

same court against administrator, widow and heirs of X, and also separate suits against B and C to subject the lien of X, B and C to the payment of their respective debts; that X, B, C and D each owned lands in the county, against which it is believed there are judgment liens; and prays, that the liens and their respective priorities may be ascertained and the lands sold to pay the liens. On demurrer to the bill on the ground that it was multifarious, because the plaintiff's judgment was joint against all the defendants, and he improperly united all the creditors having several judgments against any of the defendants severally, it was held, that the bill was not multifarious, the court saying: "In *Norris v. Bean*, 17 W. Va. 655, this court decided that, in a suit to enforce a judgment lien, all the several plaintiffs as well as all the several defendants in all the judgments in courts of record in the county in which the lands sought to be subject lie, which have been rendered by the judgment debtor alone or the judgment debtor and other defendants jointly, should be made parties." *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 210.

A creditors' bill was filed for the purpose of reaching the interest of the beneficiary under a trust deed, though the deed recited that the interest of the beneficiary should not be subject to his debts. An amended bill was filed, which alleged the original conveyance of the property from the beneficiary to his wife and from the wife to the trustee, and alleged that such conveyances were for the purpose of defrauding the beneficiary's creditors, and that the interest of the beneficiary was subject to his debts. Held, that the bill was not multifarious, as being an attempt to set the deeds aside, as well as to subject the interest of the beneficiary to the payment of his debts, but was only for the purpose of obtaining the latter relief. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655.

Where the principal object of a bill is to have the profits of a lease collected and applied to pay certain decrees against a complainant and an insolvent defendant, a prayer that accounts be taken to ascertain the rights of the parties under the lease, and the profits applied to pay the decrees and the balance according to the rights of the parties, does not make the bill multifarious. *Yates v. Law*, 86 Va. 117, 9 S. E. 508.

5. Amendment.

See the title AMENDMENTS, vol. 1, pp. 316, 321.

Where a judgment creditor files a bill to subject lands in the hands of the alienees of his debtor to the payment of the debt and one of the alienees conveys the land in trust during the pendency of the suit, it is not necessary that the plaintiff should amend his bill and make the trustee a party in order to dispose of the subject matter. *Price v. Thrash*, 30 Gratt. 515.

6. Abatement or Suspension.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

A suit to enforce liens, under W. Va. Code, 1891, ch. 139, § 7, by one judgment creditor, suing for himself and other lienors, will not be suspended by payment of the debt of the plaintiff after an order of reference. It may and will proceed in the name of the plaintiff, unless an order be made substituting another person as plaintiff. *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. 240. See post, "Operation and Effect," V, I, 10.

7. Dismissal.

a. Dismissal by Creditor Bringing Suit.

As a general rule the creditor who institutes the suit may dismiss it at his pleasure, until some of the creditors generally, who are not parties to the suit, have been admitted as parties. This power of absolute control exercised by the creditor filing the bill, ceases as soon as the creditors become

parties, by the entry of a decree or order for a general account. But before any decree for a general account is entered, a creditor may, in a proper case, be admitted as a party on the record upon a special application for the purpose; and when that is done, he acquires such control of the suit as that it can not be dismissed without his consent. Yet the original plaintiff may still dismiss the suit so far as he is concerned. *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 512; *Duerson v. Alsop*, 27 Gratt. 249; *Simmons v. Lyles*, 27 Gratt. 922.

After a decree the creditor bringing the suit can not deprive, by his conduct, others of the same class of the benefit of the decree, if they think fit to prosecute it. *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508.

A creditor who has brought the suit and whose debt has not been paid can not dismiss the suit if other creditors desire to carry it on. *Lewis v. Laidley*, 39 W. Va. 423, 19 S. E. 378. See ante, "Control Exercisable by Creditor Bringing Suit," V, E, 2.

Where Original or Nominal Plaintiff Obtains Satisfaction.—The original plaintiff having obtained satisfaction of a debt, it is not error for him to have the fact entered of record, and have the suit dismissed as to him. *Linsey v. McGannon*, 9 W. Va. 154.

A nominal plaintiff, after satisfaction of his debt may have the cause dismissed, as to himself, but not as to the other creditors who are parties, formal or informal to the creditors' suit. It is error for the court, on motion of a nominal plaintiff whose debt has been satisfied, to set aside an order, on motion of the plaintiff, reinstating a suit erroneously dismissed. Furthermore, it is error for a court to dismiss a general lien creditors' suit on motion of the nominal plaintiff, whose debt has been satisfied. So it is error for a court to dismiss a creditors' suit, on motion of the debtor defendant, which is pending before a commissioner upon an exe-

cuted order of reference entered at his instance. *Lewis v. Laidley*, 39 W. Va. 422, 19 S. E. 378; *Linsey v. McGannon*, 9 W. Va. 154; *Bilmyer v. Sherman*, 23 W. Va. 656.

Suits against Insolvent under W. Va. Code, 1899, Ch. 74, § 2.—A suit by a single creditor of an insolvent debtor, under ch. 74, § 2, W. Va. Code, 1899, whether in his own name only or for himself and other creditors, is from the date of the summons a suit for all creditors, and he can not dismiss it, against the will of other creditors, at rules or in term. It may be dismissed as to him, but others can prosecute it in their names as substituted plaintiffs. If he dismiss it at rules, other creditors may at the next term have it reinstated, though the summons has not been served or the bill filed. *Honesdale Shoe Co. v. Montgomery (W. Va.)*, 49 S. E. 434.

b. Dismissal on Motion of Debtor.

Pending an unexecuted order of reference before a commissioner the suit can not be dismissed on motion of the debtor. *Lewis v. Laidley*, 39 W. Va. 423, 19 S. E. 378.

c. Nonjoinder or Misjoinder of Parties as Grounds for Dismissal.

If proper parties are not made, a creditors' bill should not be dismissed; but the plaintiff should have leave to amend, and make the proper parties, unless a decree for an account has been made in some other creditors' suit having the same object in view. *Stephenson v. Taverners*, 9 Gratt. 398.

d. Retention on Docket after Dismissal as to Original Plaintiff.

It is not error, where the original plaintiff has obtained satisfaction of his debt, had the fact entered of record, and the suit dismissed as to him, to retain the case on the docket, under the original title, for further proceedings in behalf of other parties, as no prejudice is done the original plaintiff thereby. *Linsey v. McGannon*, 9 W. Va. 154. See also, *Piedmont, etc., Ins.*

Co. v. Maury, 75 Va. 508; *Lewis v. Laidley*, 39 W. Va. 423, 19 S. E. 378.

8. Exhibits.

See the title EXHIBITS.

G. ANSWER, DEMURRER AND OTHER PLEADINGS.

1. Answer.

See the title ANSWERS, vol. 1, p. 389.

Although it is irregular not to hear and consider the defendant's answer, upon rendering the decree, yet if the answer would not have changed the result, the appellate court will not reverse the decree, for that objection. *Linsey v. McGannon*, 9 W. Va. 154.

Answer in Nature of Cross Bill.—

Where a lien creditor has filed a bill to ascertain the property of his debtor and the liens and priorities against the same, a creditor defendant may file in such suit an answer in the nature of a cross bill attacking any of the liens involved therein as fraudulent preferences under the statutes in such case made and provided. The mere fact that such attacking creditor holds a subsequent lien that may be void as a preference does not bar him from the benefits accruing under a prior lien void as a preference. *Casto v. Greer*, 44 W. Va. 332, 30 S. E. 100.

When Petition Improperly Admitted as Answer.—A petition filed in a chancery suit to sell certain interests for the payment of a judgment lien by a stranger to it, in which he or his rights are not mentioned, setting up matter not mentioned in the bill, making no parties, containing no prayer for relief, though its matter is in opposition to the bill, is improperly admitted as his answer as if a defendant, and it is error to pronounce a decree resting alone upon such petition for its basis. *Sturm v. McGuffin*, 48 W. Va. 595, 37 S. E. 561.

2. Demurrer.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; DEMURRERS.

Averment That Another Suit Pending as Grounds.—

If a lien creditor brings suit to subject the real estate of his debtor to the payment of his debt, the fact that his bill avers that there is then pending a suit by another creditor, to subject the same real estate to their debts, is not ground for sustaining a demurrer to such bill. See *v. Rogers*, 31 W. Va. 473, 7 S. E. 436.

A judgment creditor sued on behalf of himself and all other creditors of B, C and D, and the estate of X against B, C, D and the administrator of X, defendant, averring in his bill that his judgment was founded on a note owned by X, and drawn by X, and endorsed successively by B, C, D; that a creditors' bill was pending in the same court against the administrator, widow and heirs of X, and also separate suits against B and C to subject the lien of X, B and C to the payment of their respective debts; that X, B, C and D each owned lands in the county, against which it is believed there are judgment liens; and prays, that the liens and their respective priorities may be ascertained and the lands sold to pay the liens. On demurrer to the bill it was objected that such bill showed that other creditors' bills were then pending against the defendants B and C, and the heirs of X having the same object that the suit at bar had. Held, that the defendant, B, against whom and whose lands the plaintiff had a right to proceed for the payment of his judgment against him, not being a party to any of the three creditors' suits then pending, the pendency of the suits did not prevent the plaintiff from bringing his suit. *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 210.

H. THE HEARING.

1. Refusal to Delay.

Where a judgment creditor files his bill against a judgment debtor and other judgment alienors, to enforce

his judgment lien, and the debtor files his answer, claiming that the consideration of the bond, on which the plaintiff's judgment was recovered, has in part failed; and claims a credit on such judgment to the extent of such failure, and also filing an amended answer setting up such failure of consideration more specifically, and thereupon the plaintiff files an amended bill, bringing all the parties interested in such consideration, if any, before the court, and setting up such a state of facts as would, if true, show that there ought not to be any credit on the judgment, and the plaintiff replies generally to the answer, and the defendant debtor does not answer the amended bill, neither are the facts therein set up controverted, and no proof is taken as to such alleged failure of consideration, the court does not under such circumstances err in refusing to delay the hearing of the cause and decree that plaintiff's judgment shall be paid in full. *Scott v. Ludington*, 14 W. Va. 388.

2. Issues and Defenses.

Value of Land.—Where a general creditors' bill alleges that the rents and profits of defendants' lands will not pay the liens within five years, and the answer denies the allegation, the value of the lands is made an issue, and it is the duty of the court to ascertain their value with reasonable certainty before decreeing their sale. *Dillard v. Krise*, 86 Va. 410, 10 S. E. 430.

Amount of Debt.—Where a purchaser of land which is subject to the lien of a judgment takes it subject only to the amount called for by the judgment, and it is not liable to the judgment increased by usury under a subsequent agreement between the creditor and judgment debtor, and a creditors' suit is afterwards brought by another creditor to convene and enforce liens against lands of such judgment debtor, but not against the land so sold, the administrator and heirs of such purchaser are not precluded by

such convention of creditors and decree following, from disputing the amount of a debt as fixed by the decree. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078.

Set-Off.—See the title SET-OFF, RECOUPMENT AND COUNTER-CLAIM.

A defendant in a creditors' suit can not set off notes placed in his hands for collection, and if not collected to be returned to the owner, and which never became the property of the defendant. *Magarity v. Succop*, 90 Va. 561, 19 S. E. 260.

On a bill by a creditor to subject to the payment of his judgment lands conveyed by the debtor, the defendant purchaser may set off the amount which he is entitled to receive of the vendor by reason of his not having been put in possession of part of the land sold. *Taylor v. Spindle*, 2 Gratt. 44.

3. Evidence.

See the title EVIDENCE.

In a creditors' suit to enforce a judgment rendered against a surety, on an issue whether the plaintiff be compelled to first seek satisfaction out of property which the principal was alleged to have conveyed to a third person in trust for the payment of plaintiff's claim, the deed of trust is inadmissible against the plaintiff, he not being a party thereto. *Price v. Thrash*, 30 Gratt. 515.

I. DECREE.

See the title JUDGMENTS AND DECREES.

1. Conformity of Relief to Theory Presented by Bill.

Judgment creditors seeking to subject land of their debtor, which had been conveyed in trust to secure a debt, charged in their bill that the deed was intended by the grantor to defraud his creditors, and the trustee and creditor in the deed were cognizant of the fraudulent intent at the time. The creditor answered and denied the fraud and proved his debt.

Held, that it was proper to proceed in the cause and decree satisfaction of the plaintiff's debts out of the surplus of the purchase money of the land after the satisfaction of the debt secured by the deed. *Barger v. Buckland*, 28 Gratt. 850.

A bill, termed a single creditor's bill, having for its object the enforcement of specific claims of the creditor on a certain tract of land of the debtor, can have a decree touching only the object of the bill, and it is error to decree an account to be taken by a commissioner of all debts due by the debtor, and which are valid and subsisting liens on his lands, the amounts of said debts, the persons to whom due, and their priority; and to show the quantity and annual fee simple value of all the lands of the debtor. *Baughner v. Eichelberger*, 11 W. Va. 217. The bill not having contemplated, nor asked for such an account, parties interested, relying on the essential inquiry as made by the bill, may thus be taken by surprise, and not collect testimony to meet the commissioner's inquiry. *Baughner v. Eichelberger*, 11 W. Va. 217.

If after-discovered facts and testimony render it necessary for an account of such scope, the complainant should be permitted to file a supplemental bill, and thus present a proper cause for such account. *Baughner v. Eichelberger*, 11 W. Va. 217.

2. Decreeing Specific Property to Creditor.

A court has no power to decree to a creditor any specific portion of his debtor's property. *Auld v. Alexander*, 6 Rand. 98.

"There is no case, in which a court of equity can assign to a creditor a specific portion of his debtor's property, in satisfaction of his demand." *Auld v. Alexander*, 6 Rand. 98.

3. Order of Making Decree — Where Several Suits Pending.

Where several creditors' suits are

pending, the decree may be made in the cause first ready for a hearing, though that is not the first suit brought. *Stephenson v. Taverners*, 9 Gratt. 398.

4. In Whose Favor Rendered.

See post, "Distribution of Proceeds," V, I, 11, b.

It seems that a decree may be rendered in favor of a receiver rather than the complainant, as it vests no title in the receiver but keeps the property in custodia legis. *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349.

Decree in Favor of Purchaser for Original Purchase Money, Interest and Costs.—If on a creditors' bill to subject the estate of a defendant, who is a special commissioner in another suit, it appears that the defendant, without having given bond as required by the decree under which he acts, has collected the purchase money for certain land sold by him, and misapplied it; that a rule afterwards issued against the purchaser under which said land was resold, and a personal judgment against the purchaser entered for the deficiency; and that the defendant executed a trust deed to indemnify the purchaser for loss by such misapplication, it is proper for the lower court to decree to the purchase his original purchase money with interest and costs, without adjudging further that the amount of such personal judgment should also be paid out of the estate. *Eggleton v. Dinsmore*, 84 Va. 858, 6 S. E. 146.

Presumption.—A decree for the sale of property in a general creditors' suit, in which all claims have been audited, is presumed to be for the benefit of all creditors, and not for complainant's benefit alone. *Haskin Wood, etc., Co. v. Cleveland Ship Bldg. Co.*, 94 Va. 439, 26 S. E. 878.

5. Parties Bound by Decree.

See generally, the title JUDGMENTS AND DECREES.

If a creditor files a bill to subject the real estate of a debtor to a judg-

ment lien, and in his bill fails to state that there is any other lien on this real estate, or ask the auditing of other liens, and makes only the debtor a party defendant, though the court in such case by its decree directs a commissioner to ascertain all liens and their priorities, still the court can not, upon the report of the commissioner that a prior deed of trust had been satisfied, decree that the debt secured by it has been paid, and order its release. Such a decree of the court is a mere nullity, and not binding on the trustee or cesti que trust, because they were not parties to the suit; nor does such order of reference or an actual service of notice by the commissioner on the cestui que trust make him a party, or render such a decree valid as against him. *McCoy v. Allen*, 16 W. Va. 724.

6. Personal Decree.

Party Holding Effects of Absentee Debtor.—In a suit in equity against a defendant who is out of this country, and another, within this country, having in his hands effects of, or otherwise indebted to such absentee, a decree can not be entered against the defendant in this country until, by legal and regular proceedings, the plaintiff has established his claim against the absentee. *Gibson v. White*, 3 Munf. 94.

Decree Operating Personally against Personal Representative.—If, on a bill filed by creditors to subject the estate, real and personal, of a decedent, to the payment of his debts, a copy of decedent's will is filed, by which he devised and bequeathed certain property to his wife for life, and nominated her as executrix, and the wife is made a party defendant as executrix and "as widow," this is sufficient to bind her personally by any proper decree made in the cause. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

7. Decree for Accounting.

See the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 82; EXEC-

UTORS AND ADMINISTRATORS; JUDICIAL SALES.

Where judgment creditors of a bankrupt debtor file a bill against the administrator and heirs of the debtor's surety to subject the surety's land to the payment of the debts, and, other creditors are admitted by petition, the plaintiffs are entitled to a decree for an account of debts. *Ewing v. Ferguson*, 33 Gratt. 548.

Where the bill is brought by one creditor on behalf of himself and all other creditors, if his claim is proved or admitted, and the executor confesses assets, the plaintiff may at the hearing have a decree for payment, and he is not compelled to take a decree for an account. *Duerson v. Alsop*, 27 Cratt. 229. See ante, "Dismissal," V, F, 7.

8. Claims of Creditors under Decree.

A creditors' bill enures to the benefit of all creditors who present and prove their claims, although not made formal parties to the bill. Before distribution all of the creditors should be called in by publication or some appropriate notice given. *Kinney v. Harvey*, 2 Leigh 70. See post, "Distribution of Proceeds," V, I, 11, b.

After a decree for a general account of debts in a creditors' suit, other creditors may come in and prove their claims before the commissioner to whom the cause is referred. This should be done by the creditor or some one authorized by him, and not by the administrator of the debtor whose duty it is to represent the estate. The better practice is to require the creditor to file an affidavit that the debt remains due, but the affidavit is not evidence to prove the debt. *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893.

Disallowance of Stale Claims.—A decree in a creditors' suit disallowing a claim presented by the administrator of a deceased creditor of the defendant is proper, where the remand is stale and was never asserted by decedent in his lifetime, and by reason of lapse of time, death of parties, loss

of evidence, and loose business methods of the parties, an accurate and fair settlement of their account is impossible. *Kavanaugh v. Kavanaugh*, 98 Va. 649, 37 S. E. 275. See also, *Gilbert v. Lawrence* (W. Va. 1904), 49 S. E. 155. And see ante, "Laches as Affecting Right," V, E, 5, i.

9. Decree for Sale or Lease.

See the titles JUDGMENTS AND DECREES; JUDICIAL SALES.

Certainty.—Where the bill and proceedings specify the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much as may satisfy the purposes of the decree is sufficiently certain. The maxim "that is certain which may be made certain," applies. *Barger v. Buckland*, 28 Gratt. 850.

Propriety of Decree for Sale, Convention of Lienholders, Accounting and Annulning of Former Decrees.—In *Preston v. Aston*, 85 Va. 104, 7 S. E. 344, five suits were pending by creditors to enforce liens on a judgment debtor's lands. No account was taken, but on proof of sufficiency of rents to pay the liens in five years, a decree in each suit to rent was entered, but not executed. A creditor, with a lien older than those asserted in these five suits, brought his bill reciting these facts, charging sale of the land to be necessary, praying that all the lien holders be convened, for an account of liens of lands, for hearing the suits together, for annulling the decrees to rent, and for sale of the land. A decree was accordingly rendered.

Decree for Sale before Ascertaining Priorities.—A decree for the sale of land in a creditors' suit is erroneous where the priorities of the liens against the land have not been established. *Carnahan v. Ashworth*, 2 Va. Dec. 608.

Sale Where Creditor Transfers Interest.—A court of equity in the exercise of its general jurisdiction over creditors' suits, may decree a sale, though the creditor who brought the

suit has parted with his interest before the decree, if such sale is for the benefit of the creditors. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431. See the title JUDICIAL SALES.

In Suits to Set Aside Fraudulent and Voluntary Conveyances.—See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; JUDICIAL SALES.

Suits by Creditors of Decedents.—See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; MARSHALING ASSETS AND SECURITIES.

10. Operation and Effect.

Suspending Other Suits.—A decree in one creditors' suit for an account of debts operates to suspend all other pending suits of creditors, who must come in under the decree and prove their debts. *Stephenson v. Taverners*, 9 Gratt. 398; *Ewing v. Ferguson*, 33 Gratt. 548; *Hurn v. Keller*, 79 Va. 418; *Rice v. Hartman*, 84 Va. 253, 4 S. E. 621; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531. See post, "Interruption of Other Suits," V, J.

Decree Based on Petition Improperly Admitted as Answer.—A petition filed in a chancery suit instituted by a creditor, by a stranger to it, in which he or his rights are not mentioned, setting up matter not mentioned in the bill, making no parties, containing no prayer for relief, though its matter is in opposition to the bill, is improperly admitted as his answer, as if a defendant, and it is error to pronounce a decree resting alone upon such petition for its basis. *Sturm v. McGuffin*, 48 W. Va. 595, 37 S. E. 561.

Operating to Charge Specific Land on Which Lien Rests.—The rule is still maintained in equity that a complainant can not have relief in the absence of proof which substantially establishes the case which his bill presents. Thus in *Baughner v. Eichelberger*, 11 W. Va. 217, there was a creditors' bill, filed to

enforce liens on a particular tract of land. It was held that such bill would only warrant a decree against that tract; and to allow the accounting to extend to and embrace liens on all defendant's land was error.

Lease of Railroad.—Where in a creditor's suit to subject real estate of a railroad company to the payment of judgments recovered against the company, it appears that another railroad company is in possession of the road and such company is made a party to the suit and does not respond or show what its interest is, a decree for leasing the road may be made. *Winchester, etc., R. Co. v. Colfelt*, 27 Gratt. 777.

11. Execution and Enforcement.

See the titles JUDGMENTS AND DECREES; JUDICIAL SALES.

a. Sales and Conveyances under Order of Court.

Should Be by Commissioner.—Where a suit is instituted to subject land to the liens charged thereon, and after a decree is rendered to sell the land, the debtor executes a second deed of trust on the land and then dies, and the cause is revived, and after the trustee and cestui que trust in the second deed have been made defendants to the suit and served with process, the trustee sells the land and sets up the sale in his answer to the bill and brings the purchase money into court, it is error for the court to affirm such sale and order the trustee to complete it by conveying the land to the purchaser, and order the proceeds to be paid to the prior lienors on the land. The sale should be made by the court through its commissioners. *Bock v. Bock*, 24 W. Va. 586.

Setting Aside.—In a creditors' suit, a sale of land made by a special commissioner under the decree of the court for sale, may be set aside upon any evidence, fact or facts reported which fairly show, that the land was sold at a greatly inadequate price. *Beaty v.*

Veon, 18 W. Va. 291. See also, *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431.

Transfer of Interest by Creditor Bringing Suit Prior to Decree.—Where a sale is decreed in a creditors' suit, it matters not that the creditor who brought the suit has parted with his interest before the decree, as all the creditors are deemed plaintiffs. After the sale is confirmed, it will not be set aside, except for fraud, mistake or surprise, or like causes. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431.

Noncompliance with Terms by Bidder.—Where one who bids at a sale is unable to comply with the terms of the sale, and by parol it is agreed that another shall stand in his stead, and the same is confirmed, the confirmation may be properly set aside, as it is not enforceable in a court of equity. All sales made by commissioners under decrees of court are conditional; they are not merely accepted offers, which the court may or may not approve and confirm. *National Bank v. Jarvis*, 28 W. Va. 805; *Kable v. Mitchell*, 9 W. Va. 492.

b. Distribution of Proceeds.

See the titles EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES.

Decree Made for All Creditors Coming in under Decree or by Petition.—In a creditors' suit the whole administration of the fund is assumed by the court, the assets are marshaled and a decree is made for the benefit of all the creditors who may come in under the decree, or by petition in the cause, and prove their demands before the master commissioner, to whom it is referred to take an account of all the debts charged on the fund, and all who do so will obtain satisfaction equally with the plaintiff, and will be treated as parties to the cause. And if after reasonable notice they fail to come in before the master, or by petition, they will be excluded from the benefit of

the decree, at least in the case of suits against the estates of deceased debtors, whilst they will be bound by any act done under authority. *Umbarger v. Watts*, 25 Gratt. 171; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780. See ante, "In Whose Favor Rendered," V, I, 4.

In Suits to Set Aside Fraudulent and Voluntary Conveyances.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Suits by Creditors of Decedents.—See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

12. Reversal.

On a creditors' bill it appeared that the debtor had executed a deed of trust on certain land to secure a note given to complainant and one given to another person; that the complainant had agreed that the latter note might have priority, but relinquished no other right; and that for this purpose the debtor was allowed to cut timber on the land, and apply the net proceeds to the payment of the said note. Held, that a decree as to the amount due, based on a commissioner's report, should be set aside, where evidence showed that a part of the proceeds of the timber had been applied to an old indebtedness, instead of to the note mentioned in the deed of trust, and that a certain amount of timber had been cut and sold, and that less than half of this amount had been credited as payment on the note, and that these errors were not remedied in the decree. *Farr v. Baldwin*, 1 Va. Dec. 753.

A brought its suit in the circuit court of Mingo county, for the benefit of itself and all other lien creditors who would come in and contribute to the expenses of the suit against W, the principal debtor, and T, his surety, for the purpose of subjecting the surety's real estate to the payment of the liens thereon; the cause was referred to a commissioner to ascertain and report the real estate of said T and the liens thereon, and on the filing of the com-

missioner's report, on motion of the plaintiff, the cause was remanded to rules with leave to file an amended bill making new parties, to sue out process, etc. An amended bill was filed but it does not appear from the record that it was matured. The cause was brought on to be heard, among other things upon the demurrers of T and W to the original and amended bills of plaintiff and the defendants, T and W, suggested the absence of the amended bill, and objected to a hearing of the cause until the same was restored; the amended bill not appearing in the record. Held: error to enter final decree at that time. *Bank of Bramwell v. White*, 53 W. Va. 382, 44 S. E. 287.

J. INTERRUPTION OF OTHER SUITS.

1. Maintainance of Several Suits.

In *Barger v. Buckland*, 28 Gratt. 850, there were several suits by judgment creditors to subject the land of their debtor, which he had conveyed in trust to secure a debt. As to the right of the several plaintiffs to maintain the suit, and compel consolidation, *Moncure, P.*, said: "The plaintiffs in the several suits had a right to bring them severally and to recover several costs; and it is doubtful whether they could have consolidated without their consent." *Claiborne v. Gross*, 7 Leigh 331, distinguishing *Stephenson v. Taverners*, 9 Gratt. 398. See post, "Consolidation of Causes," V, J, 2.

2. Consolidation of Causes.

See the titles APPEAL AND ERROR, vol. 1, p. 418; CONSOLIDATION OF ACTIONS, ante, p. 125.

Where two creditors filed separate bills in chancery impeaching a conveyance of land made by the debtor, as fraudulent, and the chancellor on motion consolidated the causes, it was held, by two judges, that the order of consolidation was improper. *Claiborne v. Gross*, 7 Leigh 331. See also, *Barger v. Buckland*, 28 Gratt. 850.

In *Tavener v. Barrett*, 21 W. Va.

672, it is said, orders to consolidate causes in equity should rarely if ever, be made. Citing opinion of Judge Carr in *Claiborne v. Gross*, 7 Leigh 339. Where it is proper, chancery causes should be heard together, but ought not except perhaps in a few special cases to be consolidated. *Claiborne v. Gross*, 7 Leigh 331.

And in *Barger v. Buckland*, 28 Gratt. 868, it is said by Moncure, P., the plaintiff in the several suits had a right to bring them severally and to recover several costs; and it is doubtful whether they could have been consolidated without their consent. Citing *Claiborne v. Gross*, 7 Leigh 331.

In *Patterson v. Eakin*, 87 Va. 54, 12 S. E. 144, it is said: "Judge Carr quoted with approval the language of Chief Baron Richards in *Fonnan v. Blake*, 7 Price 654, who said: 'I never heard of an order, in the course of my experience, for consolidating causes in equity nor can I conceive upon what principle it can be done.'" Tucker, P., saw no reason why when separate suits are brought which might have been brought by the plaintiff jointly, they may not be consolidated into a single cause. *Patterson v. Eakin*, 87 Va. 54, 12 S. E. 144, holds, that the consolidation of causes is within the discretion of a court of equity. In *Wyatt v. Thompson*, 10 W. Va. 645, it is also held that the consolidation of causes is within the discretion of the court. Citing *Patterson v. Eakin*, 87 Va. 54, 12 S. E. 144.

3. Decree as Operating to Suspend Other Suits.

In General.—Until a decree for an accounting and distribution of the assets has been made, another creditor may file a bill. *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Stephenson v. Taverners*, 9 Gratt. 398.

In Suits by Creditors of Decedent.—The settled rule, in respect to a creditors' suit for the administration of the assets of a deceased debtor, is that a

decree for an account of outstanding debts operates a suspension of all other pending suits of creditors, who must come in under the decree, which is treated as a decree in favor of all the creditors; and from that date the statute of limitations ceases to run, if not from the filing of the bill. The court will also, if necessary, restrain the prosecution of separate suits, and if any creditor, after reasonable notice, declines to come in, he will be excluded from the benefit of the decree, and yet will be considered as bound by the acts done under the authority of the court. *Stephenson v. Taverners*, 9 Gratt. 398; *Harvey v. Steptoe*, 17 Gratt. 289; *Kent v. Cloyd*, 30 Gratt. 555; *Ewing v. Ferguson*, 33 Gratt. 548; *Hurn v. Keller*, 79 Va. 415; *Paxton v. Rich*, 85 Va. 381, 7 S. E. 531.

In Suits Inter Vivos.—"The rule, however, as is truly said in 1 Bart. Ch. Pr., p. 177, has not been carried to the extent of holding a lien creditor of a living man, who has not been made a party to the suit or proved his claim before the commissioner, will be bound by the proceedings in the suit. Nor are we aware of any principle or authority for holding that a decree for an account of liens in a suit against a living man operates a suspension of all pending actions at law against him. On the contrary, it does not; but the plaintiff in any such action may proceed to judgment, and, when his judgment is obtained, he may come in under the decree for an account and prove his lien in the chancery suit; for until he obtains a judgment, unless his lien is otherwise secured, he has no standing in the chancery suit, the object of which is the satisfaction of secured debts only." *Per Lewis, J.*, in *Paxton v. Rich*, 85 Va. 381, 7 S. E. 531.

K. APPEAL AND ERROR.

See the titles APPEAL AND ERROR, vol. 1, p. 418; FRAUDULENT AND VOLUNTARY CONVEYANCES; JUDGMENTS AND DECREES; JUDICIAL SALES.

VI. Liens and Priorities.

See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; FRAUDULENT AND VOLUNTARY CONVEYANCES; JUDICIAL SALES; LIENS; MARSHALING ASSETS AND SECURITIES.

Objection Where Report of Commissioner Does Not Indicate Order of Priority.—Where, in a creditors' suit, the commissioner's report does not indicate the order of priority of liens of different rank on the land sought to be subjected, objection thereto may be first taken in the supreme court. *Carnahan v. Ashworth*, 2 Va. Dec. 608. See the title JUDICIAL SALES.

Marshaling to Satisfy Liens.—If in a suit brought by a judgment creditor against the judgment debtor to sell his lands to satisfy the liens thereon, one of his creditors has a lien on two parcels of land, to only one of which the other lien creditors can resort for the payment of their debts, a court of equity will require the creditor having two securities to exhaust the one to which he only can resort for the payment of his debt, before he is entitled to charge the other land of the debtor, to which alone the other lien creditor can resort. *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

Rights Where Lien on Specific Fund Is Insufficient.—See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

In the distribution among the creditors of the property of an insolvent debtor, who is living, a creditor who has a lien on a specific fund, and has obtained a decree against that fund, which proves insufficient, does not thereby acquire any lien more than he had before, upon the general fund. *Anderson v. Anderson*, 1 Hen. & M. 12.

In Suit to Reach Equitable Assets.—If several creditors under judgments of different dates, resort to a court of equity for satisfaction out of an equita-

ble interest of their debtor in real estate, they are to have satisfaction out of the fund, according to the order of their judgments in point of time, the elder being entitled to priority over the younger. *Haleys v. Williams*, 1 Leigh 140.

Running of Statute of Limitations.—See the title LIMITATION OF ACTIONS.

In a creditors' suit, where the object and purpose are to ascertain all the liens upon the debtor's real estate, and their priorities, and to provide for their payment, the statute of limitations will in general cease to run against such liens after the entering of an order of reference. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561. So where a bill is filed by creditors to subject the lands of the debtor, it is converted into a creditors' suit by order of court referring the cause to a commissioner, and with notice to creditors to convene; and the statute of limitations will cease to run from that time against all the creditors of the estate of the decedent, whether formal parties to the suit or not. *Laidley v. Kline*, 23 W. Va. 565.

Upon an entry of a decree for an account in a technical creditors' suit or one which is substantially so, time ceases to run against all creditors of the estate. *Norvell v. Little*, 79 Va. 141; *Bank of Old Dominion v. Allen*, 76 Va. 200; *Houck v. Dunham*, 92 Va. 211, 23 S. E. 238; *Scott v. Ashlin*, 86 Va. 589, 10 S. E. 751; *Harvey v. Steptoe*, 17 Gratt. 289.

Laches as Affecting Lien.—C. obtained judgment against L. and others, which became a lien on several separate tracts of land owned by L. A creditors' suit was brought against L. and others to enforce their liens against some of the tracts of land. There was a reference, and the notice to lien holders was published and posted. The lands proceeded against were sold, and the proceeds of the sale distributed among the several lien holders who ap-

peared and proved their liens. C. did not present or prove his lien in that suit. He received no part of the proceeds of the sale made therein. Another creditors' suit was brought against L. and others, in which the other lands, not proceeded against in the first suit, were sold. Held, that the failure of C. to present and prove his lien in the first suit did not bar him from proving and having it allowed in its proper order in the second suit. *Gilbert v. Lawrence* (W. Va. 1904), 49 S. E. 155. See also, ante, "Laches as Affecting Right," V, E, 3, i.

VII. Receivers.

In a creditors' suit a court of equity has authority to call in the assets of the estate from the personal representatives and place them in the hands of a receiver. *Davis v. Chapman*, 83 Va. 67, 1 S. E. 472; *Farmer v. Yates*, 23 Gratt. 145. See the title RECEIVERS.

In a suit by judgment creditors to subject real estate of their debtor to pay his debts, where there are deeds of trust on the property and numerous judgments against the debtor which are to be ascertained and their priorities fixed, and the real estate is not sufficient to pay all the debts, the court may appoint a receiver to take possession of the property and rent it out. And such receiver may be appointed by the judge in vacation. *Smith v. Butcher*, 28 Gratt. 144.

In a suit by judgment creditors to subject lands of the judgment debtor to the payment of their claims, it is error to appoint a receiver to rent out the lands pending the rendition of a decree in a separate suit to determine the interest of the judgment debtor in the land, where it does not appear that the judgment debtor is insolvent, and it appears that the land is worth more than the amount of the liens proven against it. *Banner v. Dingus*, 2 Va. Dec. 648.

VIII. Injunctions.

See the title INJUNCTIONS.

IX. Costs and Attorneys' Fees.

See generally, the titles ATTORNEY AND CLIENT, vol. 2, p. 145; COSTS, ante, p. 604.

A. COSTS.

Bringing Suit with Knowledge of Pending Suit.—A creditor, who with knowledge that there has been a decree for an account in another creditors' suit, brings a separate suit, for his own claim, will be compelled to pay the costs. *Stephenson v. Taverners*, 9 Gratt. 398; *Kent v. Cloyd*, 30 Gratt. 555.

After an order of account in a suit to administer a dead man's estate, if another creditor, with knowledge of it, brings suit for the same purpose, he will pay the costs of his suit. *Laidley v. Kline*, 23 W. Va. 565. "This seems to have been the established chancery practice to prevent numerous suits against a dead man's estate, all his assets being a fund for the payment of his creditors, and to avoid their exhaustion by numerous suits; but I do not understand that to be the practice in suits to enforce liens against the land of a living man. As to the estate of a dead man there was no prohibition against separate suits by separate creditors until the court had made an order of references for the convention of all the creditors, thus making the suit one for the benefit of all creditors; but our statute has very properly gone beyond this, and fully provided for a chancery suit to administer his real estate for the benefit of his creditors, and has provided that if, after the commencement of that suit, any creditor commence another suit, either in law or in equity, no costs shall be recovered in such last-mentioned suit." *Brannon, J., in Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 269.

Where there were three suits by judgment creditors to subject the land of their debtor, which he had conveyed in trust to secure a debt, and the debtor, the trustee and trust creditor were made defendants in each of

them, and the process was properly served on all the parties in two of the cases, and on the trustee and creditor in the third, and the court made an order that the causes should be consolidated and heard together; it was held, that though the causes were heard together, each plaintiff was entitled to a decree for separate costs. *Barger v. Buckland*, 28 Gratt. 850.

B. ATTORNEYS' FEES.

Creditors have no legal right to be reimbursed by their debtors for counsel fees contracted by them. *Gurnee v. Bausemer*, 80 Va. 867.

Where a petitioner (with other counsel) files a bill on the part of a creditor,

who sues also in behalf of all other creditors who might become parties and contribute to the expenses, and, after a fund has been secured for distribution among the creditors who have become parties, another creditor is admitted, and his claim is allowed, though petitioner has already received compensation out of the trust fund, and from the creditors previously admitted, he is entitled to additional compensation from such other creditor, to be measured by his services, by which he has been benefited, but not to be increased by reason of the failure of his fellow counsel to make a similar claim. *Howard v. First Nat. Bank*, 2 Va. Dec. 513.

Crimen Falsi.

As to what offenses are included in this term sufficient to impeach a witness, see the title WITNESSES.

Crimes.

See generally, the title CRIMINAL LAW, and the titles where the specific offenses are treated.

CRIMINAL CONVERSATION.

CROSS REFERENCES.

See the titles ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 184; DIVORCE; HUSBAND AND WIFE.

As to the arbitration of an action for criminal conversation, see the title ARBITRATION AND AWARD, vol. 1, pp. 692, 705.

Action Referred to Arbitration.—An action of criminal conversation being referred to arbitration by rule of court, if the arbitrators refuse to hear testimony offered by the defendant, impeaching the credit of the plaintiff's witnesses, or touching the deportment

of the plaintiff's wife before her alleged seduction; this is such misconduct as vitiates their award, and the court ought not to decline hearing proof of such misconduct. *Ligon v. Ford*, 5 Munf. 10.

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